Atabo (Suing as the legal representative of the Estate of the Late Sarah Atambo Esiron) v Land Registrar, Kitale & another (Environment & Land Case 54 of 2021) [2023] KEELC 16649 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16649 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 54 OF 2021

FO NYAGAKA, J

MARCH 29, 2023

BETWEEN

CATHERINE ORONDO ATABO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SARAH ATAMBO ESIRON) ..... PLAINTIFF

AND

THE LAND REGISTRAR, KITALE ..... 1ST DEFENDANT

PROF BEN WAFULA WANJALA ..... 2ND DEFENDANT

(On an Application striking out suit that it discloses no reasonable cause of action and an abuse of the process of Court)

RULING

The Application

1. By a Notice of Motion dated October 11, 2022 the 2nd Defendant/ Applicant moved this Court under Sections 3 and 3A of the *Civil Procedure Act* order 2 rule 15(1)(a) and (d) and Order 31 Rules 1 and 2 of the *Civil Procedure Rules*, and Section 7 of the *Limitation of Actions Act*. Through it, he sought the following orders:

    1. That this Honourable Court be pleased to order to be struck out the Plaintiff/Respondent's Plaint dated November 11, 2021 on the grounds that:

        a. It discloses no reasonable cause of action

        b. It is otherwise an abuse of the process of the Court.

    2. That this Honourable Court be pleased to order that this suit is statute barred and the same be struck out.

3. The Respondents be condemned to pay costs of this suit.

2. Although the Application which was based on seven (7) grounds did not specifically indicate so in its body, it was supported by an affidavit sworn by Prof. Ben Wafula Wanjala on October 11, 2022. The contents of the grounds were that the Plaintiff/Respondent was not the legal representative of the Estate of the late Sarah Atambo Esiron; she did not have the legal capacity to represent the estate of the said late Sarah A. Esiron; the late Sarah A. Esiron was the registered of land parcel No Kitale Municipality Block 16/Kaura wa Bechau/74 (herein referred to as "Parcel No 74") since 22/04/1996 while the Applicant was registered as owner of parcel No Kitale Municipality Block 16/Kaura wa Bechau/75 (herein referred to as "Parcel No 75") on February 6, 1998; the Respondent brought the suit 23 years after her late mother was issued with title to the land and therefore her rights to it had been extinguished after 12 years from then, as per the *Limitation of Actions Act*; the dispute between the Applicant and the Respondent had been solved before the area Chief on April 23, 1999 and therefore she was estopped from reviving the same 22 years later; and in the interest of justice the suit ought to be struck out.

3. The Applicant then supported the Application with an Affidavit he swore on October 11, 2022. In it he gave the summary of how he bought 2 acres of land from the Applicant's mother, one Sarah A. Esiron, between 15th and October 30, 1992. He deponed that in 1996 the Respondent's mother processed her title deed and she also did his in 1998. He annexed and marked as Ex-PBWW 1(a) and (b) copies of the titles. After processing for him the title, the Respondent's mother asked him to pay for the lower part of the land near the river, which she considered riparian and he did so. She assisted him to even plant trees which had now fully grown. His further deposition was that in 1999 the Respondent complained about the lower part of the land and the issue was resolved before the Area Chief of Kibomet on April 23, 1999 by the Applicant providing a road of access for the Respondent to the stream upon the promise that she would not claim the lower part of the land to the river. He annexed and marked Ex-PBWW 2(a) and (b) copies of the letters from the Chief. That since then, the parties lived in peace until 2021 when the Respondent filed the instant suit. He then deponed that the suit was statute-barred since her rights to file the claim were extinguished by law 12 years before the suit. He contended that the Respondent filed the suit prematurely before obtaining Letters of Administration for the estate of the late Sarah Atambo. He then stated that the Respondent was improperly before the Court. He contended that he filed the restriction on the land parcel No 74 because the Respondent wanted to sell the land to the detriment of her siblings. He stated that he did not have any interest in land parcel No 74.

4. The Plaintiff opposed the Application through a Replying Affidavit she swore on October 31, 2022. She deponed that she was the legal representative of the estate of the late Sarah A. Esiron. In support of that fact she annexed to her Affidavit and marked COA-1 a copy of the Certificate of Confirmation of Grant issued to her on October 21, 2021 in Kitale High Court Succession Cause No E011 of 2020. She repeated that she sued to protect the interests of the late mother. She deponed that land parcel No 75 was purchased by the Applicant from her mother who originally owned it as part of parcel No 74. Her deposition was that the Applicant then encroached onto, trespassed, illegally occupied and grabbed part of parcel No 74. That in a bid to defraud the late mother of the land the Applicant filed a caution on the said land parcel.

5. She stated that the allegations of the Applicant were malicious and far-fetched and that the claim that her late mother did not claim land belonging to her was vexatious and frivolous. She deponed that the Applicant had not given evidence to prove the alleged 1999 agreement between her and him was true. She then deponed that it was not true that the relationship between the 2nd Defendant and her mother was cordial and flawless since the Applicant forcefully and illegally occupied and grabbed her part of

the land and never moved out until July 31, 2004 when she died and he never bothered to move from the land but proceeded to fence the land off and occupy more acreage on parcel No 74.

6. The Respondent then deponed that she had no interest in parcel No 75 as there was no dispute over the ownership thereof. She stated that the law on Limitation of Actions did not apply since she did not claim any part of parcel No 75 and the only issues before the Court were on illegal encroachment and removal of the unlawful caution placed by the Applicant on parcel No 74. She then argued that encroachment was a continuous tort to which limitation of actions did not apply.

7. She deponed that the caution lodged on the parcel No 74 did not have the conditions stipulated under Section 71 of the *Land Registration Act, 2012*. She stated that the suit was about the determination of the exact acreage of both parcels of land, being parcel No 74 and 75 and whether any encroachment had taken place. She stated that her suit was not only in respect of encroachment but removal of the caution placed on parcel No 74. She annexed and marked as COA-2 a report by the surveyor to show that it had been established that the Applicant had illegally occupied her mother's land. She deponed that the Applicant had hived off her mother's land a large portion which did not belong to him.

8. The Applicant filed a Further Affidavit acknowledging that he had noted the issuance of the Certificate of Confirmation of Grant marked as COA-1 annexed to the Respondent's Replying Affidavit and stated that it was the reason why he lodged a caution to protect the other children's rights. He then swore that the deceased mother was survived by three other children, namely, James Louruto Imoni, Phylister Lopii Atambo and Joseph Lokawawi all of who he deponed that the Respondent had left to languish in poverty and in rentals while she leased the land to a third party who was utilising the land to their exclusion. He deponed that the evidence of the exclusion of the other dependents from the Succession Cause is what made him lodge the caution to protect their interests.

9. The parties were directed to file submissions on the Application by February 1, 2023. By that date none had filed any and the Court fixed the Application for ruling on this date of delivery.

10. I have considered the Application, the facts in response thereto and the law. The issues before me are whether or not the Application is merited and what orders to issue and who to bear the costs of the Application.

11. On the merits of the Application, this Court begins by bearing in mind that although striking out of pleadings is provided for in the law, particularly Order 2 Rule 15(1) of the *Civil Procedure Rules, 2010*, this Court bears in mind that making such an order is a draconian step which must be exercised very sparingly. More often than not courts should strive to hear parties on the merits of their cases. The duty to sit obligates the Court to lean towards hearing matters on merits than dismissing or striking them on other bases. Striking out of pleadings should be, so to say, the last resort for the Court and be done only in those circumstances where the claim or defence or any pleading for that matter is hopelessly incorrigible or where it was plainly filed against the law hence a nullity.

12. In *Crescent Construction Co. Ltd v Delphis Bank Ltd* 2007 eKLR, the Court of Appeal stated as follows on the same issue:

> "However, one thing remains clear, and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

13. Additionally, in *Fremar Construction Company Ltd .v. Minakash N. Shah* CA Civil Appeal No 85 of 2002 NBI the Court of Appeal held that: -

> " This Court has stated many times before, and the learned Judge of the superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the Court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process."

14. In addition, in in *D.T Dobie & Company (Kenya) Ltd v Muchina* 1982 K.L.R 1, the late Madan JA (as he then was) said the following about the Court's power to strike out a pleading:

> " 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."

15. Again, the Judge added: -

> " A Court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it."

16. The Judge then concluded 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."

17. I must exercise that abundant caution. Thus, this Court shall now proceed to consider the Application on the heads or prayers which were made, bearing in mind that great caution is what will lead it. The first one to determine is prayer (2) which was to the effect that the suit was statute-barred hence fit for striking out. This was supported through the argument that the suit was filed 23 years after the late Sarah Atambo applied for and obtained title to parcel No 74, on 22/04/1996, and the Applicant being issued with his in 1998. He argued that the Respondent had sued after 12 years after her right to sue had been extinguished as provided for under the *Limitation of Actions Act*.

18. The Respondent countered the claim by stating that the Applicant was a trespasser who had encroached her late mother's land all along and that the same was a continuous tort or occurrence permanent in nature hence not time barred. She argued that hers was not a claim of the Applicant's land but of determination of boundary between the two parcels of land. Again, she countered the Application that her claim was not only over the illegal occupation and trespass onto the land in issue but of the removal of a caution placed by the Applicant over parcel No 74. These she argued could not be defeated by limitation of time.

19. In my view, the above argument should be analyzed against their pleadings and I proceed to do so. The Plaintiff filed this suit vide a Plaint dated November 11, 2021. In it she averred that the 2nd Defendant now Applicant, had entered into a sale agreement with her late mother on October 11, 1990 and on November 11, 1998 illegally and forcefully taken over more hectares of the late mother's land and that even after her mother's death on July 31, 2004 he did not give up the portion. She averred further that on October 12, 2016 she carried out a search and found that the Applicant placed a caution on the parcel of land since November 3, 2010.

20. After laying that as the basis for the claim the Respondent sought twelve reliefs which may be summarized into four as follows: a declaration that the Applicant had encroached onto the suit land; an order for removal of the caution lodged on the suit land; an injunction against the Applicant restraining him and his agents, employees or other persons associated with him in any manner from trespassing and or dealing in the property in any way and another for delivery of vacant possession, and costs of the suit. The Applicant answered the claim by way of a Defence whose contents I will not outline at this stage.

21. The question that remains to answer is whether the entire claim is time barred and limited to 12 years. First, it is important to note that even if the claim was time-barred evidence has to be led to show that indeed it is time barred, unless it is plainly clear that it is, for instance, by way of admission. Again, it has to be analyzed on the basis of the entire claim and reliefs sought. There is even one that is not time-barred then the suit cannot be struck out. In such a contested matter such as the instant one wherein there are reliefs sought whose timelines for filing is not stipulated by law, it cannot be decided summarily without evidence being led on it. And that has to be the case then this suit is not for striking out.

22. Again, even the above contestation aside, the law does not provide the time within which a caution can be removed in order to form a basis of finding that the claim on removal of the caution is time-barred. This is because Section 73(1) of the *Land Registration Act, 2012* provides only that a caution can be removed by the cautioner, court or Land Registrar as provided by the law. On that account alone, the prayer fails.

23. Regarding the limb that the suit is an abuse of the process of the Court, the Applicant did not sum up anything other than that the Respondent brought this suit after a settlement had been reached before the Area Chief 22 years before the institution of the suit. As to whether there was or was not an agreement before the Chief, it is a matter of evidence and not pleading. The need for such evidence to be adduced is sufficient ground for sustaining the suit for determination on merits.

24. Additionally, while that may not demonstrate how the process of the Court has been abused it is apt to bring out the meaning of the phrase. To abuse something or someone has two main connotations. The first one which is not necessarily relevant herein is to use foul language against the person or thing as to cause hurt, annoyance, anger, discomfort and excite bad feelings from the emotions of the person. The second one is about use or application of the person or thing. Where something or one is relied on within acceptable limits to achieve a purpose as was properly intended it does not amount to abuse. However, where the person or thing is used for improper purposes, motives or in a manner not expected then it amounts to abuse. Put in another way, it is the misuse of the person or thing. The Applicant did not demonstrate how or in what way the Plaintiff abused the Court process.

25. The only limb reaming for this Court to consider is whether to strike out the suit for reason that it discloses no reasonable Court of action. Before doing so, it is important to note that an application grounded on the prayer as above is of the nature that does not require any evidence to be adduced. It only calls on the Court to analyze the pleadings and make a finding on whether there is a cause of

action or not. Therefore, no affidavit is supported to be filed to accompany the application. The Court studies only the pleadings to find whether a cause of action exists and if it does, whether it has the slightest chance of success. That only comes about by a comparison between the reliefs sought and the facts pleaded. It goes without saying then that in case such application is supported by affidavit, the claim or defence mounted to one is raises a reasonable cause of action and cannot be struck out.

26. Courts have defined what the phrase reasonable cause of action means. In *DT Dobie & Co. (K) Ltd V Muchina*, [1982] KLR, the Court of Appeal interpreting Order VI Rule 13 (1) of the repealed *Civil Procedure Rules* now the equivalent Order 2 Rule 15 defined the term "reasonable cause of action" to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ..." .

27. In *Jomunjo Education Foundation Ltd v Daniel Kipurket Lepatei & 2 Others* [2014] eKLR, the Court was clear that no affidavit evidence is required in applications where one seeks to strike out a pleading on account of it not disclosing a reasonable cause of action. The Court held:-

> "Of course, a party seeking to strike out a pleading on the ground that it discloses no reasonable cause of action need not adduce evidence in support thereof by way of supporting affidavit. All that the court considers are the pleadings without recourse to evidence."

28. In the instant Application the Defendant combined the prayers that no reasonable cause of action was disclosed and that it was an abuse of the process of the Court. In my view, that step is not correct. An applicant should elect on which limbs to bring his application in. To combine the prayers or mixed the former with those which require affidavit evidence amounts to casting the net too wide as to catch any fish but rather leave the fish swimming in the net. Again, it is clear to me that the Court and parties should have the first point of call as being the satisfaction as to whether there is or is not a reasonable cause of action or defence. After that the Court, having considered that the pleadings are sustainable, proceeds to consider if they are frivolous, vexatious, or an abuse of the process of the Court, among others.

29. This Court considered the pleadings and reliefs sought. It is of the view that the suit raises a cause of action that is worth being tried. It cannot be struck out on the grounds the applicant relies. Therefore, I find the Application unmeritorious and is for dismissal. I dismiss it with costs to the Respondent.

30. This suit shall be mentioned on April 24, 2023 for compliance and fixing a hearing date. By then the parties should have filed and exchanged trial bundles that are properly paginated and legible, and all their pages indexed.

31. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT **KITALE VIA ELECTRONIC MAIL THIS 29TH DAY OF MARCH, 2023.**

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE