



**IN THE COURT OF APPEAL OF KENYA  
AT NYERI**

**Civil Appeal 181 of 2002**

**MARGARET MUMBI KAGIRI ..... APPELLANT**

**AND**

**KAGIRI WAMAIRWE ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR NYERI ..... 2<sup>ND</sup> RESPONDENT**

**HON. THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AGRICULTURAL FINANCE CORPORATION ..... 4<sup>TH</sup> RESPONDENT**

***(Appeal from the Ruling and Order of the High Court of Kenya***

***at Nyeri (Juma J.) dated on 12<sup>th</sup> February, 2002***

**in**

**H.C.C.C. NO.33 OF 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the superior court (*Juma J.*) delivered on 12<sup>th</sup> February, 2002 in which the learned Judge struck out the appellant's suit against the four respondents on the ground that the plaint disclosed no cause of action.

The appellant herein ***Margaret Mumbi Kagiri***, as the plaintiff in the superior court, filed a suit being High Court (*Nyeri*) **Civil Case No. 33 of 2001 No.33 of 2001** against the four respondents (*as defendants*). In order to appreciate the nature of the appellant's claim it will be necessary to set out the relevant paragraphs of the plaint filed in the superior court, which were as follows:-

***“1. The plaintiff is a female adult farmer and a resident of Naro Moru Settlement Scheme and she is the wife of the 1<sup>st</sup> defendant and her address for service for the purposes of this suit is care of post office box number 626 Karuri.***

***2. (i) The first defendant is a male adult and an estranged husband of the plaintiff. He is a man of no fixed abode but is reputed to be a resident of Nyeri Town (service of summons will be effected through the plaintiff).***

***(ii) The second defendant is an employee of the Kenya Government in charge of the Lands Registry Nyeri (service of summons will be effected through the plaintiff.)***

***(iii) The third defendant is sued as the legal personality of the government of Kenya by virtue of the conduct of the Second defendant and is therefore vicarious liable on behalf of the government (service of summons will be effected through the plaintiff).***

***(iv) The Fourth defendant is a statutory body with its registered office in Nairobi (service of summons will be effected through the plaintiff.)***

3. ***That on or about 18<sup>th</sup> December 1981, Kieni East Divisional Land Control Board granted a letter of consent to Transfer 37 acres out of land parcel Nyeri/Naromoru/613 from the first defendant into the joint names of the plaintiff and the first defendant***
4. ***That the 37 acres of land referred in the consent was parceled out as parcel number Nyeri/Naromoru/627.***
5. ***That the first defendant without executing the Transfer instrument deserted the plaintiff and subsequently attempted to sell the land to a third party, thereby prompting the plaintiff to register a caution against parcel number Nyeri/Naromoru/627 on 20<sup>th</sup> April 1983 claiming half share interest pursuant to the Land Control Board Consent.***
6. ***That at all material times the plaintiff has been resident on the land together with children of her marriage with the first defendant.***
7. ***That on or about February 1999 the plaintiff went to the second defendant to carry out a search and to her surprise, she discovered that the second defendant had unlawfully lifted the caution and facilitated a fraudulent subdivision and issued three title Deeds of the subdivisions of parcel number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771.***
8. ***That the second defendant on or about 9/3/99 at the protest of the plaintiff placed a Restriction against the aforesaid titles unlawfully issued titles.***
9. ***That on or about December 1999 the plaintiff received a Notice from the fourth defendant addressed to the first defendant and copied to herself to the effect that the land had been subdivided into three parcels and that the fourth defendant had charged them due to the first defendants debt owing to the fourth defendant. The fourth defendant enclosed certificate of search which disclosed that the first defendant had caused parcel number Nyeri/Naromoru/1770, and Nyeri Naromoru/1771 all in the name of the first defendant, and that a charge had been registered despite the Restriction earlier placed by the second defendant.***
10. ***It is the plaintiff's case that lifting of the caution on Title Number Nyeri /Naromoru/627 and the subsequent issuance of subdivision Titles Numbers number Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771 was illegal and fraudulent and further the Registration of the charge by the Fourth Defendant in the face of a Restriction was unlawful."***

In the said plaint the appellant set out what she considered as particulars of fraud by each respondent and then sought the following reliefs against the respondents:-

- I. ***A declaration that the lifting of the plaintiff caution on parcel Number Nyeri/Naromoru/627 and the subsequent subdivision of the aforesaid title and transfer and issuance of title on land parcel number Nyeri/Naromoru/1769, Nyeri/naromoru/1770, and Nyeri Naromoru/1771 and also the charge on the subdivision titles was unlawful and fraudulent.***
- II. ***An order of cancellation of Titles Numbers Nyeri/Naromoru/1769, Nyeri/Naromoru/1770, and Nyeri Naromoru/1771 and reinstatement of the original title Number Nyeri/Naromoru/627 and the caution.***
- III. ***A declaration that the title number Nyeri/Naromoru/627 is the joint property of the plaintiff and the first defendant AND an order that the Title Number Nyeri/Naromoru/627 be transferred in the joint names of the plaintiff and the first defendant and in the event of a refusal by the first defendant to execute transfer documents the Deputy Registrar of this honourable court be authorized to do so.***
- IV. ***Costs of this suit."***

The four respondents filed their respective statements of defence in which they sought dismissal of the appellants suit with costs. Before the suit could be set down for hearing the 1<sup>st</sup> respondent (as the 1<sup>st</sup> defendant in the superior court) filed a Chamber Summons application under **Order VI rr.13(1)(a) & (d) & 16** of the Civil Procedure Rules in which he sought an order that the plaint be struck out. That application was brought on the following grounds:-

- “(i) The plaintiff being the first defendant's wife has no claim (sic) him known to any law.***
- (ii) The plaintiff's rights as a wife are inchoate and are not legally enforceable.***
- (iii) The suit is misconceived and incompetent.***
- (iv) The plaint discloses no cause of action in law respecting which a court would aid or enforce”.***

That was the application that went before the superior court for determination. The learned Judge considered the pleadings and arguments before him and came to the conclusion that the plaint disclosed no cause of action. He accordingly struck out the suits and ordered the appellant to pay the costs of the chamber summons application and the suit to the respondents. In

reaching that decision the learned Judge relied on the decision of this Court in Muriuki Marigi v. Richard Marigi Muriuki, Lydiah Njoki Muriuki and Samuel Murirla (A MINOR THROUGH HIS NEXT FRIEND – RICHARD MARIGI MURIUKI) – CIVIL APPEAL NO.189 of 1996 (unreported) in which it was stated:-

***“It is, however, noteworthy that the Law of Succession Act, (Cap 160 Laws of Kenya) does recognize the rights of wives and children over their husband’s or father’s estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise. Whenever they accrue the estate is shared either according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the Law of Succession Act. The Appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.*”**

***In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce.”***

Relying on the foregoing the learned Judge concluded his judgment thus:-

***“The issue before the Court of Appeal in MURIUKI MARIGA is the same as in the instant case. I was referred to the decision of the Court of Appeal in D.T. DOBIE –vs- MUCHINA about how drastic it is to strike out a suit. It should be noted that in D.T. DOBIE’ S case, it was capable of being amended. In the instant case the issue is fundamental. Even if I allowed the Plaintiff to amend her Complaint, the issue remains, is she capable, in law, of suing her husband over his land? The answer is clearly No. This plaint is incapable of being amended. There is simply no cause of action disclosed.*”**

***I therefore allow the application by the First Defendant and order that this suit be and is hereby struck out for not disclosing a cause of action. The facts of this case are such that if no cause of action is disclosed against the first Defendant, it follows that the suit against the co-Defendants cannot also stand.***

***The Plaintiff shall pay the costs of this application and the costs of the suit of all the Defendants.”***

Being dissatisfied by the foregoing the appellant herein, through her advocates, filed this appeal setting out the following six grounds of appeal:-

- “1. THAT the learned superior court judge erred in law in failing to find that there was no competent application for striking out the suit before him and hence arrived at the wrong conclusion in striking out the plaint.***
- 2. THAT the learned superior court judge erred in law in failing to address his mind to the essential principles to be considered in striking out of the Plaint and in particular whether the Plaint was so incurably defective that it could not be salvaged even by an amendment.***
- 3. THAT the learned superior court judge erred in law in overlooking a fundamental principle of a fair trial that all parties to a suit must be heard on merit of the case without being hampered unless there is a lawful reason to justify the denial of being heard on the merit of the suit.***
- 4. THAT the learned superior court judge erred in law in failing to see that the pleadings were a substantial cause of action who (sic) could only be resolved upon hearing viva voce evidence from the parties.***
- 5. THAT the learned superior court judge erred in law in failing to appreciate the issues of fraud alleged and the unlawful manner in which the caution had been lifted from the Land Registry.***
- 6. THAT in all the circumstances of this case there was absolutely no justification for striking out the Plaint.”***

When this appeal came up for hearing before us on 2<sup>nd</sup> November 2006 Mr. L.M. Karanja the learned Counsel for the appellant addressed us at length on the issue of cause of action. He submitted that the learned Judge had to look at the plaint and that had he done so he would have allowed the suit to proceed to hearing. Mr. Karanja reminded us that striking out of pleading was a drastic remedy which should be exercised sparingly. He relied on the authority of D.T. Dobie & Company [Kenya] Ltd v. Muchiri [1982] KLR 1.

In opposing the appeal *Mr. C. Wahome*, the learned counsel for the 1<sup>st</sup> respondent started his submissions by saying that the appeal before us was incompetent. *Mr. Wahome* submitted that the pleadings did not specify in what capacity the appellant was to be registered. He pointed that there was no indication as to whether there was an agreement or not.

*Mr. M. Njoroge*, the learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents associated himself with the submissions of *Mr. Wahome* and asked us to dismiss this appeal.

On his part *Mr. Wanjogu* the learned counsel for the 4<sup>th</sup> respondent similarly associated himself with the submissions of *Mr. Wahome* and *Mr. Njoroge*. He, too, asked us to dismiss this appeal.

The application that was before the superior court was for striking out of the pleadings on the ground that the plaint disclosed no reasonable cause of action. We know that striking out of a suit is a drastic step to be taken by a court of law. A court would resort to that drastic remedy where it is satisfied that the suit is so hopeless that it is incapable of being rescued by amendments. In *D.T. DOBIE & COMPANY (KENYA) LTD V. MUCHINA* (SUPRA) Madan J.A. (as he then was) said:-

***“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.”***

Can it be said that the appellant's suit was so hopeless and so plainly obvious that it disclosed no reasonable cause of action? What relief did that appellant seek in her plaint? She wanted a declaration that the suit land which was still registered in the name of 1<sup>st</sup> respondent was joint property and that it ought to be registered in the names of the appellant and the 1<sup>st</sup> respondent. In that plaint the 1<sup>st</sup> respondent was described as “an estranged husband of the plaintiff” and “is a man of no fixed abode but is reputed to be a resident of Nyeri Town”. What was the basis of the appellant's claim? That she was the wife of the 1<sup>st</sup> respondent. There was no allegation in the plaint that the appellant had contributed to the purchase of the suit land. The appellant's claim appear to have been anchored on the ground that the Land Control Board “granted a letter of consent to transfer 37 acres out of land parcel number Nyeri/Naromoru/613 from the first defendant into the joint names of the plaintiff and the first defendant”. But one may ask on what basis did the Land Control Board give that consent letter? What was the nature of the transaction? Was it a sale, transfer, lease, mortgage, exchange, petition or any other disposal of land? – see section 6 of the Land Control Act (Cap. 302 Laws of Kenya). Here we may pose the same question as raised by the learned Judge – since when did the Land Control Board have the power to award land to people? In *GATERE NJAMUNYU V. JOSEK NJUE NYAGA (1982-88) IKAR 123* this Court said at p.125 3<sup>rd</sup> paragraph:-

***“Consent does not impose any obligation upon the seller or buyer to perform the agreement, though it cannot be performed without it. The parties are free to cancel the agreement mutually even after consent and not proceed to completion. A party to the agreement may also rescind the agreement but he does so at his own peril.- The cancellation or rescission of the agreement as aforesaid is not prohibited because consent has been given. Consent has no bearing upon it. Consent is the statute's approval of a proposed dealing in agricultural land”.***

So long as the appellant's claim was based on consent of the Land Control Board without any further explanation as to the basis of that consent then the appellant's claim was bound to fail. Again if the appellant's claim was based on the fact that she was the wife of the 1<sup>st</sup> respondent that claim was bound to fail, too.

From the pleadings, the learned Judge made a finding that the original piece of Land Nyeri/Naromoru/613 was exclusively registered in the name of the 1<sup>st</sup> respondent. It was also not disputed that the suit land was registered under the Registered Land Act (Cap. 300 Law of Kenya) Section 27(a) of that Act provides:-

***“Subject to this Act-***

***(a) the registration of a person as the proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging to appurtenant thereto;”***

***and Section 28 of the same Act provides thus:***

***“The rights of proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown, in the register; and***

***(b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as effect the same and are ..... by section 30 not to require noting on the register;***

***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”***

In view of the foregoing we are satisfied that the appellant's claim in the superior court was bound to fail. We can only say that the appellant's claim in the superior court was so weak that it was beyond redemption and incurable. It could not be redeemed even by amendments. We agree with the conclusion of the learned Judge that the plaint was for striking out. He was right in adopting that procedure of striking out the plaint.

For the foregoing reasons we are of the firm view that the appellant's plaint was properly struck out by the superior court. Accordingly we find no merit in this appeal and we order that it be dismissed with costs to the respondents. It is so ordered.

**DATED and DELIVERED at Nyeri this 9<sup>th</sup> day February, 2007.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**