



Gitau & another v Mbuthu & another (Environment & Land Case E029 of 2022) [2024] KEELC 1289 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E029 OF 2022**

JG KEMEI, J

MARCH 11, 2024

BETWEEN

BERNADETTE MURUGI GITAU 1ST PLAINTIFF

ROSE MURUGI MACHARIA 2ND PLAINTIFF

AND

NAOMI WANJIRU MBUTHU 1ST DEFENDANT

JOSEPH MACHARIA NDIRANGU 2ND DEFENDANT

RULING

1. The Plaintiffs/Applicants filed the instant Motion dated 7/6/2023 under Order 2 Rule 15 Civil Procedure Rules seeking Orders that;
 - a. The defence be and is hereby struck out for being scandalous, frivolous, vexatious and may prejudice and embarrass the Court for it is an abuse of the process of the Court.
 - b. Judgement be and is hereby entered as prayed in the Plaint.
 - c. The costs of this application and of the suit be borne by the Defendants in any event.
2. The gist of the application is that the issues in the instant case have already been litigated right from Kiambu P&A 22 of 2000 and P & A 2070 of 2011 at High Court at Milimani and ultimately at the Court of Appeal CA 319 of 2019.
3. The motion is supported by the Affidavit of Bernadette Murugi Gitau the 1st Plaintiff herein sworn on behalf of the 2nd Plaintiff as well. She avowed that their suit seeks to evict the Defendants from the land parcels that the Plaintiffs acquired after a protracted succession pitting the parties herein who are all related. The Plaintiffs are step -sisters whereas the Defendants are widow and son of the 2nd Plaintiff's late brother Eliud Macharia Ndirangu respectively. That the Defendants rightly inherited the



late Eliud Macharia's share in the succession proceedings of the Plaintiffs' late father vide a certificate of confirmation of Grant dated 29/9/2017 in the Judgment of Musyoka J. which Judgment was duly affirmed by the Court of Appeal in CoA No. 319 of 2019. Accordingly, that the defence filed herein is an attempt to revive the already settled proceedings and as such is a disguised appeal.

4. Resisting the Motion, the Defendants/Respondents filed a detailed Replying Affidavit sworn on 16/6/2023 by Naomi Wanjiru Mbuthu, the 1st Defendant herein. She averred that she and her son, the 2nd Defendant, are the administrators of the estate of the late Eliud Ndirangu Macharia vide Kiambu Succ. Cause No. 47 of 2015. That their defence and counterclaim should not be struck out as prayed because the late Macharia Kimani (Eliud's father) left a will that was never considered by the High Court despite her protests.
5. She further impugned the Certificate of Confirmation of Grant issued on 29/9/2017 and listed her objection on distribution of certain properties as enumerated in para. 8 of the Replying Affidavit. That the Defendants stand to suffer irreparable loss if the properties listed in para. 10 are forcefully taken by the Plaintiffs. Conceding the High Court, Court of Appeal and Thika ELC Petition E002 of 2022 proceedings, the deponent maintained that she was denied the right to fair hearing because the issue of written wills remains unresolved thus their counterclaim ought to be heard on merit. That the Plaintiffs were to inherit land parcel known as Kiambaa/Kanunga/242 being part of the late Macharia Kimani's estate over and above the properties the Plaintiffs inherited from the late mothers (the wives of Macharia Kimani).
6. On 26/9/2023 directions were taken to canvass the Application by way of written submissions. The Plaintiffs through the firm of N. Kiagayu & Co. Advocates filed submissions dated 19/9/2023 whereas the Defendants through the firm of Adrian Kamotho Njenga & Co. Advocates filed submission dated 27/9/2023.
7. Reiterating the averments in their Supporting Affidavit, the Plaintiffs accuse the Defendants of sustaining continued litigation despite determination by the Court of Appeal which outcome the Defendants have refused to accept. That the alleged Will(s) advanced by the 1st Defendant was unknown to any family member of the late Macharia died intestate. That their defense herein admits the finalization of the subject issues and thus the Court was urged to declare the issues as res judicata.
8. On the other hand, the Defendants framed two issues for determination; whether the Plaintiffs have met the threshold for striking out the defence and who bears the costs of the application? On the first issue, it was highlighted that this suit relates to ownership disputes in respect of plot no. Kiambaa/Kanunga/T335, Ting'anga/Cianda 488, Kiambaa/Kanunga/T.277 and Kiambaa/Karuri/T888. That the Plaintiffs contention that they inherited the said properties from the estate of the late Macharia is only meant to disinherit the Defendants and as such the statement of defence cannot be said to contain mere denials. That indeed they have raised triable issues calling for determination by the Court. Secondly, that having demonstrated that the application is unmerited, it is ripe for dismissal with costs.
9. The key issue for determination is whether the Application is merited.
10. The Application is premised on Order 2 rule 15 Civil Procedure Rules which states;

“ 15. Striking out pleadings [Order 2, rule 15.]

- (1) 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



- (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. It is trite that the power to strike out pleadings is discretionary and must be sparingly exercised and it can only be exercised in clearest of cases. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in the case of *D.T. Dobie & Company (Kenya) Limited Vs. Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR* by Madan JA that;
- “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 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, L.J. (supra)). As far as possible, indeed not at all, 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 it 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.”
12. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake Vs. Albion Life Ass. Society (1876) LJQB 663*; *Marham Vs. Werner, Beit & Company (1902) 18 TLR 763*; *Christie Vs. Christie (1973) LR 8 Ch 499*.
13. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 Rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that



denial of a well-known fact can also be rightly described as scandalous. See *J P Machira Vs. Wangechi Mwangi and Nation Newspapers* Civil Appeal No. 179 of 1997.

14. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See *Bullen & Leake and Jacobs Precedents of Pleading* (12th Edn.) at 145.
15. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the Court really means in brief a pleading which is a misuse of the Court machinery or process. See *Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another* Nairobi HCCC No. 984 of 1999. A pleading is an abuse of the process where it is frivolous or vexatious or both.
16. The Court has perused the Plaintiff which discloses that the parties are related and the Plaintiffs inter alia seek eviction of the Defendants from listed properties (inheritance) that emanate from the estate of the late Macharia Kimani. That succession proceedings were concluded to the chagrin of the Defendants who preferred an appeal but ultimately lost their protests.
17. Denying the claims, the Defendants filed a lengthy Statement of Defence and counterclaim dated 18/5/2022. In it and specifically at para. 9 they deny ever occupying the impugned parcels of land that the Plaintiffs seek eviction. The Defendants lament the findings of the Succession Court and Appellate Court and argue that certain evidence was not considered to their disadvantage. They further accuse the Plaintiffs of fraudulent transfers and pray for the registration of titles to be canceled and a declaration that the Defendants are the rightful owners of the disputed properties. Further they have sought orders of general and special damages.
18. Applying the tests in Order 2 rule 15 of the Civil Procedure Rules, this Court is not required to embark on the merits of the case but at this stage must satisfy itself that there are no triable issues in the impugned defence to warrant granting of the application. In this case the Defendants have raised issues of fraud, misrepresentation and irregularity, cancellation of title and special and general damages in their suit filed by way of a counterclaim. Notably the Plaintiffs too have sought similar orders of special and general damages for trespass in their Plaintiff. For the Court to arrive at a determination either way, the Plaintiffs must lead evidence before the Court on the averments with respect to trespass as well as special and general damages. It is therefore clear that whichever way one looks at it both suits cannot be determined in a summary manner. I find that allowing the application will lead to unintended result of driving away both the Plaintiffs (in the counterclaim) and the Defendants (in the main suit) from the seat of justice with respect to the Plaintiff and the counterclaim. In conclusion the Court finds that there are triable issues for trial in the instant suit that call for judicial examination and a trial. This Court is guided by the adage that a triable issue at this stage need not be one that succeeds but one that warrants the intervention of the Court.
19. There is the third reason that militates against allowing this application and that is the right to be heard as espoused under Article 50 of *the Constitution* of Kenya which entitles the Defendants to have their dispute placed before the Court for hearing and determination. Let the parties have their day in Court.
20. After reflecting on the findings above I am constrained to express any further opinion about the details of the previous lengthy suits that have been canvassed by the parties in other Courts so as not to prejudice fair trial nor restrict the freedom of the trial Court in disposing of this case.



21. In the end I find that the application is without merit. It is dismissed with costs in favour of the Respondents.
22. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11TH DAY OF MARCH, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Njeri Kiagayu for 1st and 2nd Plaintiffs

Lerionka for 1st and 2nd Defendants

Court Assistants – Phyllis/Oliver

