



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 96 OF 2020

CKK ESTATE (1973) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT/RESPONDENT

KIMANI RANJI KAMAGURI (MCA NDUMBERI WARD)...2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application**, dated **11th February 2021**, by the Plaintiff/ Applicant seeking for orders that ;

- 1. THAT the 1st Defendant's statement of Defence dated 9th December 2020, be struck out.**
- 2. That Judgment be entered for the Plaintiff/ Applicant as prayed in the Plaint dated 1st October 2020.**
- 3. That the 1st Defendant/Respondent shall pay the costs of the suit and this Application.**

The Application is premised on the grounds that on **25th September 2017**, the 1st Defendant's/Respondent's agents and employees without any lawful justification entered the Plaintiff's private land **L.R No. 134/8**, with a grade tractor and proceeded to create a **Road through** the land, with the intention to make it **Public All Weather Road**, resulting to destruction of coffee trees on that section of land. That this prompted the Plaintiff/ Applicant to institute **ELC Case No. 128 of 2017**, and produced title documents as proof of ownership and among the Applicant's witnesses, the Land Registrar testified that there was **no public road** or **road of access** passing through the land, and that an access road could only be created through compulsory acquisition, surrender or subdivision.

That in its Judgment in the said suit, the Court declared that there was no public road passing through **L.R No. 134/8**, and an order of injunction was issued restraining the Defendants/ Respondents from trespassing or entering the Plaintiff's/ Applicant's land in any manner . On **24th June 2020**, an earth moving tractor registration **No.22CG273A**, registered and owned by the 1st Defendant/ Respondent together with its driver without any reasonable cause entered into the Plaintiff's/ Applicant's private land and proceeded to dig up a section of the Plaintiff's/ Applicant's land and as a result **102**, mature coffee trees on that section of the land were completely destroyed.

That a report dated **16th November 2018**, addressed to the office of the Attorney General following a survey on **L.R No. 134/8**, by Mr. **Victor Kirui** found that a **12 meter Road**, had been created through the land and that all the **Survey Plans** and the

Deed Plan do not show a road reserve through the Plaintiff's/ Applicant's land. That the Judgment delivered on **5th December 2018**, in **ELC Case No. 428 of 2017**, declared there is no road passing through the Plaintiff's/ Applicant's land. That the **1st Defendant's/ Applicant** allegation that a joint exercise, surveyor joint report, mutation and report is required to prove trespass is immaterial to this suit. That the **1st Defendant/ Respondent** has not pleaded or presented evidence showing that its entry and intrusion on the Plaintiff's/ Applicant's private land was lawful and/or authorized, and the Statement of Defence merely denies contents of the **Plaint**, it is evasive, vague and sham Defence to the Plaintiff's/ Applicant's claim.

In his Supporting Affidavit, **Samuel Karuga Koinange**, a Director of the Plaintiff averred that on **24th June 2020**, he received a telephone call from **Mr. Gilbert Ng'ang'a**, the Plaintiff's **Foreman**, who informed him that there were trespassers on the suit property and he identified the **2nd Defendant** as a member of **Kiambu County Assembly**, representing **Ndumberi Ward** as being present in the company of other people. That the foreman took photographs of the earthmoving tractor and a consequent search conducted on **1st September 2020**, confirmed that the same is owned by the **1st Defendant/ Respondent**.

That he was informed by the said Foreman that the **2nd Defendant/ Respondent** had received a copy of the Judgment in **ELC Case No. 428 of 2017**, and a further phone call from the Government official informing him of the illegality and they then left the premises. That the **1st Defendant/Respondent** has acted in disregard and disobedience of the Court order and further that he has been advised by his Advocate which advice he believes to be true that a general denial or general statement of non admission of the Plaintiff's assertion is not sufficient traverse of the Plaintiff's claim. That the **1st Defendant/ Respondent** has not pleaded any fact or presented any evidence, which shows that its entry and intrusion on the Plaintiff's land was lawful and or justified. That if the Defendants/ Respondents sought to develop the 12 meter road for public purposes or in the public interest, the **National Land Commission** would have issued a Gazette Notice.

That the **1st Defendant/Respondent** denied that it is the owner of the earth moving vehicle, yet the search reveals otherwise. Further that he is apprehensive that the **1st Defendant/ Respondent** will encroach on the suit property and dig it and use it as an election campaign

The Application is oppose and the **1st Defendant/Respondent** filed grounds of opposition dated **24th June 2021**, and opposed the Application on the grounds that the **Land Act 2012**, is very clear on the public right of way in **Section 143** and ways of consideration. That **Section 156 of the Land Act**, provides for the obstruction of public right of way and the procedure to deal with such. That the said **Section 156** states that if the Commission is satisfied that there has been any wrongful obstruction or any encroachment on any public right of way, it may make an order requiring the person responsible for the obstruction to remove that obstruction within a specified time. That a joint exercise, surveyor joint report, mutation and registry index map is required by the Plaintiff to prove allegation of trespass. That the Applicant has not laid out sufficient cause for the granting of the orders sought on the application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered, together with the rival Affidavits and the annexures thereto and finds that issue for determination is *whether the Plaintiff/ Applicant is entitled to the orders sought*.

The Plaintiff/Applicant has sought for the striking out of the **1st Defendant's/Respondent's** statement of Defence on the grounds that there is a Judgment by the Court in **ELC Case No. 428 of 2017**, where the Court declared that the **1st Defendant/ Respondent** had trespassed on the Plaintiff's/ Applicant's property and that the statement of Defence contains general denials amongst other grounds.

The principles that guide the court in determining whether to strike out a pleading were set out in the case of **D.T. Dobie & Company (Kenya) Limited ... Vs... Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR** the Court held that ;

"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, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it

uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.

Further in the case of *Saudi Arabian Airlines Corporation ...Vs... Sean Express Services Ltd CIVIL CASE NO. 79 OF 2013 [2014] eKLR* the court held:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Articles 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that“...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

The Court has gone through the Plaintiff dated 1st October 2020, and notes that the prayers sought by the Plaintiff/ Applicant are amongst others a Declaration that the Defendants/ Applicants have trespassed on the suit property, General damages for Trespass and exemplary damages and Kshs. 2,594.880/= being the value of the Coffee. The Court has also carefully perused the 1st Defendant's/Respondent's statement of Defence and notes that in the said Defence, the 1st Defendant / Respondent has denied trespassing on the suit property and creating a road, it has also averred that there is a need of a joint surveyor to prove the allegations of trespass.

While the Court appreciates the averments by the Plaintiff/ Applicant that there is a Judgment and a report that indicates that the Defendants/ Respondents have trespassed on the suit property, the said allegations need to be weighed against any evidence that may be produced and the same tested. An issues on whether or not there is trespass and the amount of damages payable having been denied, it is the Court's considered view that these are triable issues that must be determined at the trial. A cursory perusal of the Defence shows that it raises triable issues and should not be struck out at this stage. Therefore, this Court finds and holds that the Plaintiff/ Applicant is not entitled to the orders sought.

Having now considered the pleadings in general and relevant provisions of law and the Written Submissions, the Court finds that the **Notice of Motion Application** dated 11th February 2021, seeking to strike out the Statement of Defence dated 9th December 2020, is **not merited** and the same is dismissed entirely with costs being in the cause.

Let the suit be determined on merit.


It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy

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