



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT OF KENYA**  
**AT MALINDI**  
**LAND CASE NO. 16 OF 2010**

**RAPHAEL MLEWA MKARE &**

**515 OTHERS.....PLAINTIFFS/RESPONDENTS**

**=VERSUS=**

**AGRICULTURAL DEVELOPMENT CORPORATION....DEFENDANT/APPLICANT**

**R U L I N G**

**Introduction**

1. What is before me is the Defendant's Application dated 31<sup>st</sup> October, 2013 filed pursuant to Order 2 Rule 15 (a) and (b) of the Civil Procedure Rules.
2. The Application is seeking for the following orders;-
  - (a) **That this Honourable Court be pleased to strike out the Plaintiff's Complaint dated 1st March, 2010.**
  - (b) **That judgement be entered for the Defendant against the Plaintiffs as prayed in the Defence and Counter-claim.**
- c. **That the Complaint is scandalous, frivolous and vexatious and otherwise an abuse of the court process.**
  - (d) **That the costs of the Application be borne by the Plaintiffs.**
3. The Application is supported by the Defendant's advocate's affidavit. According to the Defendant's advocate, Joseph Kalumu Thoya, who purported to swear a verifying affidavit on behalf of 515 others did so without the leave of the court; that the Plaintiffs have not disclosed to this Court any right or interest in the suit land and therefore lack the *locus standi*.
4. It is the Defendant's advocate's deposition that the Complaint does not raise any triable issue and that the same is an abuse of the court's process.
5. In his Replying Affidavit the Defendant's counsel deponed that when Plaintiffs filed the suit, they also filed an Application for injunction and the court delivered its Ruling by holding that the Plaintiffs had established a *prima facie* case with chances of success.
6. The Defendant's counsel finally deponed that whether the suit land in question actually belongs to

the Defendant or the Plaintiffs can only be resolved after hearing the parties and that if indeed the Defendant has titles to the suit property, then the Plaintiffs will be entitled to invoke the doctrine of adverse possession.

7. The parties' advocates filed their respective submissions and authorities which I have considered.

### **Analysis and Findings:**

8. Order 2 Rule 15(1) of the Civil Procedure Rules provides that the court may at any stage order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law; or it is scandalous, frivolous or vexatious or it may prejudice, embarrass, delay the fair trial of the action or it is otherwise an abuse of the court process.
9. Allegations in a pleading are scandalous if they state matters which are indecent or offensive and are made for the mere purpose of abusing or prejudicing the opposite party **[See Christie-vs-Christie[1873]8ch. App.499]** but a scandalous matter need not be struck out if it is relevant**[See Cracknall-vs-Janson[1879] 11 ch.d1.EA.**
10. Frivolous matters on the other hand are those which are clearly unsustainable**[Dey=vs=William Hill[Park Lane]Ltd [1949]1ALLER 219[CA].**
11. A pleading is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense**[See Burstill=vs=Bey Jus[1884] 26 ch.D.35].**
12. According to the Plaint, the Plaintiffs herein are 516. It is the contention of the Plaintiffs that they are residents of Kisiwani area and occupy the land in the area as of right being their ancestral land, part of which is what is claimed to be land parcel number No.513 measuring over 3,000 acres.
13. It is the Plaintiffs' position that the land that the Defendants are claiming is actually their ancestral land.
14. On the other hand, the Defendant's claim in the counter claim is that the Plaintiffs are trespassers on its land known as Kisiwani Home and Top Farm being plot no. 513 Malindi and should be evicted.
15. The Plaintiffs filed an Application for injunction and on 25<sup>th</sup> April, 2012, Omondi J delivered a detailed Ruling. In the Ruling, the Judge found that the Plaintiffs had established a prima facie case with chances of success in view of the fact that historical injustices in this country in relation to land allocation and ownership cannot be ignored.
16. The Judge further found that there are several families on the disputed piece of land and that the balance of convenience titled in favour of the Plaintiff.
17. The court having found that the Plaintiffs had established a *prima facie* case with chances of success, it will be absurd to turn around at an interlocutory stage, to hold that the Plaintiffs' suit does not raise any triable issue and should be struck out. The strength or otherwise of the Plaintiffs' case was addressed by the court and this court cannot be called upon to address that issue again through the back door.
18. This suit, as I have directed on numerous occasions, should be set down for hearing and disposal.
19. For the reasons I have given above, I dismiss the Defendant's Application dated 31<sup>st</sup> October, 2013 with costs to the Plaintiffs.

Dated and delivered this **6<sup>th</sup>** day of **June**, 2014

**O. A. Angote**

**Judge**