



Mpunge Investments Limited v Wiseborne Industries (K) Limited & another (Environment & Land Case E029 of 2023) [2024] KEELC 4756 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E029 OF 2023**

JM MUTUNGI, J

JUNE 13, 2024

BETWEEN

MPUNGE INVESTMENTS LIMITED PLAINTIFF

AND

WISEBORNE INDUSTRIES (K) LIMITED 1ST DEFENDANT

CEASAR NJAGI KUGURU 2ND DEFENDANT

RULING

1. This Ruling is on the 2nd Defendant's/Applicant's Notice of Motion application dated 6th July 2023 seeking the Court to strike out the Plaintiff's Originating Summons dated 19th May 2023. The Motion is predicated upon the provisions of Order 2 Rule 15 (1) (a), (b), (c), and (d), Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B & 3A of the [Civil Procedure Act](#).
2. The Application is based on the grounds that it is undisputed that the Plaintiff is the registered owner of the suit properties and, as such, the prayers sought in the suit are untenable. The Applicant avers that the Defendants relinquished their rights over the properties when the suit properties were auctioned and transferred to the Plaintiff. The Applicant further avers that neither he nor the 1st Defendant interferes with the suit properties in any way and claims that the Plaintiff's intentions of filing the instant suit were to vex the Defendants.
3. The Application is supported by the affidavit of Ceasar Njagi Kunguru who reiterates the grounds and states that the suit as filed by the Plaintiff is frivolous, vexatious, scandalous and an abuse of the Court process for the reasons that the Plaintiff has not produced any evidence to show that the Defendants have obstructed it from accessing the suit properties. He also avers that the Plaintiff is the absolute owner of the suit properties and the developments thereon and that he does not live in the property or have any interest in the suit properties whatsoever.



4. The Application is opposed through a Replying Affidavit sworn by Ben Manyara Kaimenyi dated 12th February 2024. The Respondent's grounds of opposition to the Motion are that the Plaintiff's Originating Summons is well founded in law as its intention is to gain access to its properties. He avers that despite purchasing the suit properties, the 2nd Defendant still has control over the suit properties and has denied the Plaintiff the enjoyment of its properties. He further states that the Plaintiff's suit raises a reasonable cause of action and that it stands to suffer irreparable damages if the orders sought are not issued.
5. For the foregoing reasons, the Respondent urges the Court to dismiss the Applicant's application with costs.
6. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support and the Replying Affidavit in opposition and I have considered the submissions by the parties. The singular issue for determination in this matter is whether the Plaintiff's Originating Summons dated 17th May 2023 ought to be struck out under Order 2 Rule 15 (1) of the Civil Procedure Rules.
7. Although the Court exercises discretionary powers in striking out pleadings, because of its far-reaching consequences, Order 2 Rule 15(1) of the Civil Procedure Rules, has established clear principles which guide the Court in the exercise of that power in the following terms;
 - “ 15. At any stage of the proceedings the Court may order to be struck out or
 - (1) 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.” (Our emphasis).
8. Generally, a party to a civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. That is why the jurisdiction of the Court to strike out pleadings has been described variously as draconian, drastic, discretionary, and an order of last resort. It is a powerful jurisdiction, whose capacity extends to bringing a suit to an end before it has been heard on merit. The rules of natural Justice require that the Court must not drive away any litigant from the seat of Justice, without a hearing, however weak his or her case may be and it is for this reason that this remedy must be resorted to sparingly. The Court may only strike out a suit where it is plain and obvious that the suit is totally hopeless and that not even amendment could salvage it.
9. In the case of Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 (unreported) the Court summarized the principles as follows:
 - “...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.”



10. In the Case of *Trust Bank Limited v Amin Company Ltd & Another* (2000) KLR 164, the Court held as follows: -

“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 or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?”

11. Applying the aforesaid principles to this case, can this suit be said to be scandalous, frivolous, vexatious, or is otherwise an abuse of the process of the Court? In answering this question, it is important to note that the 2nd Defendant who is the Applicant does not deny that he was the previous owner of the suit properties and that he took out a loan with Fortune Sacco Limited, which he defaulted in paying and which resulted in the suit properties being sold to the Plaintiff herein. The Applicant maintains that he moved on and does not interfere with the enjoyment of the suit properties. The 2nd Defendant also does not dispute that there had been a similar application instituted by Fortune Sacco Limited against him in Gichugu Misc. Application No. 4 of 2021, which was dismissed for want of jurisdiction. He has however not responded to the allegations that he still has enclosed the properties and that the Plaintiff has not been able to access his properties. On the other hand, the Plaintiff has also admitted that it is the registered owner of the suit properties and avers that it has been unable to enjoy the suit properties because it cannot freely access them. The Applicant further contends that despite the Plaintiff having bought the properties at the sum of Kshs. 55,000,000/- the same had been valued at Kshs. 87,000,000/-. The conflicting issues between the parties is an indicator that a trial is necessary to enable the Court to interrogate the evidence and make findings on the disputed facts and determine whether the Plaintiff is entitled to the orders that it seeks. This cannot be done at this stage and certainly not without taking evidence.

12. Can it then be said that the Plaintiff's case as pleaded is scandalous, frivolous or an abuse of the process of this Court? I do not think so. The suit raises genuine triable issues against the defendants that are best left to be ventilated at the trial. It is noteworthy that a triable issue is not one that must succeed at the trial but one that in the circumstances needs to be interrogated in order for the Court to make a justiciable finding and determination. In the instant case it is unclear why the Plaintiff has difficulties in accessing the suit property. The Plaintiff alleges it is the Defendants who have repeatedly continued to deny them access. The Defendants deny this allegation and it is for this reason the Court needs to hear and interrogate the evidence from the parties.

13. For the above reasons, the application dated 6th July 2023 is dismissed with costs in the cause.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF JUNE 2024.

J. M. MUTUNGI

ELC - JUDGE

