



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 10 of 2009

ABDI ADAN HUSSEIN 1ST PLAINTIFF
SHIRE MAALIM OSMAN 2ND PLAINTIFF
IBRAHIM ABDULAH KALIF 3RD PLAINTIFF

=VERSUS=

THE ATTORNEY GENERAL 1ST DEFENDANT

THE COMMANDANT NATIONAL

YOUTH SERVICE 2ND DEFENDANT

R U L I N G

The application before me seeks to strike out the defence, and to have Judgment entered in favour of the Plaintiffs .

It is the Plaintiffs' contention that the defence constitutes mere general denials of the Plaintiffs' claim. The reason for that contention is that the Plaintiffs are the registered proprietors of the land in issue, which they acquired through public auction. Having purchased the land at a public auction which was conducted at the instance of the chargee, the Plaintiffs assert that they were bona fide purchasers for value, without any notice of any irregularity.

The Plaintiffs also asserted that the Defendants had conceded that they were using the Plaintiffs' land.

In the circumstances, Plaintiffs believe that the defence on record was a sham, that was frivolous and vexatious. As the defence was perceived to constitute an abuse of the process of the court, the Plaintiffs invited the court to strike it out.

It appears to be common ground that the land in issue was at some point in time registered in the name of LEBERIO FARM LIMITED.

That company charged the title to the KENYA COMMERCIAL BANK LIMITED (hereinafter cited as “KCB”).

The Plaintiffs assert that LEBERIO FARM LIMITED (hereinafter cited as “LEBERIO”) failed to

repay the loan it had obtained from KCB. In those circumstances, KCB instructed auctioneers, named WAGLY AUCTIONEERS, to sell the charged property by public auction.

It is the Plaintiffs' case that the public auction was conducted on 19th December, 2007, and that the Plaintiffs purchased the suit land for Kshs 2,500,000/=.

Thereafter, on 28th July, 2008, the Plaintiffs were duly registered as the new proprietors of the suit land, L.R. No. ELDORET MUNICIPALITY/BLOCK 15/2089. Having been thus registered as the proprietors, the Plaintiffs assert that they became the absolute owners of the suit land.

However, the Defendants emphasize that they had all times been the legitimate owners of the suit land. As far as they were concerned, LEBERIO never acquired any legitimate title to the land. Any title which LEBERIO may have acquired was termed as null and void. Therefore, the charge registered in favour of KCB or the auction conducted pursuant to the alleged default by the chargor, (LEBERIO), were deemed to be null and void.

The Plaintiffs pointed out that the allegations of fraud were attributed to LEBERIO, not the Plaintiffs. The Plaintiffs also emphasized that there were no assertions made by the Defendants, that the Plaintiffs knew of the alleged irregularities attributed to LEBERIO.

In any event, noted the Plaintiffs, neither KCB nor LEBERIO were parties to this suit. Therefore, they could not be condemned unheard. If the Defendants wished to make allegations against either LEBERIO or KCB, the Plaintiffs submitted that the said two companies should have been enjoined to this suit, by the Defendants.

In any event, the Plaintiffs believe that the suit land was never available for allotment by the Commissioner of lands. It had already been alienated. Therefore, the purported allotment by the Commissioner of lands was said to have been a nullity.

Furthermore, when the Commissioner appreciated his mistake, he immediately cancelled the allotment to the 2nd Defendant. Therefore, submitted the Plaintiffs, the Defendants claim of ownership, which is founded on the allotment, was a nullity.

In any event, even when there was an allotment, the party claiming to be the beneficiary thereof is supposed to proceed to procure registration, if he is to claim title to the land in question. The Plaintiffs submitted that because the Defendants have not demonstrated that they have any registered title, their defence should be struck out.

If the Defendants have no registered title, the Plaintiffs insist that the only legitimate route through which they could seek to assert their claim to ownership, would be through a suit challenging the proprietorship of the Plaintiffs.

In answer to the application, the Defendants submitted that the Plaintiffs failed to make available any evidence to prove that the Commissioner of Lands had realized that his allotment of the suit land, to the 2nd Defendant was erroneous.

The contention by the Plaintiffs that the Commissioner concluded that he had erroneously allotted the suit land to the 2nd Defendant, was said to be inadmissible hearsay.

As far as the 2nd Defendant was concerned, they did not acquire title pursuant to the allotment dated 8th March, 2007, as suggested by the Plaintiffs.

It is their contention that from as far back as 7th October, 1987, the suit land had been alienated and reserved as a National Youth Service Camel. In support of that contention, the Defendants exhibited a Part Development Plan.

In my considered view, if the Defendants are able to prove their contention, about the date from when the suit land was first alienated and reserved to the National Youth Service, as being 1987, then it would imply that the submissions founded on the Plaintiffs' contention about alienations made in 2007 would be without foundation.

The Defendants assert that the National Youth Service has been in actual occupation of the suit land for over 20 years.

If that is true, it would mean that even when LEBERIO had acquired the title to the land, the 2nd Defendant was in occupation. It would also mean that LEBERIO never tried to take possession of the suit land from the 2nd Defendant.

But we may never know that for a fact, unless and until LEBERIO is given an opportunity to respond to the said assertions.

Similarly, the Court may be unable to make conclusive findings of fact as to the assertions concerning the legality of the charge registered by LEBERIO, in favour of KCB, unless the latter is given an opportunity to respond to allegations directed at them.

As LEBERIO and KCB are not parties to the suit, is that sufficient ground to strike out the defence which asserts that the title which they dealt with was a nullity?

To my mind, the answer to that question is in the negative. I say so because, as the Plaintiffs have suggested, it is always possible to have those companies given an opportunity to be heard, before the court makes a decision which may impact on their rights and interests. My said view is fortified by the decision in D.T. DOBIE & COMPANY (K) LIMITED -VRS- JOSEPH MBARIA MUCHINA, CIVIL APPEAL NO. 37 OF 1978, wherein it was held as follows:-

“ No suit ought to be summarily dismissed unless it appears so

hopeless that it plainly and obviously discloses no reasonable

cause of action and is so weak as to be beyond redemption

and is incurable by amendment. If a suit shows a semblance

of a cause of action, provided it can be injected with real life

by amendment, it ought to be allowed to go forward, for a court

of justice ought not to act in darkness without the full facts of a case before it.

... a court of justice should aim at sustaining a suit rather

than terminating it by summary dismissal. Normally, a law
suit

is for pursuing.”

Although that holding was in relation to applications for summary judgment, I find that it has an equal application to a case in which the Plaintiff seeks to strike out the defence.

It is my considered opinion that there is considerable force in the argument that if the title which gave rise to the auction was null and void, everything that flowed from it may well be a nullity. In other words, the defence before the court is not, on a prima facie basis, a sham. It raises a triable issue of fact.

This court needs to give to the parties before it, together with any other person, or persons whom they or any of them may seek to have enjoined to the suit, an opportunity to demonstrate the history of the ownership of the suit land. It is only then that the court will be in a position to make an informed decision on the real issues between the said parties.

Accordingly, the application by the Plaintiffs, to strike out the defence is rejected. However, as the application has provoked issues which may require the Defendants to take further steps in the case, I find that the ends of justice will be met by an order that each party should meet his own costs of this application. Therefore, each party will meet his own costs of the application.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 17 TH DAY OF APRIL, 2013.

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FRED A. OCHIENG

JUDGE.