



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 956 OF 2013**

**KIMIYI OLE NKANGI .....PLAINTIFF/APPLICANT**

**VERSUS**

**DAVID MUYUKU KILONZI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PRICILLA K. MUTUKU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants' Notice of Motion dated 9<sup>th</sup> August 2013 in which they seek for orders that the Plaintiff filed herein be struck off and judgment entered in their favor in terms of the counterclaim filed in this suit and that costs for this Application and the suit be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, David Mutuku Kilonzi, sworn on 9<sup>th</sup> August 2013 in which he averred that he has known the Plaintiff since the year 1987 when his brother, Henry Musyoki Kilonzi, introduced him to the 2<sup>nd</sup> Defendant and himself. He further averred that his said brother informed him that the Plaintiff was selling a parcel of land and they arranged with the Plaintiff to take them on a visit to the land. He further averred that the Plaintiff also showed them a Letter of Allotment in Nairobi to confirm his interest in the land. He further stated that they became interested in purchasing 30 acres and came to an agreement with the Plaintiff to sell that portion to them at a cost of Kshs. 2,500/- per acre amounting to Kshs. 75,000/-. He then stated that on 23<sup>rd</sup> December 1987, the Plaintiff together with his wife Catherine Njoki came to their house in Buruburu to sign the sale agreement which they did in the presence of his said brother, Henry Kilonzi. He further stated that both he and his wife also signed the sale agreement in which the Plaintiff acknowledged receipt of Kshs. 11,000/- as the initial deposit. He further stated that the Plaintiff collected the balance of the purchase price on various dates thereafter until the total amount was paid in full on 27<sup>th</sup> November 1989. He produced a copy of the said sale agreement. He further averred that on 26<sup>th</sup> September 1988, the Plaintiff applied to the Masaku Donyo Sabuk Land Control Board for consent to subdivide the land and transfer half of the land to the 2<sup>nd</sup> Defendant and himself. He further

averred that both the Plaintiff and his wife attended the Land control Board meeting and a letter of consent was issued by the same board on 13<sup>th</sup> October 1988. He annexed a copy of the application for consent, the minutes and the letter of consent. He further stated that when the area was surveyed, parcel no. 10029/54 Kitengela was given Land Reference No. 14776 and after subdivision resulted in two parcels known as Land Reference No. 14776/1 and 14776/2. He further stated that a transfer was subsequently drawn and signed on 25<sup>th</sup> September 1995 by the Plaintiff and them in the presence of A.F. Kisebu Advocate. He annexed a copy of the transfer. He further averred that a certificate of title no. I.R. 67605 was subsequently issued to them in respect of Land Reference No. 14776/1 measuring 12.51 hectares (hereinafter referred to as the “suit property”) on 21<sup>st</sup> November 1995 by the Registrar of Titles. He produced a copy of his certificate of title. He then stated that on 25<sup>th</sup> May 2011 he received a call from the CID Headquarters Nairobi and was asked to report there. Upon doing so, he was informed that the Plaintiff had reported that both he and his wife had forged a deed plan, sale agreement and title to the suit property fraudulently. He further stated that they produced the documents in their possession relating to their acquisition of the suit property to the CID officers and after investigations, the CID found the Plaintiff’s allegations to be unfounded and concluded that the Plaintiff had given false information to them. He further disclosed that the CID proceeded to charge the Plaintiff with the offence of giving false information to public officers and that he has since been appearing in court to answer criminal charges in Case No. 242 of 2012. He further emphasized that the suit property is rightfully his and his wife’s having purchased it from the Plaintiff as evidenced by their documents and that the Plaintiff’s claim thereto is actuated by greed, is devoid of merit and should be dismissed with costs. He further pleaded with the court to strike out the Plaint filed in this suit with costs and order the eviction of the Plaintiff from the suit property.

The Application is contested. The Plaintiff filed his Replying Affidavit sworn on 14<sup>th</sup> November 2013 in which he averred that he is the registered owner of the whole of the land parcel known as L.R. No. 14776 situated in Enkutoomba within the previous local authority known as Mavoko County Council in Athi River. He averred that sometimes in the year 1987, he was approached by one Musyoki who was a brother of the 1<sup>st</sup> Defendant and said he wanted to buy 10 acres of land from him. He averred further that he informed the said Musyoki that he did not have title to the land as he did not have money to process the same. He then averred that the said Henry Musyoki promised to assist him financially to obtain the title deed and advised that the 1<sup>st</sup> Defendant would assist him to get the title deed. He further stated that in the year 1987 and 1990, he obtained Kshs. 75,000/- from the 1<sup>st</sup> Defendant which he used to obtain his title deed for L.R. No. 14776. He further stated that soon thereafter, both Henry Musyoki and the 1<sup>st</sup> Defendant severed any contact with him and only reappeared in the year 2009 alleging to have bought a portion of his land measuring 30 acres. He then stated that he was very surprised because he had not sold his land to the 1<sup>st</sup> Defendant or the said Henry Musyoki and they never agreed on a purchase price. He confirmed having reported the matter to the CID on 22<sup>nd</sup> May 2011 resulting in the 1<sup>st</sup> Defendant also being summoned. He then stated that he was surprised when he was arrested by two officers on 19<sup>th</sup> May 2012 who told him that he had given false information. He denied ever selling a portion of his land to the 1<sup>st</sup> Defendant, ever applying for consent to subdivide the land and ever signing the alleged transfer. He further averred that his Plaint raised serious issues of fraud that can only be tested through a full hearing and his suit is neither vexatious, frivolous or an abuse of the process of court.

In response thereto, the 1<sup>st</sup> Defendant filed his Supplementary Affidavit sworn on 18<sup>th</sup> November 2013 in which he averred that it is not true that the Plaintiff is the registered owner of L.R. No. 14776 as the same had been subdivided and both he and his wife obtained title to the suit property. He further contested the Plaintiff’s claim that he severed contact with him and stated that they constantly keep in touch with the Plaintiff as he was receiving his installments, signed the formal transfer and that the Plaintiff and his wife have been to his house many times. He further averred that the CID conducted their investigations and concluded that the Plaintiff had made false claims leading to the Plaintiff being charged with a criminal offence. He further averred that the documents on record speak for themselves, the Plaintiff sold the suit property as evidenced by the documents but feels cheated owing to the appreciation of value in the land and now seeks to overturn a transaction that was completed 18 years ago.

In an additional Supplementary Affidavit by the 1<sup>st</sup> Defendant sworn on 19<sup>th</sup> December 2013, the 1<sup>st</sup> Defendant produced a copy of a Forensic Document Examination Report prepared in the criminal proceedings referred to in his earlier affidavit which shows clearly the documents that the Plaintiff alleges were forged were signed by none other than himself. He further stated that this goes to confirm the Defendant's case that the Plaintiff sold the suit property in an above board transaction which is well documented and this suit is a clear abuse of court process and ought to be dismissed.

Both the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their written submissions which have been taken into account in this ruling.

The issue to be considered by this court is whether this court can strike out the plaint and enter judgment against the plaintiff as prayed in the counterclaim. I have no doubt that this court has power at any stage of the proceedings, to strike out a pleading, including a plaint or defence. However, in what circumstances can the court properly exercise such power? 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.”***

The question I have to answer is whether this is a plain and obvious case deserving to be struck off. There is no doubt that the facts of this case as outlined by the parties show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have a very strong case against the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have gone to great length to adduce affidavit evidence aimed at demonstrating that the Plaintiff has no reasonable cause of action against them. That point has been well made. However, I do agree with the authorities set out above that indeed the act of striking out a pleading is a draconian act that should be exercised sparingly. To my mind, allowing the case to proceed to full hearing will allow the Plaintiff a chance to state his claim more comprehensively than he has been able to do so far. To the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the only harm that will occasion upon them is a slight delay in having a final judgment entered and this case concluded. If allowed to proceed, in the event that the Plaintiff loses the case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants can be partially compensated through an award of costs. 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. Costs shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup>**

**DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**