



**Kandara Residence Association & another v Ananas Holdings Limited & 5 others; Director of Survey & 3 others (Interested Parties) (Environment & Land Case 37 of 2020) [2023] KEELC 15859 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15859 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 37 OF 2020  
JG KEMEL, J  
FEBRUARY 27, 2023**

**BETWEEN**

**KANDARA RESIDENCE ASSOCIATION ..... 1<sup>ST</sup> PLAINTIFF**

**KARIRA KIMARA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ANANAS HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EXECUTIVE COMMITTEE MEMBER FOR LANDS COUNTY GOVERNMENT  
OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING COUNTY GOVERNMENT OF  
KIAMBU ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR, PHYSICAL AND LAND USE PLANNING, KIAMBU COUNTY  
GOVERNMENT ..... 4<sup>TH</sup> DEFENDANT**

**JAMES MAINA ..... 5<sup>TH</sup> DEFENDANT**

**NICK WAWERU ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**DIRECTOR OF SURVEY ..... INTERESTED PARTY**

**CABINET SECRETARY, LAND & PHYSICAL PLANNING .... INTERESTED  
PARTY**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**DEL MONTE (K) LIMITED ..... INTERESTED PARTY**



## RULING

1. Before Court is the 1<sup>st</sup> Defendant/Applicant's Notice of Motion dated 30/5/2022 brought under Sections 1A, 1B and 3A Civil Procedure Act, Order 2 Rule 15 Civil Procedure Rules seeking orders that;
  - a. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents' Plaint dated June 9, 2020 and accompanying pleadings be struck out for failure to disclose any reasonable cause of action; and
  - b. Costs for this application be provided for.
2. The Application is based on the grounds thereat which are echoed in the Supporting Affidavit of even date of Ajaykumar Shanabhai Patel, the Applicant's Director. He deposed that the Applicant is the registered proprietor of Title No Thika Municipality Block 14/102 (formerly known as LR No 13169-IR No 123341), the suit property. That the 2<sup>nd</sup> Plaintiff had instituted this suit on behalf of the 1<sup>st</sup> Plaintiff claiming historical injustice based on a claim lodged before the 3<sup>rd</sup> Respondent namely, (NLC/HLI/004/2017) That on 7/1/2019 the 3<sup>rd</sup> Respondent recommended that a resurvey be conducted by the 1<sup>st</sup> Interested Party to establish if there was a variance between the land leased by the 4<sup>th</sup> Interested Party and the land occupied by the latter and any residue be surrendered to the 1<sup>st</sup> Plaintiff and 3<sup>rd</sup> Respondent to be shared in the ratio 70:30. That in their Plaint dated 9/6/2020, the Plaintiffs inter alia allege that the suit property forms part of the 3<sup>rd</sup> Interested Party's recommendations of 7/2/2019 and that the 4<sup>th</sup> Interested Party and the Applicant illegally dealt with the suit property contrary to the 3<sup>rd</sup> Interested Party recommendations.
3. The deponent further averred that the 4<sup>th</sup> Interested Party filed a Petition in Murang'a ELC Cause No 3 of 2020 inter alia seeking to have the proceedings from which the 3<sup>rd</sup> Interested Party's recommendations emanated to be declared inconsistent with Article 50 Constitution of Kenya; quashed/set aside in relation to the suit property and 3<sup>rd</sup> Interested Party be prohibited from determining any claims of historical injustice relating to the suit property. That on 28/4/2022 the Murang'a Environment and Land Court allowed the aforesaid prayers in the Petition vide a Judgment annexed as ASP1. Moreover, that this Hon. Court struck off the 1<sup>st</sup> Plaintiff from this suit on for want of locus standi on 1/10/2020 – see ASP2 copy of the said Ruling. That in light of those circumstances the instant suit is thus unsustainable and the claim cannot be cured by way of amending pleadings hence the Application.
4. The Application is opposed by the 2<sup>nd</sup> Plaintiff only.
5. The 2<sup>nd</sup> Plaintiff swore his Replying Affidavit on 18/5/2022 and avowed that striking out of pleadings is a discretionary matter of the Court that ought to be used sparingly. That for this Court to appreciate the gist of the Plaintiff's suit it has to analyze the rival evidence by way of trial and allowing the instant Application at this stage, would amount to denial of the right to access justice and fair hearing as enshrined in the Constitution of Kenya. He urged the Court to dismiss the Application with costs.
6. The Application was canvassed by way of written submissions filed by the Applicant. The Applicant filed submissions dated 16/9/2022 through the firm of J Louis Onguto Advocates and the firm of Njoroge Regeru & Co Advocates filed submissions dated 4/10/2022 on behalf of the 4<sup>th</sup> Interested Party.
7. The Applicant submitted that it has demonstrated a *prima facie* case to grant the prayers sought in light of Order 2 Rule 1(a) Civil Procedure Rules that seeks to prevent parties from being harassed through



vexatious litigation. That the Applicant has demonstrated that the cause of action is no longer tenable and it cannot be cured by amendment of pleadings as held in various Court decisions including the Court of Appeal in *DT Dobie & Company Kenya Ltd vs Joseph Mbaria Muchina & Anor* CA No 37 of 1978. Lastly that the 2<sup>nd</sup> Plaintiff has not rebutted the Applicant's assertions and beseeched the Court to allow the Application.

8. Supporting the Motion, the 4<sup>th</sup> Interested Party submitted that much as striking out a suit is draconian step, Courts would not hesitate to strike out a suit which is frivolous, vexatious or an abuse of Court process as was held by the Court of Appeal in *Kivanga Estates Limited v National Bank of Kenya* [2017] eKLR. That the suit is based on a 'now-quashed' determination of the National Land Commission, the 3<sup>rd</sup> Interested Party and a Judgment has been delivered to that effect by the Court and the Plaintiff has not challenged the said Judgment. Further that the suit property never formed the subject of the National Land Commission determination.
9. The 2<sup>nd</sup> Plaintiff did not file any submissions.
10. The sole issue for determination is whether the Application is merited.
11. The legal provisions governing striking out pleadings is anchored in Order 2 Rule 15 of the *Civil Procedure Rules* that;

“Striking out pleadings [Order 2, 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.
  - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
  - (3) So far as applicable this rule shall apply to an originating summons and a petition.”
12. The principles that guide Courts of law when considering an application seeking to strike out a pleading are undeniably well settled. In *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR the Court of Appeal was categorical that –

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of *DT Dobie and Company (Kenya) Ltd v Muchina* [1982] KLR 1 discussed the issue at length and *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a Plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other



aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike 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.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts LJ in the case of *Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and Others (No 3)* [1970] ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.” We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

13. From the above readings it is not in doubt that the relevant test to be applied in this instance is that the Plaintiff shows on the face of it that the action is not maintainable or that an absolute bar to it exists. The Plaintiff must be so bad that even an amendment would not cure it. In addition that the suit is baseless and wantonly brought without the shadow of an excuse and that to allow it to proceed to trial will only allow the Defendant to be vexed and lastly that the action is an abuse of Court process.
14. It is the Applicant’s case that the substratum of the Plaintiff’s case is no longer tenable in law in light of the determinations in Murang’a ELC Petition No 3 of 2020 and by dint of this Court’s Ruling rendered on 1/10/2020 that struck off the 1<sup>st</sup> Plaintiff from this suit. In his Replying Affidavit, the 2<sup>nd</sup> Respondent has not refuted this assertion but only maintained that his case ought to be determined on merit.
15. The Court record shows that the 1<sup>st</sup> Plaintiff was struck off this suit on 1/10/2020 and no appeal/ review against the said Ruling has been preferred. In the Verifying Affidavit sworn on 9/6/2020 accompanying the Plaintiff of even date, the 2<sup>nd</sup> Plaintiff deponed that he was the Chairman of the 1<sup>st</sup> Plaintiff and duly authorized to swear the Affidavit in such capacity. In the said Plaintiff the Plaintiffs inter alia prayed for a declaration that the ownership of the suit by the Applicant is null and void and consequently a permanent injunction be issued against the Applicant from any dealing with it in any way.
16. According to paras 12 & 13 of the said Plaintiff, the Plaintiffs’ suit was hinged on the 1<sup>st</sup> Plaintiff’s historical injustice claim determined on 7/2/2019. The 12<sup>th</sup> & 13<sup>th</sup> paragraphs state;
  - “ 12. The Plaintiffs aver that owing to the historical injustice visited upon its members leading up to colonization of the Country, the 1<sup>st</sup> Plaintiff lodged a historical claim before the 4<sup>th</sup> Interested party (sic) whereupon hearing the same, the latter’s committee on historical injustice made a determination on the 7<sup>th</sup> day of February, 2019.”
  13. The said determination postulated that inter alia that;



- a. A resurvey should be undertaken by the Director of survey to establish if there is any variance<sup>3</sup> between land leased by Del monte K limited and the land the latter occupies.
  - b. Any residue should be given/surrendered to the 1<sup>st</sup> Plaintiff for resettlement of its members and the County Government for public purpose in the ration of 70:30 respectively.”
17. The above averments form the gist of the grounds in the instant Application and it is the Applicant’s position that the 4<sup>th</sup> Interested Party herein filed a Petition in Murang’a Cause No 3 of 2020 which was determined on 28/4/2022. The Hon. Court inter alia quashed the National Land Commission determination for want of fair hearing. A perusal of the record in this Court shows that the Plaintiff’s List of Documents dated 9/6/2020 does not contain the impugned National Land Commission determination referred to in the Plaint. However, in a Further Affidavit sworn on 17/7/2020 by the 2<sup>nd</sup> Plaintiff annexing a resolution to institute suit dated 4/6/2020, the 2<sup>nd</sup> Plaintiff was categorical that the impugned determination was made in a claim known as NLC/HLI/004/2017. This claim is the same one that was assailed in Murang’a Petition 3 of 2020 according to the Judgment annexed which was subsequently quashed.
18. The 2<sup>nd</sup> Plaintiff in Replying Affidavit did not refute the averments in the Motion and in particular on the findings of the Murang’a Court relied on by the Applicant. To that end therefore this Court takes the view that the National Land Commission proceedings and determination in NLC/HLI/004/2017 that also form the basis of the instant suit, having been quashed by a Court of competent and similar jurisdiction, sustaining this suit would amount to abuse of Court process and run the risk of reaching contradictory findings. There is nothing that has been placed before this Hon Court to demonstrate that the aforementioned Judgment has been appealed/reviewed.
19. The Court of Appeal in the case *Francis Kamande v Vanguard Electrical Services Ltd* [1998] eKLR cited with approval the holding by Madan JA in this regard that;
 

“Madan JA said *DT Dobie & Co Ltd v Muchina & another* Civil Appeal No 37 of 1978 (unreported):

"No suit ought to be dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment."

What Madan JA said about the Plaintiff’s suit equally applies to the defendant answer or defence. In *Attorney General of Duchy of Lancaster v L & N>W Rly Co* [1982] 3 Ch 274 CA. it was held:

The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable."
20. In light of the above and whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that Court orders are not made in vain. It is the finding of this suit that the Plaint herein cannot be sustained in light of the determination in Murang’a Petition 3 of 2020.
21. The application is allowed for the following reasons;



- a. The foundation of the claim is the determination of the NLC in (NLC/HLI/004/2017) which culminated in the gazette notice of March 2019 has been quashed in the Judgment of this Court in Murang'a ELC Petition No 3 of 2020 delivered on the 28/4/2022. The Court was not shown any evidence that the said judgement has been vacated, appealed and or set aside.
- b. The 1<sup>st</sup> Plaintiff was struck off from the suit on the 1/10/2020 due to want in locus.
- c. The whole of the Plaint dated the 9/6/2020 is devoid of a cause of action attributed to the 2<sup>nd</sup> Plaintiff solely.
- d. The suit fails to disclose any reasonable cause of action.

**Final orders-**

22.

- a. The application dated 30/5/2022 is merited. It is allowed.
- b. Costs shall be in favour of the Applicant.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**1<sup>st</sup> and 2<sup>nd</sup> Plaintiff - Absent**

**Kamwami for 1<sup>st</sup> Defendant**

**Ms. Mbugua for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

**1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties – Absent**

**1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Proposed Interested Parties– Absent**

**Court Assistants – Esther / Kevin**

