



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kuria & 70 others v Murema High View Limited (Environment & Land
Case 52 of 2021) [2023] KEELC 232 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 52 OF 2021
LA OMOLLO, J
JANUARY 26, 2023**

BETWEEN

JOSEPH MAINA KURIA & 70 OTHERS PLAINTIFF

AND

MUREMA HIGH VIEW LIMITED DEFENDANT

RULING

Introduction

1. This is a ruling in respect to the defendant/applicant's notice of motion application dated July 7, 2022. The said application is expressed to be brought under sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, order 10 rule 11 and order 51 of the *Civil Procedure Rules*.
2. The application is filed under certificate of urgency and seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this honorable court be pleased to strike out the suit herein by the plaint filed on June 18, 2021 for the reason that it has been overtaken by events and there no longer exists a cause of action for this court to enforce.
 - d. That the defendant's counter claim do proceed to full hearing upon striking out of the plaintiff's case.
 - e. That the costs of this application be borne by the plaintiffs/respondents.
3. The application is based on the grounds on its face and the supporting affidavit sworn by one James Karanja Mwaura, a director of the defendant/applicant.



Factual Background

4. The plaintiffs/respondents commenced the present suit *vide* the plaint dated June 11, 2021 wherein they seek the following orders:
 - a. An order for specific performance.
 - b. General damages
 - c. Costs of this suit.
 - d. Any other relief that this court may deem fit and just to grant.
5. The defendant/applicant filed its statement of defence and counterclaim on October 14, 2021 where it sought the following prayers against the plaintiffs/respondents:
 - a. Breach of land sale agreements.
 - b. Special damages amounting to Kshs 4, 342,718.
 - c. General damages.
 - d. Costs of this suit.
 - e. Interest at courts rate.
 - f. Any other or further relief deemed fit to be granted by this honorable court.
6. The application first came up in court on July 8, 2022 when the court ordered that it be served on the plaintiffs/respondents and the matter slated for directions on July 14, 2022.
 7. On July 14, 2022 the court directed that that the matter be mentioned on July 26, 2022 for further directions. When the application came up on July 26, 2022, the court directed that the application be heard by way of written submissions and a further mention date given for the September 27, 2022. On the said date it was confirmed that the parties had filed their submissions. The matter was then reserved for ruling.

The Defendant/applicant's Contention.

8. The defendant/applicant contends that the plaintiffs/respondents purchased land from it and it was agreed that they would pay the transfer fees and other charges incidental thereto in order to facilitate the transfer.
9. It is its contention that in disregard of the agreements entered into between the plaintiffs/respondents and itself, the plaintiffs/respondents did not pay the agreed sum of money for the defendant/applicant to commence the process of transferring their parcels of land to them.
10. It also contends that in good faith the defendant/applicant commenced the transfer process but it was marred with delays because the directors had to use company funds and await reimbursement from the plaintiffs/respondents on completion of the transfers.
11. It further contends that similarly, the standard Ministry of Lands procedures for transfer have to run their due course and the defendant/applicant did not have control over how much time it took.
12. It contends that even though the plaintiffs/respondents were well aware that the process of obtaining their title deeds was ongoing, they still went ahead to bring this suit against the defendant/applicant while knowing that they are in breach of the agreements for sale for failure to pay the transfer fees.



13. It also contends that the plaintiffs/respondents knew that the process of obtaining titles for their parcels of land was almost complete in 2021 when they brought this suit because their office was in contact with their representatives whom the defendant/applicant kept informed of all the updates.
14. It further contends that as at March 31, 2022, all the certificates of title for the parcels of land in question had been released to the plaintiffs/respondents.
15. It contends that because the titles have now been released to it by the Ministry of Lands, the suit herein can no longer be maintained because it has been overtaken by events and the continuance thereof would be a waste of judicial time.
16. It also contends that it has learnt that most of the plaintiffs/respondents are no longer interested in the prosecution of this suit because they are aware that it has obtained their titles and they shall be released to them upon payment of the requisite fees.
17. It ends its deposition by stating that it is only prudent that this court strikes out the suit because the prayer for specific performance has been automatically overtaken by events and the grant thereof would be an exercise in futility.

Plaintiffs/respondents Response.

18. In response to the application, the 2nd plaintiff /respondent filed a replying affidavit sworn on July 25, 2022 and filed on July 26, 2022. He does this with the authority of the other plaintiffs. The same is dated June 17, 2021.
19. He deposes that he is advised by his advocates on record that the application is frivolous, devoid of merit and an attempt at misdirecting the focus of the issues at hand that require determination.
20. He also deposes that they were forced to seek redress from the court owing to non-compliance on the part of the defendant/applicant.
21. He further deposes that this non-compliance included the defendant/applicant's failure to obtain necessary consents so as to secure registration of the sub-leases having caused the mother title to be subdivided and offered the resultant parcels for sale.
22. It is his disposition that the defendant/applicant is duty bound to avail to the purchasers a title capable of transfer so as to enable the purchasers to transfer the same.
23. He also deposes that the defendant/applicant confirms, from the documents exhibited, that it has obtained titles over the resultant parcels sold to them.
24. He further deposes that despite having received full payment of the purchase price to enable it meet any expenses towards availing title deeds to the plaintiffs/respondents, the defendant/applicant turned the process into a cash cow by demanding that the plaintiffs/respondents each pay about Kshs 100,000/= to cover the "expenses".
25. He deposes that the issue that remains for determination is who is to pay costs incurred by the defendant/applicant. The said costs relate to subdivision of the mother -title, obtaining the necessary consents to permit sub-division, costs pertaining to change of user and costs incurred in obtaining titles in the name of the defendant/applicant.
26. He also deposes that they are of the opinion that the suit remains alive in the absence of consensus amongst the parties.



27. He further deposes that the issues for determination have not been rendered moot on account of the developments alluded to by the defendant/applicant.
28. He ends his deposition by stating that the defendant/applicant is in breach of the terms of the agreement and that it should be compelled to avail the completion documents to enable the plaintiffs/respondents acquire title deeds over their respective land parcels.
29. He concludes by praying that the application be dismissed with costs to pave way for the hearing of the main suit.

The Defendant/applicant's Response To The Plaintiff/respondents Replying Affidavit.

30. James Karanja Mwaura filed a supplementary affidavit sworn on August 5, 2022 and filed on August 11, 2022 in response to the plaintiffs/respondent's replying affidavit.
31. It is his contention that he is advised by his advocates on record that the defendant/applicant's application is in the interest of justice as it is for the expeditious disposal of the suit whose prayers have already been overtaken by events and therefore proceeding to the hearing thereof is pointless and may result in orders incapable of being enforced.
32. He contends that before he delves into the alleged issues for determination, he wishes to clarify that from all the plaintiffs/respondents, the defendant/applicant only entered into land sale agreements with 15 of them and this is evidenced from the land sale agreements attached.
33. He sets out the names of the plaintiffs/respondents that they allegedly entered into sale agreements with and contends that the 33rd plaintiff/respondent Geoffrey Njuguna Wanjohi did not sign the authority to make affidavits used to initiate the suit.
34. He also contends that the 15 plaintiffs/respondents agreements for sale were clear in their terms and clause 4 of the same outlined that the purchaser had to pay for all the transactions of transfer and cost of titles.
35. He further contends that the plaintiffs/respondents never paid any transaction and title costs which is one reason why the process of obtaining titles took a long time adding that the company had to raise money for the transfers.
36. He contends that paragraph 8 of the replying affidavit alleges that the full payment of the purchase price was to enable the vendor meet the expenses towards availing the title deeds to the plaintiffs/respondents which is not true.
37. He also contends that if it was the vendor's obligation to obtain the necessary consents and transfer for the parcels of land, which it has, then paragraph 5 of the replying affidavit is unfounded as the defendant/applicant could not have subdivided without having obtained the necessary consents.
38. He further contends that the completion documents including the necessary consents are available for collection by the plaintiffs/respondents upon payment of transaction and title costs as agreed upon.
39. He contends that the plaintiffs/respondents have not demonstrated that they have suffered any damage or loss as they have lived on the said parcels of land where they have built houses that they have lived on for many years without any interference by the defendant/applicant.
40. He also contends that the plaintiffs/respondents have breached the terms of their agreements with the defendant/applicant by failing to pay the transaction and title costs agreed upon and are now suing for



damages for breach of contract while knowing that it is the defendant/applicant who continues to bear losses in the unpaid transaction costs yet it has processed titles hence the filing of the counter claim.

41. He further contends that the other purchasers of the subdivided parcels of land have already honored their agreements by paying the transaction costs and the completion documents have already been given to them.
42. He contends that even though the title deeds are now ready, the company cannot release them without reimbursements of the money spent processing them.
43. He reiterates that he is advised by the defendant/applicant's advocates on record that the prayer for specific performance has been overtaken by events because he has showed that the title deeds are with them and the claim for damages incurred by the plaintiffs/respondents is not merited.
44. He avers that he is also advised by his advocates on record that save for their counterclaim, there are no further issues for determination against the defendant/applicant in the suit.
45. He ends his deposition by stating that if the court does not intervene, the plaintiffs/respondents real intentions are to subvert justice and unjustly enrich themselves by acquiring titles to their parcels of land without paying the transaction costs agreed on.

Issues For Determination.

46. The defendant/applicant filed its submissions dated August 5, 2022 on August 11, 2022 while the plaintiffs/respondents filed their submissions dated September 14, 2022 on September 27, 2022.
47. The defendant/applicant in its submissions reiterates the contents of its supporting and supplementary affidavits. The defendant/applicant relies on order 2 rule 15(1) of the *Civil Procedure Rules*, the case of *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] eKLR and submits that the prayer for specific performance in the plaint has been overtaken by events as it has obtained the title deeds to the suit property which it is ready to issue to the plaintiffs/respondents upon payment of the requisite fees.
48. The plaintiffs/respondents in their submissions identify one issue for determination which is whether or not the suit remains alive or the same ought to be dismissed.
49. They submit that as per the plaint, their claim is that despite payment of the agreed purchase price, the defendant/applicant declined to issue completion documents to enable them get titles.
50. The plaintiffs/respondents also submits that the defendant/applicant has resorted to demanding exorbitant fees from them and that the annexures to the present application are titles in the name of the defendant/applicant and not in their favour. Since they are yet to get their titled deeds then the court has to make a determination on whether the defendant/applicant has performed its obligations as required.
51. The plaintiffs/respondents conclude their submissions by seeking that the defendant/applicant's application be dismissed with costs to them.

Analysis And Determination.

52. I have considered the application, the affidavit in support of the application, the replying affidavit and the supplementary affidavit and the submissions by both the parties.
53. It is my view that the issues that arise for determination are as follows:



- a. Whether the plaintiffs suit has been overtaken by events and should be struck out.
- b. Whether the defendant's counter claim should proceed for full hearing upon striking out of the plaintiffs suit.
- c. Who should bear the costs of this application.

a. Whether The Plaintiffs Suit Has Been Overtaken By Events And Should Be Struck Out.

54. The defendant/applicant alleges that the plaintiffs/respondents herein purchased land from it and they agreed that that they would pay transfer and other charges incidental thereto in addition to the purchase price.
55. The defendant/applicant further alleges that it begun the transfer process but the plaintiffs/respondents did not pay the transfer fees but instead filed the present suit seeking orders of specific performance amongst other orders.
56. The defendant/applicant also alleges that it is now in possession of the title deeds and therefore the plaintiffs/respondents case has been overtaken by events and it should be dismissed and their counterclaim heard.
57. The plaintiffs/respondents on the other hand allege that the purchase price they paid was to meet all the expenses that include those of transfer but that the defendant/applicant has resorted to demand for more payment. They further allege that this therefore means that there is an issue remaining for determination which is - who should have paid for the subdivision of the suit property.
58. Order 2 rule 15 (1) and (2) of the *Civil Procedure Rules* provides as follows:
 - (1) 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.
 - (2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.
59. The Court of Appeal in the case of *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (civil appeal No 54 of 1999) held 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...”
60. The Court in the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (civil appeal No 35 of 2000 held as follows:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) 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...it cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

61. As pointed out before, the defendant/applicant alleges that the suit has been overtaken by events as it has obtained the title deeds in the name of the plaintiffs/respondents herein.
62. A scrutiny of the annexed copies of certificates of title shows that they are in the name of the defendant/applicant and not in the names of the plaintiffs/respondents as alleged.
63. Further and importantly, the defendant/applicant states in its supplementary affidavit that it entered into sale agreements with only fifteen of the seventy-one plaintiffs/respondents. This court is yet to hear the nature of claim that the remaining plaintiffs/respondents have against the defendant/applicant.
64. The defendant/applicant and the plaintiffs/respondents also give contradicting versions in respect of the terms of the agreement for the sale, more particularly, who was to pay for the transfer fees. According to the defendant/applicant, the plaintiffs/respondents were to pay additional fees to facilitate the transfer while the plaintiffs/respondents argue that the purchase price was inclusive of transfer fees. This can only be determined at the hearing of this suit.
65. There is no doubt that there are many questions yet to be determined and these questions are not as crystal clear as alleged by the defendant/applicant. These can only be resolved after each party adduces evidence during the main hearing.
66. The Court in the case of *D.T Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, Madan J.A stated as follows:

“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”.

67. In *Humphrey Mbaka Nandi t/a Nyati Distillers Limited Equity Bank(K) Ltd & 2 others* [2018] eKLR the learned Judge cited with approval the decision in *DT Dobie and Company (K) Ltd v Joseph Mbaria Muchina & another* (Supra) and stated as follows:

“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).



b. Whether the Defendant's Counter Claim should proceed for full hearing upon striking out of the Plaintiffs suit.

68. Taking into account my finding in (a) above, the answer to this question is in the negative.

Disposition.

69. Guided by the judicial decisions set out in the preceding paragraphs and the facts and circumstances in this application, it is evident that it would not be in the interests of justice to strike out this suit.

70. Consequently, I make orders as follows:

- a. The defendant/applicant's notice of motion application dated July 7, 2022 is hereby dismissed with costs to the plaintiffs/respondents.
- b. Parties shall file and serve the agreed and/or separate list of issues for determination and other compliance documents within 14 days from the date hereof.

71. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Wairegi for the Defendants/Applicant.

Miss Nyaga for Miss Thiongo for Plaintiffs/Respondents.

Court Assistant; Ms. Monica Wanjohi.

