



**Mugure v Kiarie & 14 others (Environment & Land Case
E004 of 2020) [2023] KEELC 17 (KLR) (12 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 17 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E004 OF 2020**

**JG KEMEI, J
JANUARY 12, 2023**

BETWEEN

SAMUEL THUO MUGURE PLAINTIFF

AND

ERUSTUS MUNGAI KIARIE 1ST DEFENDANT

JULIUS KAMBO KIARIE 2ND DEFENDANT

BLESSED SHELTER HOLDINGS 3RD DEFENDANT

ERIC MWINZI MWANGANGI 4TH DEFENDANT

JOYCE WANJIRU KIARIE 5TH DEFENDANT

ESTHER WANJIRU KIARIE 6TH DEFENDANT

EUNICE WANGUI MBUA 7TH DEFENDANT

MARGARET NJERI KIARIE 8TH DEFENDANT

EUNICE WANGARI KIARIE 9TH DEFENDANT

SUSAN WATHONI KIARIE 10TH DEFENDANT

NAOMI WANGARI MWIHAKI 11TH DEFENDANT

JULIUS MOKAYA OKERO 12TH DEFENDANT

MACHINI NYAMUTTA MERCYLINE 13TH DEFENDANT

LYDIA MUTHONI WAMBUI 14TH DEFENDANT

THE CHIEF LAND REGISTRAR, RUIRU 15TH DEFENDANT



RULING

1. There are two applications which are the subject of this ruling. The first is dated the January 20, 2022 and the second one is dated the July 18, 2022.
2. With respect to the 1st application, the plaintiff/applicant filed the instant motion dated January 20, 2022 seeking Orders That;
 - a. The 1st to 14th Defendants' Statement of defence be struck out.
 - b. Judgment be entered against the Defendants as prayed for in the Plaint together with costs and interests accruing thereon.
 - c. Costs of this application and suit be provided for.
3. The Application is based on the grounds on the face of it which are reiterated in the Supporting Affidavit of even date of Samuel Thuo Mugure, the Plaintiff. He averred that the 1st – 14th Defendants' Statement of Defence filed herein is scandalous and an abuse of Court process. That he filed the instant suit to enforce the Judgment and Decree issued in Nairobi ELC No 954 of 2012 where he had sued the 1st Defendant herein and two other Defendants. That an order of injunction was issued against any dealing in LR No Ruiru/Ruiru East Block 1/1511 (the suit land) via a Ruling delivered by this Court in ELC 954 of 2012 on June 27, 2014; copy of the Ruling is annexed as STM-1. That later a judgment was delivered in the said case on April 24, 2019 and a decree issued on August 28, 2019, annexed as STM-2 & STM-3 respectively. That the 1st Defendant herein filed an application, STM-4 to set aside that Judgment but the Application was dismissed for want of merit.
4. The Plaintiff swore that, nonetheless, the 1st Defendant illegally subdivided the suit land to create new titles numbers namely LR Number 6678-6687 which have been transferred and registered in the names of the 1st – 14th defendants. It is this subdivision that the Plaintiff seeks a declaration that the subdivisions were illegal and the new titles be declared null and void and the Defendants be ordered to comply with the initial Judgment. That the 1st – 14th defendants' defence herein is a sham as they admit the facts of the abovementioned ruling and final judgment at paras. 9 – 11 of the defence. Inter alia that the 1st defendant is misleading the Court that he was not represented at the hearing yet he was represented by counsel and has never preferred an appeal against the said Judgement.
5. The Application is contested by the 1st Defendant, Erastus Mungai Kiarie who swore a Replying Affidavit on his behalf and that of the 2nd-14th defendants. He avowed that the judgement in Nbi ELC No 954 of 2012 was entered ex parte and that his Application to set it aside was dismissed. That he has been advised by his Counsel on record that his non-participation in ELC 954 of 2012 should not be construed as an admission of the Plaintiff's claim therein. That enforcing the said judgment will be prejudicial to the Defendants and the prayer to strike out their defence ought not be allowed as it infringes on the Defendants right to a fair trial.
6. On May 19, 2022, directions were taken by the parties to canvass the Application by way of written submissions. Only the Plaintiff filed his submissions dated June 6, 2022 through the firm of Mulanya & Maundo Advocates.
7. The Plaintiff drew three issues for determination; whether or not the ex parte Judgment in favor of the Plaintiff in Nbi ELC 954 of 2012 was obtained regularly; whether the Defendants' statement of



defence dated November 15, 2021 ought to be struck out and whether or not the Defendants are in disobedience of Court orders.

8. On the first issue, the Plaintiff submitted that the Nairobi Judgement was properly entered against the 1st defendant who was well represented by the firm of Wangui Kuria & Co Advocates. That indeed the 1st defendant indeed swore a Replying Affidavit in opposing the Plaintiff's motion dated December 6, 2012.
9. Secondly, the plaintiff cited the case of *Saudi Arabian Airlines Corporation vs Premium Petroleum Co Ltd* [2014] eKLR on the factors the court has to consider in exercising the power to strike out a suit or defence. That the 1st Defendant's defence is a mere sham aimed at denying the Plaintiff the fruits of his Judgement. That the said defence offends the provisions of Section 7 of the *Civil Procedure Act* by raising issues that are *Res Judicata*.
10. Lastly it was submitted that the 1st Defendant's move to illegally subdivide the suit land was in utter disobedience of a valid Court orders flying in the face of the appellate Court decision in *Central Bank of Kenya & Anor vs Ratalal Automobiles Ltd & Others* Nbi Civil App No 247 of 2006 on obedience of Court orders.
11. I have considered the application, the pleadings of the parties and the written submissions of the Plaintiff and the issue for determination in my humble view is whether the application has merit.
12. Order 2 Rule 15 of the *Civil Procedure Rules* offers procedural guidance on the issue of 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.”

13. It is trite that striking out of pleading 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 *DT Dobic and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 stated as follows:-

“The power to strike pleadings out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

14. Similarly in the case of *Blue Sky Epz limited vs Natalia Polyakova & Another* [2007] eKLR the Court held that:

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action



or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.”

15. Equally in the case of *Kenya Trade Combine Ltd vs M Shah* CA No 193 of 1999 (unreported), the Court of Appeal expressed itself in part as follows:

“In a matter of this nature, all a Defendant is supposed to show is that a defence on record raised triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raised triable issues does not mean a defence that must succeed.”

16. The starting point in analysing the case is to look at the pleadings of the parties. According to the Plaintiff, the suit land parcel 1155 belonged to their family patriarch and grandfather namely Mbugua Kiarie, who had two sons; Geoffrey Kangethe Mbugua and James Kiarie Mbugua who are the fathers of the Plaintiff and the 1st Defendant respectively. That the 1st Defendant transferred the land into his own name and assumed exclusive rights on land that he held in trust for the two families of Kiarie’s sons. The Plaintiff filed suit ELC 954 of 2012 challenging the 1st Defendant’s title on ground of trust. In addition, injunctive orders were issued by the Court on the June 27, 2014 restraining the 1st Defendant from *inter alia*, subdividing the suit land pending the hearing and determination of the suit. Upon hearing of the suit, the Court rendered its judgment on the April 24, 2019 in favour of the Plaintiff and held that indeed the land was subject to trust and ordered the land be subdivided into two and given to the families of Kangethe and Kiarie in equal halves.
17. It is the plaintiff’s case that unknown to him, the 1st defendant had illegally subdivided the suit land namely 1511 into 10 plots and transferred them to the 1st – 14th defendants, who have subsequently developed the land. That the actions of the 1st defendant are null illegal and are geared at subverting the judgement and decree of this honourable court in order to defeat justice.
18. That the 1st Defendant’s application to set aside the judgement delivered on the April 24, 2019 was dismissed on grounds that it was unmeritorious.
19. Particulars of fraud and illegality committed by the 1st Defendant were cited in para 19 and consequently the Plaintiff sought the following orders;
- a. A declaration the subdivision of the Title Number LR No Ruiru/Ruiru East Block 2/1511 to create Titles Number LR No Ruiru/Ruiru East Block 1/6678, 6679, 6680, 6682, 6683, 6684, 6685, 6686 and 6687 was procured illegally hence the same is null and void.
 - b. That all the Titles Number LR No Ruiru/Ruiru East Block 1/6678, 6679, 6680, 6681, 6682, 6683, 6684, 6685, 6686 and 6687 being a subdivision of Original land Parcel Number Ruiru/Ruiru East Block 1/1511 are hereby declared null and void and nullified/cancelled and the register for the suit parcel is hereby re-opened the Title for the suit land is hereby ordered to revert to the Original Title Number Ruiru/Ruiru East Block 1/1511.
 - c. That the Original Title LR No Ruiru/Ruiru East Block 1/1511 be subdivided into two equal portions and shared out between the families of James Kiarie Mbugua and Geoffrey Kang’ethe Mbugua as decreed by Court in Nairobi ELC Number 954 of 2002.
 - d. That the 1st defendant is hereby ordered to obey and fully comply with the Judgment and Decree entered by this court on April 24, 2020 in Nairobi ELC No 954 of 2012 by signing all relevant documents / forms to facilitate the subdivision of the Land Parcel Number Ruiru/Ruiru East Block 1/1511 into two equal portions for the families of James Kiarie Mbugua and Geoffrey Kang’ethe Mbugua.



- e. That the Deputy Registrar of this court be and is hereby directed and/or authorized to sign all relevant documents / forms on behalf of the 1st defendant in order to facilitate the subdivision of the parcel of Land Number Ruiru/Ruiru East Block 1/1511 in the event the 1st defendant fails to execute the said documents.
 - f. That a permanent order of injunction is hereby issued restraining the 1st to 14th defendants herein, their agents, servants, assignees, Chargee and / or any person acting on their instructions from claiming ownership and or interest in the one half of the portion of the Original Title Ruiru/Ruiru East Block 1/1511 allocated to the family of Geoffrey Kang'ethe Mbugua pursuant to the Judgment and Decree issued by this Court in Nairobi ELC Case No 954 of 2012.
 - g. That the OCS Ruiru Police Station be and is hereby ordered to provide necessary security and maintain peace during the subdivision of Land Parcel Number Ruiru/Ruiru East Block 1/1511 and ensure that the orders issued herein are enforced.
 - h. That the 1st defendant be and is hereby ordered to meet the costs of this suit.
20. The 1st – 14th defendants filed their defence on the November 15, 2021 in opposition to the Plaintiff's claim. They claimed that the original suit land was sold to James Mbugua Kiarie, the father of the 1st defendant by his father Kiarie Mbugua. That upon his (James Mbugua Kiarie) death the 1st defendant was appointed the legal administrator of the estate of his father and registered the land in his name to hold in trust for the 2nd, 5th - 11th defendants (alleged beneficiaries) and that his actions of registering the title in his name, subdividing it and transferring to the 1st – 14th defendants were legal and above board. In addition, that the 1st defendant in ELC No 954 of 2012 was not accorded the right to be heard on account of inadequate representation by his lawyer who informed him of the judgement later and that his attempts to set aside the said judgement was dismissed by the court. In sum that they hold valid titles having acquired through a legal process.
21. The gist of the plaintiff's application is that the defendants defence filed on record be struck out and judgment be entered in favour of the Plaintiff pursuant to the prayers in the plaint.
22. Having analysed the pleadings as set out above, I make the following findings;
23. ELC 954 of 2012 was filed in the year 2012 and determined on the April 24, 2019. It is on record that the suit land parcel 1511 was registered in the name of the 1st defendant on the February 21, 2011 during the pendency of the Land Dispute Tribunal Case No RUR/LDT/16/2010 which dispute was determined on the October 18, 2011.
24. The 1st defendant has argued that the decision of the LDT was overturned by the court but no evidence was placed before this court in support, the averment is therefore unsupported.
25. It is not in dispute that the court issued an injunction against the 1st defendant interalia restraining him from transferring subdividing leasing charging and or interfering with the suit land parcel 1511 pending the hearing and determination of ELC 954 of 2012. The 1st defendant opposed this application vide his replying affidavit dated the January 15, 2013. The import is that the 1st defendant was clearly aware of the suit and the resultant orders issued by the court restraining him from specifically subdividing the suit land parcel 1511. The action of subdividing and registering the subdivisions on the March 8, 2019 were therefore illegal and in disobedience of the court orders issued on the June 27, 2014 in the presence of the 1st defendants counsel. The said subdivisions were therefore a nullity.



26. The defendants have argued that the plaintiff was to blame for not lodging or registering the said injunctive orders on the title so as to bring to the notice of third parties that the title was encumbered. With due respect to the defendants argument, this court finds this misleading as court orders were issued in the knowledge and presence of the 1st defendant who is the main actor in this dispute.
27. It is not clear from the pleadings when the suit land parcel 1511 was subdivided but according to the green cards for the resultant subdivisions (see mutation form registered on the March 8, 2019), the 1st Defendant became registered as owner of the subplots on or around the March 15, 2019. This was during the pendency of ELC 954 of 2012 a period in which any transfer or any form of disposition of the land was prohibited by the doctrine of *Lis pendens*.
28. Black's Law Dictionary 9th Edition, defines *lis pendens* as the jurisdictional, power or control acquired by a Court over property while a legal action is pending. *Lis pendens* is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed.
29. While addressing the purpose of the principle of *lis pendens*, Turner L J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-
- “It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”
30. In the case of Mawji vs US International University & another [1976] KLR 185, Madan, JA (as he then was) stated thus:-
- “The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides, Section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”
31. In the same case the Court observed *inter alia* that:-
- “Every man is presumed to be attentive to what passes in the Courts of justice of the State or sovereignty where he resides.”
32. It is trite that the doctrine of *Lis Pendens* is still applicable to our legal system through the application of Section 3 of the Judicature Act read together with Section 107 (1) of the Land Registration Act which provides the saving and transitional provisions of this Act, and which stipulates,
- “Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”



33. The doctrine of *Lis Pendens* is a principle of law that a disposition made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.
34. According to the undated affidavit annexed to the statement of defence of the defendants, the 1st defendant alleges that he is the administrator of the estate of his father but no evidence in form of a grant of legal administration was provided in support. The affidavit also shows the defendants subdivided the land during the pendency of the suit – ELC 954 of 2012 and in the face of court orders restraining the subdivisions.
35. I have said enough to show that the subdivision and transfer of the resultant subdivisions by the 1st defendant during the pendency of the suit was contra law and public policy and the outcomes of the said actions being the subdivisions and disposal of the parcels were null and void *ab initio*.
36. Subsequent transfers are carried out in quick succession within a period of two months according to the copies of the green cards on record, again contrary to the judgement delivered by the court on the April 24, 2019.
37. Both parties acknowledge the judgement delivered on the April 24, 2019 entered in favour of the Plaintiff in ELC 954 of 2012 in which the Court stated as follows;

“That the Court declares that Ruiru/ruiru East Block 1/1511 registered in the names of Erastus Mungai Kiarie, the 1st Defendant, is held in trust for the households of Geoffrey Kangethe Mbugua – deceased and James Kiarie Mbugua – deceased. The land will be subdivided into two equal portions and shared out between the families of James Kiarie Mbugua and Geoffrey Kangethe Mbugua in accordance with the decision of Githurai Land Dispute Tribunal in LDT/16/2010. The Plaintiff is awarded the cost of the suit.”
38. It is not in dispute that the 1st defendant attempted to set aside this judgement but his application was found unmerited. As at now, this judgement is firmly in force and no evidence has been placed before this court to show that the same has been appealed, vacated and or set aside.
39. It is the Plaintiff’s case that he discovered post judgement that the title 1511 has been subdivided into 10 plots giving rise to parcels 6678-6687 contrary to the decree of the Court issued on the April 24, 2019 which ordered that the mother title No 1511 be subdivided equally between the households of Kangethe and Kiarie. See letter dated the October 21, 2020.
40. The gist of the Plaintiff’s suit as I have gleaned through the plaint is the nullification of the subdivisions and reverting the land to parcel 1511, the mother title, to enable the subdivision of the said title into two in compliance with the orders of the court issued in ELC 954 of 2012.
41. I have already determined that the titles were registered in the name of the 1st defendant during the pendency of the tribunal proceedings. The subdivision and transfer were carried out during the pendency of the ELC 954 of 2012 and the injunctive orders issued by the court in 2014; the transfers to some of the defendants were carried out in May 2019 after the delivery of the judgement on the April 24, 2009 ordering the subdivision of the land into two in favour of the household of Kangethe and Kiarie. I have already found that these actions were illegal null and void.



42. Pursuant to Section 80 of the *Land Registration Act*, this court therefore orders that the resultant subdivisions be cancelled and the land thus revert to parcel 1511. Section 80 of LRA states as follows;
- “ 80 (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
43. The court is in agreement with the plaintiff that the defence of the 1st - 14th defendants as set out in para 4 is devoid of any triable issues, the averred issues having been determined in the Judgement and the 1st defendants application seeking to set aside the judgement.
44. The issue of ownership of the land was determined by this court with finality in the judgement in ELC 954 of 2012. The said judgement has not been set aside, vacated and or appealed against. The issue of ownership therefore is resjudicata given that there is in force a valid and enforceable judgement on record.
45. In the end I grant orders as follows; -
- The application is allowed in its entirety.
 - The 1st -14th defendants statement of defence be and is hereby struck out.
 - Judgement is entered against the defendants as prayed in the plaint.
 - The costs of the application and the suit shall be in favour of the Plaintiff.
- Application dated July 18, 2022
46. The 4th, 12th, 13th, 14th defendants and two intended Defendants (hereinafter called the Applicants) filed the instant motion for Orders that;
- Spent.
 - The court be pleased to strike out the purported statement of defence and trial bundle by the 1st, 2nd, 3rd and 4th applicants and do grant leave for the applicants to file fresh statement of defense.
 - Leave be granted to the 5th and 6th applicants to be enjoined as defendants and file their statement of defense.
 - Costs of the application be granted.
47. The application is based on the grounds on the face of it and supporting affidavit of even date sworn by Erick Mwinzi Mwangangi and Julius Mokaya Okero, the 1st and 2nd Applicants. They swore that they had authority to plead for the rest of the Applicants. They averred that they were not aware of the instant suit until when the 1st applicant instructed his Advocate to register a further charge upon LR No Ruiru/Ruiru East/6680 (the suit property). That upon presentation of the charge documents at the lands office he was astonished to learn of a Court order restricting any further dealings on the suit



property. That they have never been served with any summons to enter appearance and were therefore shocked to learn that the firm of Ntoti Kirui & Co Advocates had entered appearance on their behalf and filed a statement of defence together with an authority to act marked E-1.

48. The deponents further avowed that they have never instructed any other Advocate save for Kamuiru Muibu & Co. Advocates and as such the pleadings annexed as E-2 & E-3 filed herein by the firm of Ntoti Kirui & Co Advocates were procured fraudulently and a complaint has been lodged at the Directorate of Criminal Investigations. That the 4th and 5th Applicants are bona fide purchasers for value for LR Nos. Ruiru/Ruiru East Block 1/6685 and 1/6679 having bought them from the 5th, 6th, 7th, 11th and 12th defendants. Accordingly, that the 5th and 6th applicants have a meritorious defense and unless they are enjoined the suit, there is a likelihood of multiplicity of suits and the orders being sought by the Plaintiff in the instant suit will directly affect the 5th and 6th applicants.
49. On the November 8, 2022 Mr Amwanzo Advocate holding brief for Mr Mulanya Advocate for the Plaintiff informed the court that the Plaintiff that they were not contesting prayer No b above that is to say the application to strike out the defence against the 4th, 12th, 13th and 14th defendants and leave be granted to file a fresh statement of defense be allowed. The Plaintiff however informed the court that he would be contesting the prayer for joinder of the intended new defendants. The parties agreed to file written submissions. By the time of writing this ruling none of the parties have filed written submissions.
50. Having determined that the subdivisions and the subsequent transfers were illegal null and void, the court finds that there was no valid interest that was conveyed to the defendants to anchor a claim of bonafide purchasers for value without notice. The defendants received nothing as the suit land was encumbered with a trust in favour of the Plaintiff and the 1st defendant's families.
51. The defendants are not at a loss as their claim lies elsewhere and have the liberty to proceed against the appropriate parties for their appropriate remedies.
52. The application is dismissed with costs to the Plaintiff.
53. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 12TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Mulanya for Plaintiff

Ms. Nganga HB for Kinyua for Defendants 1 - 14

Defendant 15 - Absent

Court Assistant – Phyllis / Kevin

