



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT AT NYERI**

**E.L.C.NO.39 OF 2012**

**NANCY WANJIRU NGAHU.....PLAINTIFF**

**VERSUS**

**JANE WAMBUI WANJEGE )**

**JOSEPH MUTHAIGA WANJEGE )**

**NICHOLAS NGUGI WANJEGE ).....DEFENDANTS**

**R U L I N G**

The application dated 11/6/2012 seeks orders that the Honourable Court be pleased to strike out the plaint herein and order the suit be dismissed with costs to the defendant. The applicant further prays that the caution lodged by Nancy Wanjiru Ngahu upon **LR No.Loc 20/Githuri/205** on the 12th day of August 2011 be removed.

The application is brought under the provisions of orders 2 rule 15 (1), and order 51 rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all enabling provisions of law. The application is grounded on the facts that the late Peter Wanjege Ngugi never entered into a sale agreement with the plaintiff for sale of LR No.Loc.20/Githuri/205. **Moreover** that the sale agreement exhibited by the plaintiff does not have any contractual value in law and the same is not enforceable even if it had been entered by the late Peter Wanjege Ngugi and the plaintiff. **Furthermore** that the documents exhibited by the plaintiff herein such as the certificate of search, letter of consent by the Land Control Board and the land certificate in the name of Peter Wanjege Ngugi are not genuine documents and they are apparently forged documents. **Lastly** that the plaint herein therefore discloses no reasonable cause of action in law, the same is scandalous, frivolous and vexatious and the same is otherwise an abuse of the process of the court.

The application is supported by the affidavit of Jane Wambui Wanjege whose import is that the defendants never knew or heard of any sale of the deceased's parcel of land thus Loc.20/Githuri/205 to the plaintiff whatsoever.

She states that her late husband was a loving husband and could not have sold the land for the alleged amount or at all and that her late husband was an intelligent man and was dealing with banks, and therefore could not have entered into such a stupid agreement with the plaintiff as he very well knew where and how to get money from banks using his title documents. She said she never knew or heard about sale of her husband's parcel of land in question to the plaintiff herein prior to this case, otherwise why would she have bothered with clearing the said loan so tirelessly from her meager income only to be

faced with this unfounded case after she had worked herself out with the said loan only to be faced by an idler who never paid even a penny towards the loan and only dreamt of the sale.

She also stated that she was informed by her advocates on record, which information she believed to be true, that the agreement alleged to have been entered by her husband and the plaintiff herein is of no legal basis and has no contractual value in law as no consideration was ever paid by the alleged purchaser to the vendor. She further stated that even if the said agreement would have been entered by the alleged parties, which is denied, the same would still not be enforceable as it is against the terms and conditions of the Law Society of Kenya which it was meant to be subject to. She claims that the plaintiff is guilty of forgery as is very well portrayed by the copy of the title deed the said plaintiff has displayed in her list of documents, which is an outright forgery as the identity card number meant to be that of her late husband is an outright forgery. The 1st defendant is of the view that it defeats reason as to what comes first, the signing of the sale agreement or obtaining of the land board consent as the letter of consent in the list of documents was obtained on the 28th day of August 1979 before signing of the sale agreement which was apparently signed on the 11th day of September 1980 and which is contrary to what is stated in paragraph 4 of the plaint that the land Peter Wanjege Ngugi entered into a sale agreement with plaintiff on or about the 11th day of September 1980 where he agreed to sell LR Loc.20/Githuri205 and thereafter the Land Control Board Consent was granted.

Finally, she states that the certificate of official search also exhibited by the plaintiff is also giving contradictory information of what is in the land office and she wonders where it emanated from and doubts its authenticity. That in the circumstances she is opined that this suit is just a waste of the precious time of this Honourable Court and the same should be dismissed to pave way for this Honourable Court to deal with more deserving matters before it which are many.

On the 10/11/2012 the plaintiff, Nancy Wanjiru Ngahu filed a replying affidavit shown on the 19/11/2012 by herself whose import was that the plaintiff purported to give evidence before trial. She states that the issues raised in the plaint and defence were triable and could only be determined on full trial. She states that the issue as to whether an agreement was entered into by the late Peter Wanjege, the authenticity of certificate of search, consent of land control board and land certificate are issues that cannot be determined without oral evidence by witnesses. She further states that the affidavit by the applicant contains arguments and submissions. The respondent argues that the applicant does not deny having been duly granted the letters of administration to the estate of the late Peter Wanjege Ngugi and that she is a registered owner of the property by transmission.

This court begins by warning itself that striking out pleadings is a draconian measure and therefore the court is obliged to act with caution and should be slow in deciding to order the striking out of any pleading. Except in plain and obvious cases a court should exercise its discretion in favour of a trial in all cases. Apart from ground (d) of the Notice of Motion, the rest of grounds a, b and c amount to evidence that should be considered on full trial.

Ground (d) of the application reads that the plaint herein therefore discloses no reasonable cause of action in law. The same is scandalous, frivolous, vexatious and the same is an abuse of the process of the court. The court is obliged to deal with this ground alone to determine the application. The first issue to be determined is ***whether there is a reasonable cause of action disclosed*** by the plaint.

On this issue, it is trite law that no evidence is admissible on such application and therefore the application on grounds of no reasonable cause of action is not properly before court because the applicant relies on a supporting affidavit that is full of evidence and submission based on the evidence that require full trial. The fact that the applicant states in grounds (d) that the plaint herein therefore discloses no cause of action implies that he is relying on grounds a, b & c to come to a conclusion that there is no cause of action. Grounds a, b & c is evidence and therefore not admissible to support the argument that the plaint discloses no cause of action.

This court is only obliged to look at the averments in the plaint and the averments in the defence to establish whether there is a cause of action disclosed. The plaintiff claims that on the 11th day of

September 1980, the late Peter Wanjege Ngugi entered into a sale agreement with the plaintiff whereby the agreed to sell L.R.Loc.20/Githuri/205 to him and the Land Control Board consent was granted however, the deceased failed to release the original title and transfer form to the plaintiff for no good reason until his death in September 2003. The 1st defendant became the proprietor of the parcel of land upon the death of her husband on transmission. The plaintiff's claim is that he is entitled to own the suitland as a purchaser

***Halsbury's Laws of England Fourth Edition paragraph 81 gives insight on Striking out pleading showing no reasonable cause of action or defence.***

*It provides that the court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that it discloses no reasonable cause of action or defence, as the case may be. The power so to order is complementary to the jurisdiction to stay or strike out any action under the inherent jurisdiction of the court. Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider this evidence until the question whether or not on the fact of the pleading some reasonable cause of action or defence, as the case may be, is disclosed has been determined.*

*In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defense exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie. .*

In the case of **DT Dobie & Company (Kenya) Ltd v Muchina Court of Appeal, Nairobi Madan, Miller & Potter JJA** held that

***“That 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 itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers 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.***

***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***

***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.”***

Clearly the claim by the plaintiff against the estate of deceased is not one that can be described as disclosing no cause of action as the same is not as hopeless as described by the applicant since there is an agreement on record whose authenticity should be established and therefore the application fails on this ground. Moreover the plaintiff can salvage his suit through an amendment.

The **second** issue to be considered under this ground is whether the plaint is scandalous. A pleading is scandalous if the same is indecent or contains offensive matter or has allegation made for the purpose of abusing or prejudicial to other party.

The **third** issue on the same ground is a frivolous pleading. The pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the court. ***Young -V- Halllary 1895 P87 at 90.***

**In Ngokonyo & 2 Others -VS- K.P.T.C 1992 Klr P.567.** It was held by Bosire J as he then was that scandalous implies a pleading which is merely made for the purpose of abusing or prejudicing the opposite party care.

**In Nyati (2002) Kenya Limited v Kenya Revenue Authority (2009) eKLR High Court at Nairobi in civil suit No.67 of 2007** it held that

***“A matter would only be scandalous frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serous or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is ipso facto vexatious.”***

A statement of claim is prejudicial & and embarrassing if it tends to delay other fair trial of an action or fair dealing with the main issue. A statement of claim is embarrassing if it raises a claim that the plaintiff is not entitled to make. The defendant has not demonstrated that the plaintiff is making a statement of claim that he is not entitled to make.

A statement of claim would be an abuse of the process of court if it raised an issue that has been determined by the court or raises an issue based on speculation rather than facts. The plaintiff has failed through affidavit or otherwise to prove that the suit is an abuse of the process of the court.

The court has considered the above issues and finds that the applicant has failed to prove that the suit is scandalous, frivolous, vexations and otherwise an abuse of the process of the court, the same is dismissed with costs.

***Dated, signed and delivered at Nyeri this 28th day of June 2013.***

**A. OMBWAYO**

**JUDGE**