



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO.105 OF 2014

SOLOMON GITUNGU.....PLAINTIFF

VERSUS

FRANCIS MAWATHI.....DEFENDANT

RULING

This application is dated 15th April, 2015. The application is predicated upon order 2 Rule 15(1) (a) (b), (c) and (d) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application seeks orders:-

1. ***THAT the defendant's defence be struck out with costs.***
2. ***THAT judgment be entered for the plaintiff as prayed for in prayers (a), (b), (c) and (e) of the plaint.***
3. **IN THE ALTERNATIVE**

THAT the defendant be evicted with the assistance of the officer commanding Giaki Police Station or nearest Police Station from all that land comprised in Title No. Nyaki/Giaki-Kiburine/478 and from one (1) acre of all that land comprised in title No. Nyaki/Giaki-Kiburine/556.

4. ***THAT this suit be listed for formal proof on payment of damages as prayed for in prayer (d) of the plaint.***
5. ***THAT the defendant do pay the costs of this application.***

The application is supported by the affidavit of Solomon Gitundu and has the following grounds:-

1. ***THAT the Defendant's defence is a mere denial and discloses no reasonable defence in law.***
2. ***THAT the defendant's defence is frivolous and or vexatious.***
3. ***THAT the defendant's defence may prejudice and delay the fair trial of the case.***
4. ***THAT the defendant in his defence has admitted he has no claim for adverse possession for five (5) acres comprised in Title No. Nyaki/Giaki-Kiburine/556.***
5. ***THAT it is apparent from the defendant's defence and the attached originating summons No.***

72 of 2004 at Meru High Court, that the defendant did not have a cause of action to claim for adverse possession against Cypriano Kigorwe for he had not been in possession of Title No. Nyaki/Giaki-Kiburine/556 for a period of twelve (12) years prior to filling the Originating Summons.

6. The defendant's defence has no merit and is otherwise an abuse of the Court process.

In his plaint the plaintiff prays for judgment against the defendant for:-

- a. **A declaration that the plaintiff is the registered absolute proprietor of Parcels of land comprised in Title Nos. Nyaki/Giaki-Kiburine/478 and Nyaki/Giaki-Kiburine/556.**
- b. **An order that the defendant be evicted with assistance of the police from all that land comprised in titles Nos Nyaki/ Giaki-Kiburine/478 and 556.**
- c. **A permanent injunction to restrain the defendant, by himself, his servants and or agents from re-entering all that land comprised in Title Nos. Nyaki/Giaki-Kiburine /478 and Nyaki-Kiburine/556.**
- d. **Damages.**
- e. **Costs.**
- f. **Any other or further relief this Court may deem fit and just to grant.**

The defendant has a Counter Claim which says that the plaintiff, although the registered owner of parcel No. Nyaki/Giaki-Kiburine 556, is not absolute owner of the land. He claims that he has been on this parcel of land since 1976 openly, continuously, with exclusive possession and occupation in an uninterrupted manner. He therefore claims to have acquired title by adverse possession. The defendant further claims he has extensively developed the land and has never known any other home for 44 years.

The defendant claims that the acquisition of the land by the plaintiff was fraudulent and actuated by malice and sets down his particulars of malice as:-

- a. **The Plaintiff bought the land while he knew or ought to have known that the defendant was in actual occupation of the land.**
- b. **The Plaintiff failed to disclose to the defendant that he was buying the suit land and**
- c. **The Plaintiff caused the land to be transferred to himself secretly and without minding the apparent interest of the defendant on the Suit land.**

The defendant prays for judgment in the following manner:-

- a. **Dismissal of the plaintiff's suit with costs.**
- b. **A declaration that the defendant has acquired L.R.NO. NYAKI/GIAKI-KIBURINE/556 and the same be transferred to him absolutely.**
- c. **Costs of the Counter-Claim.**

The assertions proffered by the parties are diametrically opposed. The plaintiff has submitted extensively in support of his assertion that the defendants defence should be struck out as it discloses no triable issues, that it is a mere denial, is frivolous, vexatious and only intended to delay the expeditious trial of this suit to the plaintiff's prejudice. The plaintiff has proffered several authorities in support of his assertions.

The defendant has opposed the application. Among other things he says that there is a Counter Claim and opines that the Plaintiff in his submissions has wholly ignored to submit on the Counter-Claim. He rhetorically poses the question:-

“What would it mean to strike out the defence and leave the Counter-Claim that seeks the Court's declaration of title under adverse possession?”.

He submits that the defence in this suit brings out triable issues which should be allowed to proceed to full trial on its merits which he opines is a function of the trial Judge after he has heard evidence from all parties.

The defendant has proffered several authorities in support of his assertions.

As this application is predicated on Order 2 Rule 15, I reproduce herebelow Order 2 Rule 15 Subrules 1 and 2 which states as follows:-

“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 entered accordingly as the case may be***

(2) No evidence shall be admissible on an application Under Sub rule (1) (a)

but the application shall state concisely the grounds on which it is made”.

I have carefully considered the pleadings proffered by the parties, their submissions and the authorities they have tendered in support of their assertions. I do note that the plaintiff seeks orders in respect of parcel Nos. Nyaki/Giaki-Kiburine/498 and Nyaki/ Giaki-Kiburine / 556. In his defence and Counter claim the defendant mentions only Parcel No. Nyaki /Kiburine/556. This is clearly a triable issue.

I do find that the Counter Claim by the defendant raises the issue of acquisition of the title to the Parcel No. Nyaki/ Giaki-Kiburine/556 by adverse possession . I find that this is a triable issue. Order 2 Rule 15 Subrule 2 unequivocally dictates that no evidence is admissible on an application under rule 1. The Court principally needs to look at the plaint, defence and Counterclaim, if there is one. Having looked at the apposite documents, I find that the defendants defence and Counter Claim disclose triable issues. Having so found, I dismiss this application. Costs shall be in the cause.

It is so ordered.

Delivered in open Court at Meru this 27th day of October, 2015 in the presence of:-

CC: Daniel /Lilian

Kiugu present for Plaintiff/ Applicant

Murango Mwenda for defendant

P. M. NJOROGE

JUDGE