



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 63 OF 2020

HARUN NTORURU NASHON & 6 OTHERSPLAINTIFFS

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

(Application to strike out defence; plaintiffs claiming to have had an agreement with the defendant to develop stalls within Kongowea market, Mombasa; plaintiffs alleging that the defendant has breached that agreement by demolishing and/or threatening to demolish their structures; defendant filing defence denying the plaintiffs' suit and putting the plaintiff to strict proof; defendant also having filed witness statements inter alia stating that they gave notice to the plaintiffs; such defence cannot be considered a sham and defendant deserves to be heard; application dismissed)

1. The application before me is that dated 6 May 2021 filed by the plaintiffs. They seek orders to have the statement of defence struck out and for judgment to be entered in their favour as prayed in the plaint. Nothing has been filed to oppose the motion.

2. The suit itself was commenced through a plaint filed on 8 June 2020. The plaintiffs plead that they are an organised group of traders known as Kongowea Wholesale Market Stall Owners. They aver to be tenants of the defendant and paying monthly ground rent in accordance with the space occupied by each of them. They complained that the defendant has threatened to dispossess them and demolished their structures at night. They plead that this is not in accordance with a consent entered between them and the defendant in *Mombasa High Court Judicial Review Cause No. 71 of 1998, Lawrence N. Maranga & 12 Others vs Attorney General and the Municipal Council of Mombasa*. It is pleaded that it was agreed as follows in the said suit :-

(a) That the plaintiffs members who had prior to the institution of the proceedings herein commenced construction of their business structures/buildings at the said Kongowea Market be allowed to complete the same on the basis of as is where is.

(b) That those members of the plaintiff who have not yet commenced construction of their proposed structures/buildings should only do so upon approval of building plans by the second defendant.

(c) That the plaintiffs to pay the requisite or applicable ground rent to the Second Defendant.

(d) That payment of such ground rent to become effective on the 1st day of January, 2000.

(e) That a lease/tenancy be provided for.

(f) That the plaintiffs and the second defendant to agree tenancy and which lease/tenancy should be duly executed on or before the 1st day of January 2000.

(g) That in the event of the second defendant being desirous of repossessing any portion of the whole of its land and upon which the plaintiffs have erected their structures/buildings, the second defendant should/is to fully compensate the plaintiffs or any of them, as the case may be, for the costs of the same.

3. The plaintiffs plead that they acted on the said representation by completing structures at Kongowea market at their own cost, and effective 1 January 2000, paid and continue to pay the requisite ground rent. They aver that in breach of the orders, the defendant refused to issue formal leases; that the defendant has continued to receive ground rent without providing a formal lease; that the defendant has attempted to unlawfully obtain possession of the premises without fully compensating the plaintiffs; and that the defendant has failed to undertake a valuation of the premises. In the suit, the plaintiffs ask for the following orders :-

(a) A declaration that the defendant's actions of evicting the plaintiffs from the suit properties, demolishing, evicting or otherwise interfering with the plaintiffs' structures and quiet possession of the suit properties being the privately owned permanent structures situate on the right hand side of the motor vehicle entrance of the Kongowea Public Market on one side and on the north eastern gate of the market on the second side is illegal.

(b) A declaration that the defendant's actions of evicting the plaintiffs from the suit properties, demolishing, or otherwise interfering with the plaintiffs' structures without giving a lawful notice and compensating the plaintiffs in accordance with the consent agreement entered in HCCC Judicial Review Application Misc. Civil Cause No. 71 of 1998, Lawrence N. Maranga & 12 Others vs The Attorney General and Municipal Council of Mombasa is unlawful.

(c) A permanent injunction restraining the defendant from evicting the plaintiffs from the suit properties, demolishing, or otherwise interfering with the plaintiffs' structures all the suit properties being the privately owned permanent structures situate on the right hand side of the motor vehicle entrance of the Kongowea Public Market on one side and on the north eastern gate of the market on the second side without giving a lawful notice and fully compensating the plaintiffs the value of the structures at the prevailing market value.

(d) Costs.

4. The defendant entered appearance and filed defence. The defence denies all the averments in the plaint. The defendant also filed two witness statements, one by Shadrack Mutuku Ndambuki the retail markets superintendent, and the other by David Onyango Muga, the Deputy Director, Trade. The statement of Mr. Mutuku inter alia avers that a notice had been issued to traders located in Kongowea market to demolish or remove their structures to pave way for the construction of an emergency access road. The statement of Mr. Muga is also more or less along the same lines.

5. It will be recalled that in this application, the plaintiffs want the defence struck out and judgment to be entered in their favour. The applicants in their suit have mentioned that they had an agreement with the predecessor of the defendant which was entered by consent and it is their case that the defendant has breached that agreement by demolishing or threatening to demolish their structures. This of course has been denied by the defendant and it is apparent that the defendant is preparing to go to trial.

6. I do not think that the defence of the defendant can be considered a sham and I do not think that the defendant ought not to be given an opportunity to ventilate that defence. It appears as if they wish to raise a defence that they did give notice to the plaintiffs, and to me, that is a defence that raises triable issues. It would be drastic to strike out the defendant's defence without giving the defendant a chance to be heard and a chance to ventilate that defence. This is a proper case for each party to present evidence before the court can determine the matter.

7. I therefore decline to allow the application and proceed to dismiss it. I however make no orders as to costs as the defendant did not attend to oppose it.

8. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA