

REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT ELDORET

E&L NO 561 OF 2012

Formerly HCC 175 'A' OF 2009

JOSEPH HINGA GATHIL.....PLAINTIFF

VS

HEZEKIAH MUGO WAITHANJI.....1ST DEFENDANT

JACSON KIPRONO.....2ND DEFENDANT

DORIS ANYANGO OSWAGO.....3RD DEFENDANT

LAND REGISTRAR UASIN GISHU.....4TH DEFENDANT

CHIEF LAND REGISTRAR5TH DEFENDANT

(Preliminary Objection raised to have plaint struck out under Order 2 Rule 15; whether a party when making reference to Order 2 Rule 15 needs to file a formal application; Court rules that if a party raises preliminary objection and refers to Order 2 Rule 15, then a formal application needs to be filed; preliminary objection dismissed)

RULING

1. This ruling is in respect of a preliminary objection filed by the 4th and 5th defendants. The objection is based on two grounds as follows :-

1. *That the suit offends the provisions of Order 2 Rule 15.*
2. *That the suit against the 4th and 5th defendants be dismissed with costs.*

A little background will shed light on the above objection.

3. This suit was commenced by way of plaint on 26 October 2009. The original defendants were the 1st and 2nd defendants. The claim in the original plaint was that the 1st defendant, vide a sale agreement of 14 May 1988 between himself and the 1st defendant, sold to the plaintiff the land described as Block 12 Neighbourhood Uns. Res. Plot No. 29 Eldoret Municipality, at a consideration of Kshs. 35,000/=. That property later became registered as Eldoret Municipality Block 12/234, but a transfer to the plaintiff was never effected. In September 2009, the original 2nd defendant, Doris Anyango Oswago, sought to enter the premises, and it is then that the plaintiff discovered that the 1st defendant had sold the same land to her, and that a Certificate of Lease to the said land had been issued to Doris on 18 March 2009. The plaintiff alleged that the sale and transfer of the suit land to Doris was fraudulent. He sought a declaration that he is the legitimate owner of the suit land and sought a cancellation of the title of Doris' title, or in the alternative, compensation against the 1st defendant for the present market value of the property. The two defendants filed separate defences in which they challenged the plaintiff's suit. Doris in her Statement of Defence, inter alia stated that she purchased the suit land from one Jackson Kiprono.

4. Through an application dated 25 January 2010, the plaintiff sought leave to amend his plaint to include the name of Jackson Kiprono, and have him as the 2nd defendant, with the original 2nd defendant (Doris), now being the 3rd defendant. That application was allowed by consent on 21 April 2010. In the

amended plaint, the plaintiff pleaded various particulars of fraud against both the original 2nd defendant (now 3rd defendant) and Jackson Kiprono, the new 2nd defendant.

5. Another application for amendment of plaint, dated 29 August 2010, was filed by the plaintiff. Through this application the plaintiff sought to introduce the Land Registrar, Uasin Gishu District, as 4th defendant and the Chief Land Registrar, as the 5th defendant. That application was allowed by consent on 19 September 2012. However, despite naming the 4th and 5th defendants, and describing them, the plaintiff did not directly plead anything against the 4th and 5th defendants. They are therefore only named as defendants without any pleading against them and without any prayer being sought from them.

6. It is probably for this reason that the 4th and 5th defendants want the suit against them struck out, since in their view, it discloses no cause of action against them.

7. Mr. Odongo for the 4th and 5th defendants, pointed me to Order 2 Rule 15 and argued that a plaint that does not disclose a cause of action is liable to be struck out. He also stated that Order 1 Rule 10, allows the court to strike out the name of a party. He submitted that the plaintiff has not mentioned any illegality on the part of the 4th and 5th defendants.

8. All other parties except for the plaintiff, supported the preliminary objection.

9. Mr. Njuguna for the plaintiff in opposing the preliminary objection, argued that Order 2 Rule 15 requires an application. He stated that there are particulars in the original pleadings which touch on the 4th and 5th defendants. He was of the view that the 4th and 5th defendants are necessary parties and that in any event the plaint can be amended.

10. I have considered the preliminary objection. The 4th and 5th defendants rely on the provisions of Order 2 rule 15. The same provides as follows :-

Striking out pleadings [Order 2, rule 15.]

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

*(a it discloses no reasonable cause of action or defence in law;
) or*

*(1 (b it is scandalous, frivolous or vexatious; or
))*

*(c) it may prejudice, embarrass or delay the fair trial of the action;
or*

(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.

(2 No evidence shall be admissible on an application under subrule (1)(a) but the application shall state) concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

11. In my view, if the 4th and 5th defendants wish to strike out the plaintiff's pleadings on the basis of Order 2 Rule 15, then an application needs to be filed. It is in that application where it will be stated why

the party wants the particular pleading struck out, and exactly which sub-rule, within Rule 15, is being relied on. I do not think that the rules allow one to strike out pleadings while utilizing Order 2 Rule 15 through a Preliminary Objection. There is a reason why the rules prescribe that an application be made. This is probably to give an opportunity to the respondent to make a substantive response to the claims that the suit is liable to be struck out.

12. Striking out of a pleading is serious business and I think it is important that the rules be strictly followed before a pleading is struck out. If I allow an application to strike out pleadings through a preliminary objection where there is direct reference to Order 2 Rule 15, then I will be failing to give the respondent a fair opportunity to be heard, for the respondent cannot file any replying affidavit to oppose the preliminary objection.

13. I think the procedure adopted by the 4th and 5th defendants is wrong. Although Article 159 (2) (d) of the Constitution of 2010 provides that the court ought not to be too strict on procedural technicalities, as I have said, allowing the Preliminary Objection to be heard in the form that it is drawn, will be to fail to give a fair opportunity to the plaintiff to respond. It is solely on that basis that I decline to allow the preliminary objection.

14 If the 4th and 5th defendants still hold the opinion that the suit against them does not disclose a cause of action, and still wish to rely on Order 2 Rule 15, then let an appropriate application be filed and the same will be considered on merit.

15. For the above reasons, I have no option but to strike out the preliminary objection but in my discretion, I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. Kariuki Mwaniki holding brief for Mr. J.N. Njuguna for plaintiff.

Mr. S.M. Mathai present for 1st defendant.

Mr. E.W. Ayieko holding brief for M/s R.M. Wafula for 2nd defendant.

Mr. H.O. Aseso present for 3rd defendant.

No appearance for the State Law Office for 4th and 5th defendants.