



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ENVIRONMENT LAND CASE NO. 131 OF 2013.

JULIUS OKOTH MAGINAPLAINTIFF/APPLICANT

VERSUS

SAMWEL OWOKO ALIAS OOKO.....DEFENDANT/RESPONDENT

R U L I N G

JULIUS OKOTH MAGINA, the Applicant, filed this application dated 28th January, 2014 seeking to have the statement of defence filed by Samwel Owoko, the Respondent, dated 18th December, 2013 struck out. He also prays for judgment to be entered in his favour and cost. The application is based on three grounds which are set out hereinbelow'

1. That the defence filed is scandalous, frivolous and vexatious.
2. That the defence will delay the fair hearing of the case and is otherwise an abuse of the process of the court.
3. That the Applicant is the sole proprietor of the suit land and that he had not entered into any sale agreement with the Respondent.

The application is opposed by the Respondent through the replying affidavit dated 10th March, 2014 and filed on 21st March, 2014 in which he among others avers to the following:-

1. That his son-in-law, namely Wilson Angalwa Makokha, bought for him a piece of land measuring 0.1 hectares from parcel No.Bukhayo/Ebusibwabo/3788, from the Applicant in the 2006.
2. That the portion was clearly demarcated on the ground by the Applicant who allowed him to take possession and that he has extensively developed the said portion.
3. That he has lived peacefully on the said land with his son-in-law and the Applicant, until 2012 when his daughter, Carolyne Angalwa died.
4. That it is after the death of his daughter that his son-in-law and the Applicant planned to evict him from the said land.
5. That he has never been informed that the Applicant had refunded the purchase price of the land to his son-in-law and that he never voluntarily agreed to vacate from the land.

When the matter came up for hearing on 24th March, 2014, both the Applicant and the Respondent made

short submissions. I have carefully considered those submissions and find as follows:-

- a. That the pleadings filed by the Applicant and Respondent clearly shows that there was no legal arrangement between the parties over land parcel Bukhayo/Ebusibwabo/3788 or a portion thereof.
- b. That the sale agreement of 2006 was between the Applicant, as the seller, and one Wilson Angalwa Makokha ,as the purchaser.
- c. That the Respondent occupied the portion of land Wilson Angalwa Makokha was buying with the permission of the purchaser.
- d. That the sale arrangement between the Applicant and Wilson Angalwa Makokha of 17th October, 2006 was terminated in September, 2013 when the Applicant refunded the purchase price and interest totaling Kshs.120,000/= to the purchaser, Wilson Angalwa Makokha.

Applications brought under Order 2 Rule 15 of the Civil Procedure Rules do not require evidence to be tendered. What is required under sub Rule 2 is that the grounds be stated in a concise manner. The court notes that the Applicant, while filing this application dated 28th January, 2014 also filed a supporting affidavit with it. This was in clear contravention of Order 2 Rule 15 (2) of the Civil Procedure Rules. However, under Article 159 (2) (d) of the Constitution, this court is enjoined to do justice without undue regard to procedural technicalities. Also the overriding objectives set out in section 1A of the Civil Procedure Act is to facilitate the just, expeditious , proportionate and affordable resolution of the Civil disputes. In recognition of the duty to do substantial justice without regard to undue technicalities, and considering this is a land case, the court is of the view that this is an appropriate case where the parties should be given the opportunity to present the evidence before the court can make a ruling one way or the other. It is only after the parties have presented their evidence that the court will be in a position to rule either for or against the prayers sort. To strike out the defence at this stage will deny the Defendant the opportunity to be heard and to call witnesses.

For the reasons set out above, the application dated 28th January, 2014 is rejected with each party bearing his own cost. The Plaintiff is advised to set take the necessary steps to set down the case for hearing as soon as possible. It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON...3RD DAY OF.....APRIL.....,2014.

IN THE PRESENCE OF;