



Okech (Suing as the Legal Representative of the Estate of Boaz Okech Okech alias Okech Okech Owour - Deceased) ((Suing as the Legal Representative of the Estate of Boaz Okech Okech alias Okech Okech Owour - Deceased)) v Ombago (Sued in his Individual Capacity and as the Legal Representative of the Estate of Ombago Ogongo alias Alex Ombago Ogongo) & another ((Sued in his Individual Capacity and as the Legal Representative of the Estate of Ombago Ogongo alias Alex Ombago Ogongo)) (Environment & Land Case E002 of 2023) [2024] KEELC 3673 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E002 OF 2023**

AY KOROSS, J

MAY 9, 2024

BETWEEN

**ONYANGO OKECH PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BOAZ
OKECH OKECH ALIAS OKECH OKECH OWOUR - DECEASED)**

AND

**CLEOPHAS OMONDI OMBAGO 1ST DEFENDANT
DIOCESE OF KISUMU TRUSTEES 2ND DEFENDANT
(SUED IN HIS INDIVIDUAL CAPACITY AND AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF OMBAGO OGONGO ALIAS ALEX
OMBAGO OGONGO)**

RULING

1. The ruling is in respect of the plaintiff's notice of motion dated 10/11/2023. The plaintiff has by the provisions of Sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Order 2 Rule 15(1)(a)(b)(c) and (d) of the [Civil Procedure Rules](#), seeks the following prayer: -
 - a. The defendants' counterclaim dated 17/8/2023 be struck out and costs of the motion and of the counterclaim be awarded to the plaintiff.
2. The motion is supported by several grounds on its face and the supporting affidavit deposed on 10/11/2023 by the plaintiff Onyango Okech.



3. In summary, the plaintiff disparaged the counterclaim on grounds it contravened or sought to overturn the orders issued in Kisumu CM LA No.12 1974, it concealed material facts and the motion is vexatious, frivolous and an abuse of the court process.
4. In opposition, the defendants' counsel on record M/s. N.A. Owino & Co. Advocates filed the affidavit deposed by Father Vincent Odundo on 2/02/2024. Since it was filed outside the timelines, this court will not consider it and it is hereby expunged from the court record. Therefore, the motion is unopposed.
5. When the motion came up for hearing on 19/02/2024, counsel for the plaintiff made his oral submissions. In rehashing the contents of the motion, counsel urged this court to allow it.
6. Having carefully considered the motion and affidavit, my understanding of the plaintiff's claim is that because of the orders that ensued from Kisumu CM LA No.12 1974, the defendants were barred from filing a counterclaim. Therefore, according to him, the defendants' counterclaim is vexatious, frivolous, and an abuse of the court process.
7. The striking out of pleadings including counterclaims is anchored in Order 2 Rule 15 (1) of the Civil Procedure Rules and this provision of law states as follows:-

“(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.”

8. Although striking out of pleadings is discretionary, the Court of Appeal decision of Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR which I hereby adopt illuminates that the striking out of pleadings should be issued sparingly and in the clearest of circumstances. Further, if a pleading is arguable or raises even a single triable issue, the court will allow the party to have his day in court and argue his case. This decision stated:-

“It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word “may”. Order 2 rule 15 which retains word for word

Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles as follows;:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out



pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

9. From the facts of this case, the plaintiff’s main challenge of the counterclaim is that because of the existence of the consent order of 23/09/2021 in Kisumu CM LA No.12 1974, the defendants’ counterclaim is frivolous, vexatious, an abuse of court process, tends to prejudice or embarrass or delay the fair trial of the case.
10. The decision of *Trust Bank Limited v H.S.Amin & Company Ltd & another [2000]* eKLR defined these key terms in the following words:-

“In the case of *J P Machira vs Wangechi Mwangi and Nation Newspaper Court of Appeal Civil Appeal No 179 of 1997 Omolo JA* after quoting Ringera J in the case of *Dr Muray Watson vs Rent A Plane Ltd & 2 others HCCC No 2180 of 1994*, had this to say:-

“While I would broadly agree with the judge, I can find no warrant for restricting the meaning of the term scandalous to only that which is indecent, offensive or improper... Denial of a well known fact can also be rightly described as scandalous...

In *Buller & Leake and Jacobs Precedents of Pleading (12th Edition)* on chapter dealing with striking out pleadings at page 145 it stated:

“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. ”

And 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.” Emphasis added.

11. Because of the draconian nature of the striking out of pleadings, this court has to exercise extreme caution and not deny a party his day in court.
12. Now, turning to the counterclaim, plaint, documents contained in the plaintiff’s list of documents and proceedings in Kisumu CM LA No.12 1974, I must state the plaintiff’s allegations fall far short of the threshold set out in Order 2 Rule 15 (1) of the [Civil Procedure Rules](#) as shall be seen shortly.
13. Firstly, the defence in paragraph 5 asserts the consent was void ab initio. Further, the green cards of land parcel nos. Siaya Koyeyo 1090, 1091, and 1096 (suit properties) show the 2nd defendant is the registered owner of these properties and whose interests were adversely affected by the decision of 23/09/2021 in Kisumu CM LA No.12 1974 yet it was allegedly never joined or heard in those proceedings.
14. This was contrary to Article 50 of [the Constitution](#) which states that a party must be accorded a right to fair hearing which is tandem with the audi alteram partem cardinal principle of law. The counterclaim demonstrates the defendants seek to protect their interests which were affected by the outcome of 23/09/2021 in Kisumu CM LA No.12 1974.



15. Secondly, the consent order that was adopted as an order of the court on 23/9/2021 raises more questions. Who was recording the consent? Was it the plaintiff in this case, if the plaintiff herein represented estates of deceased persons as both applicant and respondent then in what capacity did Joseph Oluoch and Opoyi Otieno alias Hages Amolo Otieno participate in those proceedings?
16. Further, an observation of the green cards of the suit properties demonstrates that Charles Owino Oruko whom the plaintiff represented therein in his capacity as administrator was neither the 1st registered proprietor of the suit properties nor has he ever been registered as one.
17. Lastly, the reasoned ruling rendered by Hon. Wambilyanga on 8/2/2021 declining to adopt the consent dated 2/11/2020 puts into question the legality of the subsequent adoption of the consent on 23/09/2021 by Hon. P.N. Gesora.
18. In conclusion and bearing in mind the 2nd defendant is prima facie the registered owner of the suit properties, yet, the plaintiff seeks their registration in his name and also seeks eviction orders, this court sees nothing wrong in the 2nd defendant seeking in the counterclaim for it to be declared the registered proprietor of the suit properties.
19. Having carefully considered the defence and counterclaim, I do find that in my humble opinion, the counterclaim is not frivolous, vexatious, an abuse of the court process, or tends to prejudice or embarrass or delay the fair trial of this case.
20. Moreover, I also find the defence and counterclaim raises triable issues. Ultimately, I must dismiss the notice of motion dated 10/11/2023 with costs being in the cause.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

9/5/2024

Ruling delivered in open court virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Charles Gachichio for the plaintiff

Miss Marucho h/b for Mrs. Owino for the defendants

Court assistant: Ishmael Orwa

