



Ethics and Anti-Corruption Commission v Nesco Services Limited & 3 others; National Bank of Kenya (Interested Party) (Environment & Land Case E211 of 2023) [2024] KEELC 6661 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E211 OF 2023
MD MWANGI, J
SEPTEMBER 24, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NESCO SERVICES LIMITED 1ST DEFENDANT

HARUN OSORO NYAMBUKI 2ND DEFENDANT

JOEL JOSEPH MUSYIMI 3RD DEFENDANT

JOHN NYAGA MAUKI 4TH DEFENDANT

AND

NATIONAL BANK OF KENYA INTERESTED PARTY

RULING

Background

1. Before me for determination are two applications. The 1st one by the Plaintiff is a Notice of Motion dated 14th December, 2023 brought under the provisions of Order 40(1) of the *Civil Procedure Rules*. The Plaintiff prays for an order of temporary injunction restraining the 1st Defendant/Respondent by themselves, their agents/servants and or employees or any other person interested in the suit property from alienating, selling, further charging, leasing, transferring, wasting, disposing or in any other manner dealing with LR No.209/13557 (I.R 76437) located in Nairobi West area, off Langata Road, other than by way of a surrender to the Government of Kenya, pending hearing and determination of the main suit.



2. The application is premised on the grounds on the face of it and on the supporting affidavit of one Feiza Abdi.
3. The second application is by the 1st and 2nd Defendants herein and is dated 19th February, 2024. The application is premised on the grounds on the face of it and on the supporting affidavits of Esther Katheu Maingi & Harun Osoro Nyamboki. It seeks to strike out the Plaintiff's suit with costs.
4. The 1st and 2nd Defendants term the Plaintiff's suit as scandalous, frivolous, vexatious and filed in bad faith and motivated by vendetta. It is the 1st and 2nd Defendant's case that the Plaintiff's suit is based on falsehoods and spite and amounts to an outright abuse of the process of court. Further, the 1st and 2nd Defendants aver that the Plaintiff's suit violates the clear provisions of the Civil Procedure Rules; particularly Order 3 and 4 of the Civil Procedure Rules.
5. The 1st and 2nd Defendants too allege that this suit is meant to protect directors of a certain private company from facing criminal prosecution for offences committed during the illegal and unlawful acquisition of a public service lane adjacent the 1st Defendant's property. They assert that the suit is a cover-up for breaches of law and code of conduct of the Plaintiff's employees and particularly the Chief Executive Officer. It is therefore in the interest of justice, fairness and equity and rule of law that the suit herein be struck out. The averments in the supporting affidavit elaborate the grounds in details and attach various annexures in support of the various allegations.
6. Due to its nature, I will deal with the 1st and 2nd Defendants application dated 19th February, 2024 first. Response by the Plaintiff to 1st and 2nd Defendants' application dated 19th February, 2024.
7. The Plaintiff responded to the 1st and 2nd Defendants' application by way of a replying affidavit sworn by one Feiz Abdi sworn on 7th March, 2024. The deponent is an investigator with the Plaintiff who deposes that he is one of the investigators who investigated the allegations of irregular allocation of a public car park LR NO. 209/13557 located at Nairobi West to Haron Osoro Nyamboki.
8. He avers that the Commission has the powers to conduct such kind of investigations upon receiving a complaint from any person. The Commission too has the power to institute and conduct proceedings in court for recovery and protection of public property.
9. The deponent discusses the findings of the investigations which led to the conclusion that the suit property was public property set aside for a public car park cum offices at paragraphs 10 and 11 of the replying affidavit. The property, according to the deponent, was not therefore available for allocation to a private entity. The subsequent issuance of a grant to Harun Osoro Nyamboki for a term of 99 years was consequently irregular and illegal.
10. The deponent confirms receiving information about the adjoining plot LR NO. 209/10191 alleging illegal allocation to Kennelec Supplies Ltd. He asserts that investigations regarding LR NO. 209/10191 are ongoing and that appropriate action will be taken depending on the outcome of the investigations.

Court's Directions

11. The court's directions were that this application and the Plaintiff's application dated 14th December, 2023 be heard by way of written submissions. Both parties complied and filed their respective submissions. On 29th April 2024, parties had occasion to highlight their submissions before the court.
12. The submissions by the parties and the proceedings during the highlighting form part of the record of this court. I need not replicate them in this ruling.



Issues for Determination

13. From my reading of the 1st and 2nd Defendants' application, the response by the Plaintiff as well as the submissions by the parties, the critical issue for determination is whether the 1st and 2nd Defendants have established grounds for striking out the Plaintiff's suit.

Analysis and Determination

14. Striking out a suit or pleadings generally for that matter is such a drastic remedy that it must be sparingly resorted to and only in obviously hopeless cases.
15. The court of Appeal in the case of *Ramji Magji Gudka Ltd v Alfred Morfat Michira & 2 others* (2003)eKLR, expressed the opinion that the power of striking out of pleadings should only be exercised in the clearest of cases. The court cited with approval the holding by Madan, JA (as he then was) in the case of *D.T.Dobie & Company (Kenya) Ltd v Muchina* (1982) 1KLR, in respect to the issue of summary procedure and striking out of pleadings.
16. Madan, JA in the DT Dobie case (*supra*) held 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 LJ (*supra*)). As far as possible indeed, 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 right.

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

17. In the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* (2009) KLR, the Court of Appeal restated the above principles and held that striking out of pleadings should only be resorted to where a pleading is a complete sham. The Court of Appeal cited the sentiments of Dankwerts L.J in the case of *Wenlock v Moloney* (1965) 2 ALLER 871 at page 84 where he stated as follows:-

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.

18. I have taken the liberty to look for the meaning of the word “sham”. The Concise *Oxford English Dictionary*, 12th Edition, defines the word to mean, “a person or thing that is not what they are purported to be “otherwise ‘bogus’ or ‘false’.



19. The first question in considering this application then is whether the Plaintiff's suit as presented is bogus or false.
20. I considered this issue cautiously conscious of the fact that at this state I ought not to deal with any merits of the case. The Plaintiff in response to the application has asserted that its case is premised on investigations carried out by its investigators in exercise of its statutory mandate to protect and recover public land. In its 'index' dated 14th December, 2023, the Plaintiff in addition to attaching its pleadings has also attached documents it seeks to rely on in proving its case.
21. I cannot from the perusal of the Plaintiff's pleadings and the supporting documents term its case as a sham. I am persuaded that the Plaintiff's suit raises triable issues that ought to be considered after a full hearing. I must add that the allegations raised by the 1st Defendant in its application ranging from vendetta to bad faith on the part of the Plaintiff are very serious and need to be interrogated through cross-examination as well. It is noteworthy that the 1st Defendant too has filed a counterclaim against the Plaintiff.
22. The 1st Defendant additionally alleges that the Plaintiff's suit violates provisions of the *Civil Procedure Act*. The violations includes the failure to indicate choice of track contrary to the provisions of Order 3 rule (2) of the *Civil Procedure Rules* and non-compliance with the requirement of Order 4 rule 1(f). The rule requires the plaint to have an averment that there is no other pending suit and that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter.
23. The 1st Defendant protests that the Plaintiff has not effectively described the suit property in the plaint contrary to the provisions of Order 4 rule 3 of the *Civil Procedure Rules*.
24. The argument by the 1st Defendant brings to the fore the age-old argument on the place of rules in the dispensation of justice. Of course, the courts exist to do justice. The question then that the court must ask itself is whether the omissions or violations of the rules of procedure by the Plaintiff are curable. Are they omissions/violations that would warrant the striking out of the suit.
25. In answering the two questions, I rely on the eloquent exposition of Ringera J (as he then was) in the case of *Microsoft Corporation – vs- Mitsumi Computer Garage Ltd & Ano* (2001) KLR 470 where he stated that,

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”
26. The deviations from the procedure by the Plaintiff in this case do not go to the jurisdiction of the court. I am not convinced that they prejudice the 1st Defendant in any fundamental respect. They are omissions that can be remedied by an amendment of the plaint. They do not therefore warrant the striking out of the Plaintiff's suit.
27. Consequently, I disallow the 1st and 2nd Defendants' application with no orders as to costs.



28. Having determined the 1st Defendant's application, I now turn to the Plaintiff's application of 14th December, 2023. Considering that the suit is pending hearing and determination, I will be deliberately economical with my words in order not to prejudice the hearing of the main suit or embarrass the trial court.
29. Section 13 (7) of the *Environment and Land Court Act* empowers this court in exercising its jurisdiction under the Act, to make and grant any relief as the court deems fit and just including interim preservation orders. The interim preservation orders are meant to preserve the substratum of the suit awaiting final determination of the suit.
30. In considering an application for interim reliefs as the one by the Plaintiff, the court is not required to make conclusive or definitive findings of fact or law rather the court's responsibility is only to preserve the state of things awaiting the final determination of the suit.
31. The provisions of Section 13 (7) of the *ELC Act* are in sync with the doctrine of "lis pendens". "Lis Pendens" is described in the *Black's Law Dictionary*, 9th Edition as the "jurisdictional power or control acquired by a court over property while legal action is pending."
32. The Court of Appeal in the case of *Ruth Kinyua – vs- Patrick Thuita Gichure & Ano* (2015) eKLR, embraced the doctrine of 'lis pendens' noting that a Plaintiff would be liable in every case to be defeated by the Defendant's alienation of the subject property before conclusion of the case and would be forced to commence his proceedings de novo subject again to defeat by the same course of proceedings if alienation 'pendent lite' was permitted to prevail. The Court further held that the doctrine is still applicable in Kenya even after the repeal of the ITPA by virtue of Section 3(1) of the *Judicature Act* which identifies the substance of common law, the doctrines of Equity and the statutes of general application in force on the 12th August, 1997 as applicable in Kenya.
33. Guided by the foregoing, I find it appropriate, fit and just to issue interim preservation orders in the form of an interlocutory injunction pending the hearing and determination of this suit, restraining the 1st Defendant by itself, agents, servants and or employees or any other person from alienating, further charging, transferring or disposing the suit property LR No. 200/13557 located in Nairobi West Area, off Lang'ata Road.
34. The costs of this application shall be in cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Biwott for the Plaintiff

Mr. Munjira for the 3rd Defendant

Mr. Oyugi for the 1st and 2nd Defendant

Ms. Mutonyi for the Interested Party

Court Assistant: Yvette

