



**Wepukhulu v Wanambisi (Environment & Land Case 98 of 2015)  
[2023] KEELC 15913 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 98 OF 2015  
EC CHERONO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**CHRISTINE WAFULA WEPUKHULU ..... PLAINTIFF**

**AND**

**STEPHEN JUMA WANAMBISI ..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion application dated November 22, 2022, the applicant moved this Honourable court under Order 2 Rule 15 a, b, c & d seeking the following orders;
  1. That this Honourable court be pleased to strike out the statement of plaint dated July 17, 2015 on the ground that it discloses no reasonable cause of action or it is scandalous, frivolous, vexatious and otherwise an abuse of the process of the court.
  2. That Costs of this application and of the suit be awarded to the applicant.
2. The application is supported by grounds shown on the face of the application and the affidavit of the applicant filed in court on November 23, 2022 as well as annexures thereto.
3. In his supporting affidavit, the applicant contends that he bought nine and a half acres of land from one Evanson Wafula Wepukhulu being a subdivision from land parcel No Bukusu/n.sangalo/661 and immediately took possession. The applicant further stated that he also constructed his homestead in the suit land and erected other structures. However, the High court in Kakamega Succession Cause No 124 of 1986 (Estate of Wepukhulu Wanambisi Maundele revoked the Title of Evanson Wafula Wepukhulu on February 15, 2012 and appointed two administrators namely; David Wafula Wepukhulu and Moses Maudede Wepukhulu and the Title of Evanson Wafula was cancelled.
3. The applicant also stated that as a consequence of these actions, he filed a suit in Bungoma against the two administrators being ELC Case No E010 of 2021 claiming his land from the two administrators.



He stated that Christine Wafula Wepukhulu, the plaintiff in this suit has failed to make full disclosure of material facts to this Honourable court that Evanson Wafula Wepukhulu is not the registered proprietor of the suit land nor administrator as the grant issued to him was revoked by the Probate Court in Succession Cause No 124 of 1986 on February 15, 2012

4. In conclusion, the applicant averred that non-disclosure of this vital information is fatal to this suit.
5. The Plaintiff/Respondent failed to file response and/or written submissions to the said application within the given timelines.

### **Analysis and Determination**

6. I have considered the Notice of Motion application dated November 22, 2022, the supporting affidavit and the submissions by the applicant. Order 2 Rule 15 a, b, c & d which was invoked in the application provide as follows;

“ 15

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on 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---“

7. It is apparent from the provisions of the law that striking out pleadings is draconian and can only be applied where the pleadings are so hopeless that it cannot be remedied by amendment. It is also to be noted that striking out of pleadings is a discretionary power which must be exercised judicially.
8. The applicant has invoked all the four grounds for striking out of the plaintiff's plaint dated July 17, 2015 without laying basis for each ground. He has not stated what is frivolous, vexatious, scandalous or an abuse of the court process in the said plaint. On the first ground that the plaint dated July 17, 2015 discloses no reasonable cause of action, the applicant has annexed numerous documents to his supporting affidavit as evidence which is contrary to Order 2 Rule 15(2) *CPR*. The applicant has not also deposed anywhere in his supporting affidavit that the plaintiff's plaint dated July 17, 2015 cannot be cured by amendment.
9. Having carefully read the plaint dated July 17, 2015, I find that from the face of it, the same discloses a arguable cause of action which can be cured by amendment. It must be borne in mind that a reasonable cause of action is not the that must succeed during the trial. That was the holding in a



number of decision by the superior courts. In the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* (2009) KLR, the court held;

“The principles guiding the court when considering such an application which seeks striking out of 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. What was before him was an application under Order 6 R 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.”

10. Again in the case of *Michael Kalani Muatha v Kyalo Mwikya & another* (2022) eKLR and while citing with approval the decision by their brother Madan JA in the Blue shield case (supra) held as follows;

“—We may add that like Madan JA 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.”

11. I agree entirely with the two decisions by the superior courts which is binding on me. The upshot of my finding is that the Notice of Motion dated November 22, 2022 is not merited and the same is hereby dismissed with costs to the plaintiff/respondent.

12. Orders accordingly.

**READ DELIVERED AND SIGNED IN THE OPEN COURT THIS 23<sup>RD</sup> FEBRUARY, 2023**

**HON. E.C CHERONO**

**ELC- JUDGE**

In the presence of;

M/s Mogo holding brief Boniface Njiru for Defendant.

Mr. Shiku holding brief Kakhila for Plaintiff.

