



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL SUIT NO. 446 OF 2008**

**GARDEN ESTATE COMPANY LIMITED ..... PLAINTIFF/APPLICANT**

**VERSUS**

**GULBANU D/O HUSSEIN**

**HUSSEIN JAN MOHAMED .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AMIRALI AKBARALI**

**GULAM HUSSEIN NANJI ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FIROZ AKBARALI GULAM HUSSEIN NAJI .....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Defendants' Notice of Motion dated 27<sup>th</sup> September 2012 in which they seek for the Plaintiff's claim to be struck out, for judgment to be entered for the Defendants against the Plaintiff as prayed in the counterclaim and for the Defendants' costs of this Application and the suit to be borne by the Plaintiff.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 3<sup>rd</sup> Defendant, Firoz Akbarali Gulamhussein Nanji, sworn on 27<sup>th</sup> September 2012 in which he averred that the Plaintiff filed this suit (hereinafter referred to as the "first suit") claiming to be the owner of the suit property contending that the same was transferred to it in the year 1989. He further stated that the Defendants have denied this and pleaded that the documents relied upon by the Plaintiff in its claim of ownership of the suit property are fraudulent. He further stated that the Plaintiff filed another suit in this honorable court being Nairobi ELC No. 16 of 2012 (OS) (hereinafter the "second suit") seeking an order to remove entry numbers 8 and 9 on the title of the suit property being a grant of probate of a written will and a caveat lodged by the Defendants. He further averred that the Plaintiff made no disclosure in the second suit of the existence of the first suit. He further stated that the second suit was eventually struck out by Justice Kimondo in a ruling delivered on 14<sup>th</sup> June 2012. He further indicated that upon perusal of the documents filed in both the first suit and the second suit, the Defendants noticed that the Plaintiff is relying on two different certificates of title documents to claim ownership of the suit property as follows: that the certificate marked RO3 attached to the affidavit of Robert Otachi sworn on 18<sup>th</sup> September 2008 and filed in the first suit is different from the one marked RK3 and RK4 attached to the affidavit of Robert Kotch on 16<sup>th</sup> January 2012 and filed in the second suit. He further specified that

the certificate of title marked RO3 attached to the affidavit of Robert Otachi sworn on 18<sup>th</sup> September 2008 shows an entry to the effect that the property had been transferred to the Plaintiff, whereas the certificate of title marked RK3 and RK4 attached to the affidavit of Robert Kotch sworn on 16<sup>th</sup> January 2012 and filed in the second suit does not have any such entry. He further averred that the transfer marked RO2 attached to the affidavit of Robert Otachi sworn on 18<sup>th</sup> September 2008 and filed in the first suit is different from the one marketed RK2 attached to the affidavit of Robert Kotch sworn on 16<sup>th</sup> January 2012 in the second suit. He further stated that the copies of transfers mentioned above were witnessed by an advocate by the name of K.S. BRAHMBHATT and allegedly witnessed by one B.C. MURAGE Advocate. He then stated that his advocate Mr. Kiragu Kimani had received confirmation from the Law Society of Kenya (LSK) that they have never had an advocate by the name of K.S. BRAHMBHATT in their records and their records show that B.C. MURAGE passed away in 1982. He then stated that the Plaintiff has in the two suits asserted two totally different and contradictory positions. He further stated that the Plaintiff has no cause of action against the Defendants and proceeding with this matter any further will be a waste of the court's time.

The Application is contested. The Plaintiff filed the Replying Affidavit of Robert Otachi, a Director of the Plaintiff/Respondent, sworn on 22<sup>nd</sup> November 2012, in which he averred that he and he co-Director have never instructed any other advocates to file any other suit in respect of the subject matter of the first suit and denied further that M/s Ongegu & Associates have acted for them in any other suit and in particular in the second suit. He further averred that the Plaintiff has always been represented by M/s Oyugi & Co. Advocates. He stated further that there is no relationship between the first suit and the second suit and that whoever instructed the said advocates to file the second suit is unknown to the Plaintiff. He further stated that this Application is brought in bad faith, is misconceived and a waste of the court's time because the Plaintiff/Respondent has a pending application seeking leave to amend its defence to the counterclaim, that the Defendants/Applicants have filed 4 previous applications which have been determined, that the last application seeking interlocutory orders was dismissed on 26<sup>th</sup> July 2012 and the Defendants/Applicant's filed a notice of appeal against that ruling which is pending, that the Defendants/Applicants entered a consent order before Justice Ougo to file witness statements, list of witnesses and documents but have never complied to date and that the Defendants/Applicants fixed the first suit for hearing at one stage on 20<sup>th</sup> January 2009 but later brought other applications to frustrate the scheduled hearing. He further averred that what is in dispute is a prime property and the only avenue to determine the rightful owners thereof is through a full trial and not through interlocutory applications. In closing, he averred further that the Plaintiff/Respondent has been in possession of the suit property since 1989 and the Defendants are aware of this fact.

Both the Plaintiff and the Defendants filed their written submissions which have been read and 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. 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,

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided***

***it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

The above are the principles upon which this Application to strike out the Plaintiff’s pleadings will be considered. A look at this Application illustrates that the Defendants have gone into lengthy details to explain and justify the grounds upon which the Plaintiff should be struck out and have in essence delved into the realm of actual evidence in order to justify their case for striking out the Plaintiff. The question of ownership of the suit property is at the heart of the first suit and shall be determined upon consideration of all the evidence adduced at the trial. Therefore, the question whether or not the Plaintiff is relying on contradictory evidence shall be determined at the main hearing of this suit. Accordingly, in bringing up that issue and seeking to rely on it in support of this Application, it is my opinion that the Defendants have in a way embarked upon a trial of this case at this stage.

Further to this, the remedy of striking out a pleading is rarely resorted to or granted. It is a harsh and drastic one. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case. It can only be granted where the case is plain, obvious, weak and one that cannot be redeemed by amendment. Madan, J.A in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR** stressed 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.”***

After perusing the pleadings in this first suit, I hold the view that the Plaintiff has disclosed a reasonable cause of action which should be determined after a full trial. I therefore disagree with the Defendants that the first suit is an abuse of the court process. I consider that the first suit should proceed to full hearing where the issues raised by the Defendants can be addressed conclusively. I have perused the court record and find that the Plaintiff has filed its List of Documents and Witness statements while the Defendants have not filed any of these documents. I have also read the ruling delivered by Ougo J delivered on 26<sup>th</sup> July 2012 and note that at page 6 of her ruling paragraph 9 she made an order that parties comply with Order 11 of the Civil Procedure Rules which the Defendants have not complied with. I direct the Defendants to proceed and comply with Order 11 to pave the way for full trial at the earliest possible moment.

Accordingly, this Application is dismissed with costs to the Plaintiff.

**DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**