



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 69 of 2010

SHEM OKEMBIA.....PLAINTIFF

VERSUS

ABDALLA APONDI ABDALA.....1ST DEFENDANT

ZAINABU MOHAMED.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR-KISUMU.....3RD DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....4TH DEFENDANT

RULING

This ruling follows interpartes hearing of the application filed here on 17/5/2012.

The application is a motion on notice and seeks to have the defences of 2nd, 3rd and 4th defendants struck out. The said defences are alleged to be a sham and the Court is therefore asked to enter judgment, for the plaintiff as prayed in the plaint. Provision for costs of the application is also asked for.

The grounds pleaded in support state that Bjourn Oloo Berendes, the donor of power of attorney to plaintiff – **SHEM OKEMBIA** still has the original title deed yet Kisumu Land Registry has issued another title deed to 1st and 2nd defendants for reasons that are not explained. It is termed as a clear case of impunity where land has been taken away from the plaintiff without any reason at all.

The supporting affidavit to the application states, inter alia, that Bjourn Oloo Berendes, the donor of power of Attorney, owned the suit land jointly with his wife the late Zainabu Sunguti, having purchased the same from one Omwanda Opala in 1989; the Berendes then realized in year 2002 that the land – **KISUMU KORANDO/3796** – had been registered in 1st defendant's name while he himself still held the title. The Berendes then placed a caution at the Land Registry, Kisumu, but the Land Registrar later removed the caution and transferred the land to 2nd defendant without informing Berendes at all or giving him any reasons.

The 2nd defendant then charged the land with 3rd defendant.

The defences of the 2nd, 3rd and 4th defendants are faulted for not demonstrating how Berendes was dispossessed of his land and how another title was issued while Berendes still held the original title.

The 2nd Defendant – **ZAINABU MOHAMED** – filed a lengthy replying affidavit which stated inter alia, that her defence has triable issues; that the plaintiff alleges fraud which can only be proved by way of oral evidence which evidence would be blocked out of summary judgment is entered. The application is also

said to be without merit.

Both 3rd and 4th defendants replied by way of filing grounds of opposition in which the application is termed frivolous, misconceived and mischievous. It is asserted that the defences have triable issues.

The application was heard inter partes on 3/12/12 and Awino for Plaintiff/Applicant advanced his arguments along what is contained in the application.

Lore for 4th defendant reiterated that the application is frivolous and mischievous. He said that the explanation as to how the title changed hands can only come out well after a full trial.

In the course hearing of various rulings were availed containing pronouncement in application of this nature. A careful readings of the rulings show, inter alia, that the applications are only allowed where defences filed are trifling, fanciful and put forward to waste courts time. They are also allowed where the defences filed lack bonafides, are hopeless, oppressive, and tend to cause the opposite party unnecessary anxiety, trouble and expense. Also necessary to consider is whether the defences are likely to prejudice, embarrass or delay the fair trial of the action. For all this, the ruling in **NATIONAL BANK OF KENYA VS RUBBER COMPONENTS LTD & 2 OTHERS:HCCC NO.40/04, ELDORET**, is a good example.

The power of the Court to enter summary judgment is to be exercised sparingly and cautiously and only in plain and obvious cases (Please see **GEORGE JOSHUA OKUNGU V. TOM MSHIND & Another: HCC NO.348/05, NAIROBI**)

And in an application for summary judgment, even one triable issue if bonafide would entitle the defendant to unconditional leave to defend. (Please see **BUSHSTOCK ENTERTAINMENT COMPANY LIMITED VS EAST AFRICAN BREWERIES LIMITED (2006) e KLR**.)

In this matter, the plaintiff's claim is mainly founded on fraud. In focus is the Kisumu Lands Office which is said to have fraudulently transferred the land to 1st defendant who then sold it to 2nd defendant. The 2nd defendant in turn charged the land to 4th defendant.

The 2nd defendant filed a defence denying inter alia, that the plaintiff is a donee of power of Attorney from Berendes; that Berendes had a wife called Zainabbu Sunguti and/or that together they bought the suit land from Onwala Opana; that there was any fraud perpetrated in registration of the suit land to her; and that the suit is bad in Law and the plaintiff is non-suited for lacking Locus Standi;

The 3rd defendant's defence was filed on 19/3/2012. Fraud is denied.

The plaintiff's suit is also faulted in the defence for not complying with section 13 of Government proceedings ACT and the suit itself is said to be time barred and therefore in violation of Section 3(1) of Public Authorities Limitation Act Cap 39, Laws of Kenya.

The 4th defendant's defence denies that the plaintiff is the registered owner of the land in question. The Locus standi of the plaintiff is also denied. Fraud too is denied.

The starting point for any Court when faced with application of this kind is a look at the defences. It is important to see what is denied and how the denial is pleaded.

If the denials respond, squarely or fairly reasonably to the averments put in the suit, it is difficult to see how somebody can assert they don't raise triable issues.

In this matter, fraud is raised in the claim. It is denied by all the defendants. The Locus standi of the plaintiff is questioned by 2nd and 4th defendants.

The suit itself is said to be time barred and is also alleged to have failed to comply with Section 13 of Government Proceedings Act (Cap 40). (See the 3rd defendant's defence).

The Plaintiff has not responded to all the Fraud, as alleged and particularized in the plaint, requires further explanation and this is so whether or not it is denied by the opposite side.

A summary judgment would block such further explanation. The legal wrong of fraud is weighty and serious. Skeletal or sketchy allegations of it in written pleadings would rarely suffice. Substantiation whether by oral or other evidence is almost always necessary. In this suit itself, fraud is denied. Proof is therefore very necessary. Such proof can only come by way of trial.

It is also necessary to prove or disprove the legal issues raised in the defence of 3rd defendant.

The plaintiff filed reply to defence of 2nd defendant. That reply was filed on 15/6/2010. It has not been retracted.

It still stands and it joins issue with what the 3rd defendant says in its defence. Joinder of issues necessary means that the matter should go for trial for determination of the issues raised. It therefore becomes difficult to understand how the plaintiff can ask for summary Judgment or striking of pleadings against the 3rd defendant which such joinder of issues still stands.

A look at all the defences actually shows that they are not frivolous , mischievous, or without weight. It would be wrong to say, in light of the defences filed, that the plaintiff's suit is plain and obvious. It is therefore a suit that should go for full trial to establish where justice lies.

The considered view of the Court is that this application should not have been brought in the first place.

Bearing all this in mind, this application is dismissed with costs to the 2nd, 3rd and 4th defendants.

A.K. KANIARU – JUDGE

23/1/2013

23/1/2013

A.K. Kaniaru – Judge

Dianga – C/C

No party – Present

Indumuly for Ngala Owino for plaintiff/Applicant

Eseli for 3rd plaintiff/respondent

Sechele M/S for the 4th defendant

Court: Ruling on application filed here on 17/5/2012 read and delivered in open Court.

R.O.A – 30 days

A.K KANIARU – JUDGE

23/1/2013

AKA/va