



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 672 OF 2007

STEPHEN WAWERU THUO.1ST PLAINTIFF

GELISHO OLE PESI.....2ND PLAINTIFF

VERSUS

ISAAK MUSSA ADAM.....1ST DEFENDANT

KARIM BUX MUSSA ADAM.....2ND DEFENDANT

NAZIR ALI MUSSA ISSA.....3RD DEFENDANT

BASHIR MUSSA HAJI.....4TH DEFENDANT

HAMIN MUSSA HAJI.....5TH DEFENDANT

NAROK COUNTY COUNCIL.....6TH DEFENDANT

RULING

Coming up before me for determination is the Chamber Summons dated 19th August 2010 filed by the Plaintiffs/Applicants in which they seek for this court to strike out the Statement of Defence filed by the Defendants and enter judgment in favour of the Plaintiffs as prayed in the plaint and that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together the Supporting Affidavit of the 2nd Plaintiff, Gelisho Ole Pesi, sworn on 19th August 2010 in which he averred that the Narok County Council allocated to him and the 1st Plaintiff Plot Nos. 117 and 118 (hereinafter referred to as the “suit premises”) respectively on 15th April 1992. He produced copies of their respective allotment letters. He further averred that they later came to learn that the 1st to 5th Defendants had acquired the suit premises leading to their filing this suit on 8th May 2002 and seeking injunctive orders against them. He further averred that on 6th June 2002, the said Defendants filed their Defence in which they denied the Plaintiffs’ claim. He further stated that the Town Council of Narok as it then was held a meeting and resolved that the Plaintiffs are the owners of the suit premises. He then averred that the Defence filed by

the Defendants is a sham defence only and is intended to deny them the right to enjoy quiet possession of the suit premises and should therefore be struck out.

The Application is contested. The 2nd Defendant, Karim Bux Mussa Adam, filed his Replying Affidavit sworn on 14th October 2010 in which he averred that an application to strike out their Defence can only be allowed in plain and obvious cases where the Defence is a mere denial or is evasive which is not the case here. He further averred that the Chamber Summons raises triable issues in law as to whether the Plaintiffs/Applicants are genuine allottees of the suit premises and if so whether their purported letters of allotment by the County Council of Narok (as it then was) are in law superior to a certificate of lease issued to them by the Narok District Land Registrar on 12th September 2001 relating to the land parcel number Narok/Township/356 for a period of 99 years with effect from 1st September 1998. He produced a copy of the certificate of lease. He further stated that the Plaintiffs/Applicants have acknowledged that they are the registered owners of the land parcel number Narok/Township/356 hence they are stopped by law from alleging that their Defence filed on 6th June 2002 does not disclose a reasonable defence or is otherwise an abuse of the process of the court. He further contested this Application on the ground that it was filed after an inordinate delay of 8 years since the suit was filed. He further contested the Application saying it ought to have been dismissed for want of prosecution as it has never been set down for hearing since it was filed. He further disclosed that since allotment, they have been faithfully paying land rates and rent on the suit premises. He further contended that the suit premises were procedurally and legally registered in their names after following the due process through the Commissioner of Lands who was the allocating authority of the leases. He then stated that on that basis, their Defence raises several triable issues of law hence this Application to strike it out is unsustainable.

In their written submissions dated 24th September 2013, the Respondents argued that the issue of the claim of ownership of the Plaintiffs/Applicants over the suit premises based on letters of allotment as contrasted to the Defendants' claim of ownership thereof based on a certificate of lease is a crucial issue to be determined by the court and for that reason, their Defence should not be struck out. They further submitted that the Plaintiffs cannot be heard to complain about the delay the Defence filed by them will cause to this suit bearing in mind that since this suit was filed by them in the year 2002, they have taken no steps to set it down for hearing. They further submitted that since the Plaintiffs filed this Application on 20th August 2010, it is only now, 3 years later that they are making efforts to have it determined.

The Plaintiffs filed their written submissions dated 22nd September 2011 in which they argued that a simple examination of the Statement of Defence filed by the 1st to 5th Defendants indicate that it raises mere denials and is a plain and obvious case for which striking out procedure should be invoked. They further contended that the Defence is a sham and unless it is struck out, it will prejudice, embarrass or delay the trial of the action. Further that it does not raise any trial issues.

The issue I must determine here is whether I should strike out the Defence and enter judgment in favour of the Plaintiffs as prayed by them in their Plaint. The applicable law is to be found **in Order 2 Rule 15(1) of the Civil Procedure Rules, 2010** which states as follows:

“At any stage of the proceedings the court may order to struck out or amend any pleading on the ground that –

- a. **It discloses no reasonable cause of action or defence in law; or**
- b. **It is scandalous, frivolous or vexatious; or**
- c. **It may prejudice, embarrass or delay the fair trial of the action;**
- d. **It is otherwise an abuse of the process of the court,**

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

In the case of **Sunday Principal Newspaper Limited [1961] 2 ALL E.R. 758**, the principles for striking out were expressed thus,

“It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases....”

In addition to the Sunday case, in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR**, Madan, J.A articulated himself as follows,

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by way of cross-examination in the ordinary way (Seller LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In their Application, the Plaintiffs have argued that the Statement of Defence filed by the Defendants raises no triable issues and comprises of mere denials. They contend that it is not a defence properly so called. They further assert that the said Statement of Defence will prejudice, embarrass or delay the fair trial of this suit and that it is an abuse of the court process. After a careful perusal of the Defendants’ Defence, I do note that the Defendants raised the issue of their ownership of the suit premises as their main defence against the Plaintiff’s claim over the suit premises. The Defendants have asserted their ownership rights over the suit premises based on a certificate of lease bearing their names which they produced in court as their defence against the Plaintiffs’ similar claim of ownership of the suit premises based on letters of allotment. To my mind, this raises the main triable issue in this suit which cannot be neglected or wished away. This goes to the heart of this suit and is an issue that cannot be determined at this stage. The same is determinable after full trial of this suit. I do not therefore agree with the position put forward by the Plaintiffs that the Defence should be struck out. The position I have adopted finds further support in the decided case of **Vinodeep Investment Property Ltd versus Henkel Company Ltd & 2 Others Civil Case No. 140 of 2003** where Justice J.B. Ojwang held as follows:

“... it is clear that only very sparingly will the striking out of a statement of defence be entertained:

- i. Because such an act is fatal to the litigious initiative of the Defendant and could well embody the seeds of injustice of the party;**
- ii. That it is a requirement for the striking out of a defence that it be ascertained that the defence discloses no arguable defence, carries no trial issues;**
- iii. A decision to strike out a defence should be on the whole taken only in plain and obvious cases that do not require the adduction of evidence and the making of submissions in the full hearing;**
- iv. The decision to strike out a defence should not be based on the unlikely success of the defence case.”**

Overall, I am of the view that this suit should proceed to full hearing at the earliest possible moment so that the case is concluded in the normal way.

Arising from the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 30th

DAY OF MAY 2014

MARY M. GITUMBI

JUDGE