



REPUBLIC OF KENYA



**Kung'u v Mwangi (Environment & Land Case E009 of 2023)
[2024] KEELC 6012 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E009 OF 2023
AA OMOLLO, J
SEPTEMBER 19, 2024**

BETWEEN

DAVID NG'ANG'A KUNG'U PLAINTIFF

AND

JOSEPH KAMAU MWANGI DEFENDANT

RULING

1. For determination is the notice of motion application dated 20th February, 2024 brought under order 2 rule 15 of the Civil Procedure Rule. The Defendant/Applicant prays for orders;
 1. That the suit brought against Defendant/Applicant be struck out.
 2. That the costs of this application be provided for
2. The application is premised on the supporting Affidavit and further affidavit sworn by the Applicant. He deposed inter alia to selling plots B & C being part of subdivision of LR No. 11646/9 to the Plaintiff/Respondent. That after the plaintiff paid him Kshs.500,000 he allowed the plaintiff to take possession with understanding the balance of Kshs.900,000 was to be paid within 90 days of the agreement. That the plaintiff did not settle the balance and only added Kshs.100,000 on 7th December, 1992.
3. He deposed further that he had not initiated legal proceedings against the plaintiff because he had allowed him to stay there on the promise that the plaintiff would pay the balance. That where a person enters land vide a sale agreement, the time begins to run from a particular time of the year when the purchaser pays the purchase price in full. Therefore, the Applicant contends the suit is premature, vexatious, scandalous and without any basis. He urged the court to strike out the suit with costs.
4. The Plaintiff swore a replying affidavit dated 13th April, 2024 in opposition to the application. He deposed that he had on 18th June, 2008 file a suit ELC 293 of 2008 for breach of contract which



suit was dismissed for want of possession. He also deposed to the Applicant not filing suit capable of interfering with the limitations of actions. The plaintiff asserts that there is no balance of purchase price outstanding. The Respondent asserted that subsequent to the payment of the purchase price, he took possession and has never been served with any demand letter.

5. Parties filed written submissions which I have considered. The Defendant/Applicant addressed the court on the essentials to be met in a claim for adverse possession. Nowhere in the submissions does he address the court on why the suit is premature, scandalous and vexatious. The case has not proceeded to hearing hence addressing this court whether the claim by the Respondent meets the threshold of adverse possession is misplaced.
6. In the case of *D. T Dobie v Muchina* (1982) KLR 1 the Court of Appeal held that a suit ought to be struck out only where it cannot be cured by amendment. Similarly, in the case of *Yaya Towers Limited v. Trade Bank Limited* (in Liquidation) Civ Appeal No. 35 of 2000, it was held that;

“A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said:-

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini-trial upon the affidavits.”

7. The question this court asks herself is whether the suit as filed is premature, scandalous and without basis. The Defendant/Applicant deposes that in a claim for adverse possession arising from a sale of land agreement, time begins to run when the purchase price is paid in full. He claims there is a balance of the price owing which assertion the Respondent contradicts.
8. Consequently, a triable issue arises on when did time begin of the plaintiff. This court cannot arrive at a conclusion that the claim is premature without receiving evidence to support each side of the claim. The other question is whether the filing of the previous suit ELC 293 of 2008 disentitled the plaintiff from bringing the present claim. The plaintiff argued that the previous suit was not heard on merit and that it was dismissed for want of prosecution.
9. The allegations contained in this application can in my view be addressed by way of a defence to the claim and not a basis to strike out a suit as it is pleaded by one party and denied by another. Further, the fact of the plaintiff’s occupation being with or without consent of the Defendant/Applicant can only be verified by giving each party an opportunity to justify their case.
10. In brief, the application before the court cannot with finality resolve the dispute based on the facts pleaded in the affidavits sworn in support thereof. It is without merit and it is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

A. OMOLLO



JUDGE

