



**JBW (Suing as the Guardian and Manager of the Estate of GW as a Person of Unsound Mind) v JK & 2 others (Environment & Land Case E115 of 2024) [2024] KEELC 13523 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13523 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E115 OF 2024**

**JG KEMEL, J  
NOVEMBER 28, 2024**

**BETWEEN**

**JBW (SUING AS THE GUARDIAN AND MANAGER OF THE ESTATE OF GW AS A PERSON OF UNSOUND MIND) ..... PLAINTIFF**

**AND**

**JK ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

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

**RULING**

1. This Ruling relates to the 1<sup>st</sup> Defendant/Applicant's Notice of Motion dated 26/7/2024 premised on Order 2 Rule 15 (1)(b) & (c) of the [Civil Procedure Rules](#) seeking to strike out the suit with costs.
2. The basis of the application is set out on the grounds therein that; the Plaintiff herein invaded Githunguri/Githunguri/38XX on 24<sup>th</sup> and July 25, 2024 causing destruction as deponed in the Applicant's Supporting Affidavit; the suit is *res judicata* as outlined in the defence and Replying Affidavit dated 29/7/2024; the Plaintiff herein is erroneously filed pursuant to the notion that the Plaintiff has obtained an order committing his brother GW (the Defendant and Judgement Debtor in Githunguri SPMCC No. 9 of 2015) as being of unsound mind extricates him from the said Decree; that there is an application seeking extension of time to appeal out of time against the Judgment in Githunguri SPMCC No. 9 of 2015 in Kiambu High Court Misc. App. No. E204 of 2023.
3. Further in his Supporting Affidavit JK, the Applicant adopted the contents of his Replying Affidavit dated 19/7/2024. He averred that the subdivision of Githunguri/Githunguri/37XX was fraudulent and the resultant subdivisions be cancelled; that the said subdivisions into Githunguri/Githunguri/38XX and 3897 and the registration of Githunguri/Githunguri/38XX in the Applicant's



- name was pursuant to a Decree of 29/4/2021 in Githunguri SPMCC No. 9 of 2015. That the said Decree has not been set aside by any other Court and thus the instant suit is an abuse of Court process.
4. Opposing the application, JBW the Plaintiff/Respondent filed his Replying Affidavit dated 20/9/2024. He averred that the gist of this suit is the illegal interference of the suit property known as Land parcel No. Githunguri/Githunguri 38XX which belongs to his brother GW, a person adjudged to be of unsound mind. That the Applicant illegally and unlawfully excised the suit property from the original land parcel No. Githunguri/Githunguri 37XX. He avowed that the Applicant's claim that G was of sound mind at the time they allegedly entered the sale transaction for the suit property is untrue and unsubstantiated in light of the medical reports from Mathari Hospital. That it is against that backdrop that the deponent moved to file Kiambu HC Petition no E034 of 2021 to safeguard his brother's proprietary interests. Copies of the medical reports and order issued in the Kiambu HC Petition no E034 of 2021 as JWB1 and 2 respectively.
  5. On 24/9/2024 directions were issued and parties agreed to dispose the application by way of written submissions.
  6. The Applicant through the firm of D.B Wati & Co. Advocates filed submissions dated 26/7/2024. Relying on the provisions of Order 2 Rule 15 (1) (b)-(d) of the *Civil Procedure Rules*, the Court was urged to strike out the suit comprised in the Plaint dated 3/7/2024. It was submitted that the said Rule empowers this Court to strike out pleadings that are scandalous, frivolous and vexatious especially where such pleading cannot be amended as was held in the case of *D.T Dobie & Co. (K) Ltd Vs. Muchina* [1982] KLR 1. That in his Plaint, the Plaintiff seeks a number of reliefs on account of his appointment as the guardian and manager of GW vide Petition No. E034 of 2021 and when the order was not registered by the 1<sup>st</sup> Defendant, it resultantly rendered the subdivision of the suit land null and void. That in objection to the suit, the 1<sup>st</sup> Defendant relies on affidavits dated 24/7/2024, 19/7/2024 and 26/7/2024.
  7. In addition, the Applicant was emphatic that the order declaring GW as being of unsound mind was made on 31/10/2022, 18 months after the Decree in Githunguri Court was issued. The Decree in Githunguri Court was to the effect that the Defendant therein presents all relevant documents to the land registry to enable the excision and registration of the parcel of land measuring 50x100 feet being a apportion of Githunguri/Githunguri/37XX in favor of the Plaintiff within 60 days. That the said Decree notwithstanding GW had subdivided Githunguri/Githunguri/37XX long before 2014 as shown by consent to the Land Control Board and mutation forms he signed to birth Githunguri/Githunguri/38XX and 3897. That accordingly this suit is res judicata in light of the Plaintiff's capacity which is similar as that of GW his predecessor.
  8. The firm of Mitiambo & Co. Advocates filed the Respondent's submissions dated 1/10/2024. It was submitted that the case involves a property belonging to a person adjudged to be of unsound mind as defined under Section 2 of the *Mental Health Act*. That the Plaintiff has raised triable issues aimed at protecting G's constitutional rights and as such the draconian power to strike out a suit ought not be applied herein.
  9. Further the Respondent denied the claim that this suit is res judicata as claimed by the Applicant. The Plaintiff maintained that he has established a prima facie case against the Applicant to warrant a full hearing. That the Applicant is determined to conceal his fraudulent acts committed over the suit land in light of the suit property's registration on 3/1/2024, a year after the registration of the Guardian Order on 5/12/2022.
  10. Having analyzed and read the record before me and rival submissions, the germane issue for determination is whether the application is merited.



11. The motion is expressed to be brought under Order 2 Rule 15 (1)(b) & (c) of the [Civil Procedure Code](#) which deals with striking out of pleadings and provides as follows;

“Rule 15. (1) At any stage of the proceedings the Court may order to be struck out or 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.”

12. It is trite that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of [Ramji Megji Gudka Ltd Vs. Alfred Morfat Omundi Michira & 2 Others](#) [2005] eKLR held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT Dobie & Company (Kenya) Ltd Vs. Muchina* [1982] KLR 1 in which Madan J.A. at page 9 said: -

“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.”

13. In the instant application, the Applicant urges the Court to strike out the Respondent’s suit on grounds that it is scandalous, frivolous or vexatious and that the suit may prejudice, embarrass or delay a fair trial. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake Vs. Albion Life Ass. Society* (1876) LJQB 663; *Marham Vs. Werner, Beit & Company* (1902) 18 TLR 763; *Christie Vs. Christie* (1973) LR 8 Ch 499.
14. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See *J P Machira Vs. Wangechi Mwangi and Nation Newspapers* Civil Appeal No. 179 of 1997. 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 and expense. See [Bullen & Leake and Jacobs Precedents of Pleading](#) (12th Edn.) at 145.



15. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the Court really means in brief a pleading which is a misuse of the Court machinery or process. See *Trust Bank Limited Vs. Hemanshu Siryakat Amin & Company Limited & Another* Nairobi HCCC No. 984 of 1999. A pleading is an abuse of the process where it is frivolous or vexatious or both.
16. A glean of the Plaintiff dated 3/7/24 accuses the Applicant of unlawful interference of the suit land belonging to G, a person said to be of unsound mind. At para. 8 of the Plaintiff, the Respondent outlined the particulars of irregularity, fraud and conspiracy on the part of the Applicant and 2<sup>nd</sup> Defendant herein inter alia irregular removal of restrictions on the suit land and subsequent registration and transfer of the suit land in favor of the Applicant. The Respondent prays for orders that the said subdivision and transfer be declared void ab initio, a Permanent injunction restraining the Applicant from interfering with the suit land and damages for trespass.
17. Vide his statement of defence dated 19/7/2024, the Applicant denied the claim and defended the transfer and registration of the suit land in his favor based on the Judgment issued in Githunguri SPMCC No. 9 of 2015 between him and GW. While recognizing the appointment of the Respondent as G's guardian, the Applicant averred that such appointment did not extricate G's liabilities against the Applicant as it was obtained 18 months after the delivery of the judgement.
18. From the material placed before the Court it is clear that the 1<sup>st</sup> Defendant sued GW for orders of specific performance arising from the sale agreement dated the 7/1/2014 for the sale of a portion of parcel 37XX measuring 50ft by 100 ft. In the alternative the 1<sup>st</sup> Defendant sought a refund of the purchase price. The Court heard the matter and delivered its judgment on the 19/4/2021 in favour of the 1<sup>st</sup> Defendant. Later, the Applicant sought and obtained orders of the Court ordering the Court administrator to execute the necessary documents to effect the judgement. Clearly the land was transferred to the 1<sup>st</sup> Defendant pursuant to a Court order.
19. Unchallenged Affidavit evidence shows that the Plaintiff has sought extension of time to file an appeal out of time. Allowing this suit therefore will amount to a flagrant abuse of the Court.
20. On the face of it, I find that this suit is devoid of a cause of action, the cause of action being an order for specific performance against Waweru, for whom the Plaintiff in this case is representing was heard and determined. There is no evidence to show that the judgment of the Court has been set aside, appealed and or vacated. The instant suit is challenging the decision of a competent Court. In Kenya a decision of a Court is either reviewed or appealed but not by filing a fresh suit. If the current suit is allowed, there is a likelihood of the Courts arriving at conflicting decisions hence bringing the Court into disrepute. The Plaintiff has stepped into the shoes of GW and the Court has not been addressed on the provisions of the law allowing him to file a fresh suit on behalf of Waweru. It is public policy that litigation must come to an end.
21. The Court finds that the registration of the suit land in the name of the 1<sup>st</sup> Defendant was pursuant to a Court order; the guardianship order was obtained post judgment; the Plaintiff therefore stepped into the shoes of GW pursuant to the guardianship order; the cause of action against GW was specific performance which action has been heard and determined; the judgement of the trial Court has not been set aside, appealed nor vacated. In my view this suit has been filed to counter the orders of the Court issued in the judgment aforesaid; As matters stand the Respondent did file an application to file an appeal out of time as well as stay of execution of the judgment in SPMCC No 9 of 2015 on



9/10/23 before the Kiambu High Court . The application was accompanied with a memorandum of appeal of even date. Clearly the appeal is pending before the Kiambu High Court. In the High Court the suit is filed by the Respondent as a guardian of GW.

22. Allowing this suit to stand when parties have already submitted themselves to the appellate jurisdiction of the High Court is highly irregular, leads to multiplicity of suits and an abuse of the process of the Court.
23. In the end I find that the suit is an abuse of the process of the Court and proceed to strike it out with costs in favour of the 1<sup>st</sup> Defendant.
24. Consequently, the orders issued on the 4/7/2024 be and are hereby vacated.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mitiambo for the Plaintiff

Wati for 1<sup>st</sup> Defendant

2<sup>nd</sup> and 3<sup>rd</sup> Defendants - Absent

Court Assistant – Phyllis

