



**Wekesa v Wamukoya & another (Environment & Land Case  
E001 of 2023) [2024] KEELC 4752 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4752 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE E001 OF 2023**

**DO OHUNGO, J**

**JUNE 19, 2024**

**BETWEEN**

**CAMILUS PETER WEKESA ..... PLAINTIFF**

**AND**

**IDRISS SHIKANA WAMUKOYA ..... 1<sup>ST</sup> DEFENDANT**

**SULEIMAN MURUNGA WAMUKOYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff moved the court through Originating Summons (OS) dated 17<sup>th</sup> August 2023 wherein he averred that the defendants are the registered proprietors of the parcel of land known as North Wanga/Kholera/1392 and that he had acquired title to an 80' x 100' (0.08 Ha) portion of the parcel of land known as North Wanga/Kholera/1012 by adverse possession.
2. In response, the defendants filed Notice of Motion dated 11<sup>th</sup> September 2023 wherein they prayed that the OS be struck out with costs for failure to disclose a cause of action against them. This ruling is in respect of the said Notice of Motion.
3. The grounds stated on the face of the application are that for a claim seeking ownership of land through the doctrine of adverse possession to succeed, the claimant ought to bring the claim against the validly registered proprietor of the land in question yet in this case, parcel number North Wanga/Kholera/1012 is non-existent since it was closed on the 28<sup>th</sup> January 1997 while parcel number North Wanga/Kholera/1392 is registered in the name of one Johnson Shikuku Misiko who is not a party in this suit. That in the circumstances, the suit is unsustainable and ought to be struck out with costs.
4. The application is supported by an affidavit sworn by Idriss Shikana Wamukoya, the first defendant. He reiterated the position advanced in the grounds of the application and annexed a certified copy of the register in respect of parcel number North Wanga/Kholera/1012 and a copy of certificate of official search in respect of parcel number North Wanga/Kholera/1392, as on 22<sup>nd</sup> August 2023.



5. The plaintiff opposed the application through a replying affidavit which he swore. He deposed that the application was filed in bad faith and urged the court to dismiss it.
6. The application was canvassed through written submissions. The defendants referred the court to the certified copy of the register and the certificate of official search as well as the cases of *Stephen Mwadoro & 56 others v Alhad Mohamed Hatimy* [2020] eKLR and *Wesley Kipyegon Bor & 8 others v Richard Pares & 3 others* [2020] eKLR.
7. In response, the plaintiff argued that he had established the elements of adverse possession, and that the application is not meritorious. He relied on the cases of *Gabriel Mbui v Mukinda Maranya* [1993] eKLR and *Kimani Ruchine v Swift Rutherford & Co Ltd* [1980] KLR 10 and urged the court to dismiss the application with costs.
8. I have considered the application, the affidavits and the submissions. The issue for determination is whether the OS should be struck out for failure to disclose cause of action.
9. The power to strike out pleadings is grounded on Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules* which provides that at any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law.
10. It is trite that striking out of pleadings is a draconian remedy that must only be resorted to in the clearest of cases. It is also settled law that if a pleading raises a triable issue irrespective of whether it will succeed, the suit ought to be allowed to proceed to trial. Further, if some life can be injected into a pleading by way of amendment, the court should allow the parties an opportunity to have their day in court.
11. If only to underscore the limited scope of striking out, I find it necessary to reproduce in extenso, the wise counsel of the Court of Appeal in the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR:

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. The present application is stated to be brought under Section 13 (7) of the *Environment and Land Court Act*. The provision deals generally with the jurisdiction of the court but does not specifically address striking out of pleadings. Since the defendants are seeking striking out of the OS “for failure to disclose a cause of action,” the application could only have been brought under Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules*.
13. While considering an application seeking striking out of a pleading for failure to disclose a cause of action, no evidence is admissible in support of such an application. The court examines only the pleading sought to be struck out and does not go beyond it. That position was reiterated by the Court of Appeal in *Crescent Construction Co Ltd v Delphis Bank Ltd* [2007] eKLR.
14. The defendants have sought to prop their application with a supporting affidavit, complete with annexures. Indeed, their contention that the OS discloses no cause of action is based exclusively on the annexures. The defendants are in essence asking the court to determine the case on its merits at this stage. That is not permissible in an application such as the present one.
15. I have perused the OS. The plaintiff’s case is that he has acquired title to an 80’ x 100’ (0.08 Ha) portion of the parcel of land known as North Wanga/Kholera/1012 by adverse possession. That is a clearly discernible cause of action. Whether he will establish that claim in respect of the parcels mentioned and against the particular defendants is a matter to be determined at trial.
16. I find no merit in Notice of Motion dated 11<sup>th</sup> September 2023. I dismiss the application with costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: M Nguyayi

