



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Environmental & Land Case 104 of 2008

SOPHIA MUTIO MUTUA..... PLAINTIFF

VERSUS

PETER MUHIA NG'ANG'A.....1ST DEFENDANT

THE HONOURABLE THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The Plaintiff filed suit herein by way of a Complaint dated 12th February 2008 in which she claimed that she obtained a Certificate of Lease for the parcel of land described as NAIROBI/BLOCK 82/5874 (hereinafter referred to as the suit property), on 23rd October 1997 for a period of 99 years. Further, that she subsequently discovered that the 1st Defendant had fraudulently caused the 2nd Defendant to register the said lease in his name. The Plaintiff thereupon sought orders that the 2nd Defendant cancels the said lease and the 1st Defendant be held liable to pay damages for the loss suffered by the Plaintiff.

The 1st Defendant filed a Defence dated 17th September 2009 denying the Plaintiff's claim. He averred that the Plaintiff had no proprietary interest in the suit property and was a nominee of the rightful owner of the property, one Fredrick Mutua Mutoko, from whom he had acquired the suit property. The 2nd Defendant had also earlier on filed a Defence dated 24th April 2008, denying the Plaintiff's claims and putting her to strict proof thereof.

The Plaintiff has filed a Notice of Motion dated 25th February 2013 seeking orders that the court strikes out the 1st Defendant's Defence dated 17th September 2009, and enters judgment for the Plaintiff in terms of the Complaint dated 12th February 2008. The said Notice of Motion is the subject of this ruling. The grounds for the Notice of Motion is that the said Defence discloses no reasonable defence, is scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action and is an abuse of the process of court. Further, that the Plaintiff's proprietary interest is vindicated by a title deed issued in her name, and the averment that she is a mere nominee is a sham and afterthought. She also states that the transfer that vested the property in the 1st Defendant was procured through fraud.

The Plaintiff explained in the supporting affidavit she swore on 22nd February 2013 that she obtained a leasehold interest in the suit property in 1997. However, that upon conducting a search in July 2007 she discovered that the same had been transferred without her knowledge to the Defendant. She attached copies of a certificate of lease issued to her on 23rd October 1997 and of a certificate of official search dated 4th July 2007.

The Plaintiff further stated that upon inspection of the file for the suit property at the registry she discovered that she had purportedly executed a transfer to the 1st Defendant, which was attested to and endorsed by an Advocate by the name of Paurvi Rawal. The Plaintiff denied executing the said transfer in respect of the suit property, or being a nominee for the said Fredrick Muta Mutoko mentioned in the 1st Defendant's Defence. Further, that Paurvi Rawal Advocate has denied having attested to and endorsed the aforementioned transfer as shown in a copy of her letter dated 12th February 2013 which was annexed together with the purported transfer.

The Plaintiff also annexed a letter from the Law Society of Kenya dated 1st February 2013 stating that there is only one Advocate in their records by the name Paurvi Ramesh Rawal. The Plaintiff averred that it is manifestly clear that the transfer that vested the property in the 1st Defendant was procured through fraud and is of a criminal nature.

The counsel for the 1st Defendant opposed the Plaintiff's Notice of Motion in grounds of opposition dated 5th March 2013 and filed with the court on 6th March 2013. He stated that the Plaintiff's Notice of Motion was misconceived, bad in law, was frivolous, vexatious and abuse of the court process and had no legal basis. Further, that the suit herein cannot be tried by affidavit as the issues raised in the said Notice of Motion can only be determined by visa voce evidence. Additional grounds of opposition raised were that the 1st Defendant is the registered owner of the suit property whose proprietary cannot be challenged without involving the Government organs that registered the title, and that the 1st Defendant's defence raises serious issues that would warrant the suit to go to hearing.

Counsel for the Plaintiff and 1st Defendant agreed to proceed with the prosecution of the application by way of written submissions. The Plaintiff's counsel in submissions filed in court dated 22nd March 2013 relied on the provisions of sections 24(b), 27 and 126 of the Registered Land Act (since repealed) to argue that registration in the Plaintiff's name vested in her all the leasehold interest described in the lease, and that where a registered proprietor is meant to be a fiduciary, there has to be an instrument showing so and the title must show that he or she has been registered as trustee.

The counsel also relied on the Court of Appeal decisions in **Coast Projects Limited vs M.R Shah Construction (K) Limited (2004) 2 K.L.R. 119** and **D.T. Dobie Company Kenya Limited v Muchina (1982) K.L.R. 1** to submit that the Defence is a sham, a mere denial and raises no reasonable cause of action. Counsel also cited the Black's Law Dictionary and the decision in **County Council of Nandi v Ezekiel Kibet Ruto and 6 Others (2013) e KLR** respectively on the meaning of a sham Defence being a false defence, and on the meaning of scandalous frivolous and vexatious pleadings. Lastly, the counsel submitted that the Plaintiffs allegations have been proved and are not controverted by the 1st Defendant, and that Order 2 Rule 15(2) allows for an application such as the present one to be decided by way of affidavit evidence so long as the grounds are stated concisely. Further, that the Attorney General is a proper party to this suit.

The 1st Defendant's counsel filed written submissions dated 27th March 2013 and relied on the decision in **Wachira Waruru & Another v Francis Oyatsi, Civil Appeal No.11 of 2000** to argue that striking out a defence should be done in plain and obvious cases. He denied that the 1st Defendant's Defence was a sham, frivolous or vexatious as it was not false and had legal merit. Counsel also submitted that Order 2 Rule 15 of the Civil Procedure Rules does not envisage evidence where a party is seeking to have a pleading struck out for disclosing no reasonable cause of action or defence.

It was further submitted by the counsel that this case does not qualify for summary judgment, and that the entry of judgment sought was premature under Order 10 of the Civil Procedure Rules. Finally, it was argued for the 1st Defendant that allegations of fraud cannot be proved by affidavit evidence, and that the issue of the title being issued to the 1st Defendant needed to be canvassed and he needed to be accorded his constitutional right to be heard.

I have read and carefully considered the pleadings, evidence and submissions made. The first issue to be

decided is whether the 1st Defendant's Defence is amenable to striking out. The second issue is whether summary judgment can be entered in favour of the Plaintiff.

On the first issue, the law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) and (2) provides that:

“(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 to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made. ”

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1 as follows at page 9:-

“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 incurable by amendment. If a suit shows a mere 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.”

The Plaintiff states that the grounds for striking out the Defence are shown by the fact that she had a title deed issued in her name and the averment that she was a mere nominee is a sham. The 1st Defendant's Defence on the other hand is that he acquired the property from a named person on whose behalf the Plaintiff held the property as nominee.

The arguments as to the effect of the Plaintiff's prior registration as proprietor of the suit property, and the circumstances in which the said property was subsequently registered in the 1st Defendant's names particularly the allegations of fraud in this respect are legal and triable issues, that can only be disposed of after further evidence has been canvassed at a full trial. While it is the case that these are grounds that can also be shown by way of affidavit evidence under Order 2 Rule 15, it is not plain and obvious at this stage that the 1st Defendant's Defence is frivolous or vexatious. The 1st Defendant's also needs to be given the opportunity to present his evidence, as his Defence was filed under the repealed Civil Procedure Rules which did not require him to present the evidence he was relying on at the time of its filing.

The court cannot also at this stage without the benefit of further evidence determine whether the 1st Defendant's Defence is a sham or not. A finding that a Defence is a sham or false is a value judgment that can only be made after carefully examining the different arguments and evidence presented by the opposing parties. The Plaintiff's prayer for striking out of the 1st Defendant's Defence is therefore denied for these reasons.

On the second issue whether the prayer for summary judgment can issue, Order 36 Rules 1 and 2 of the

Civil Procedure Rules provide as follows:

1. (1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

In Richard H. Page and Associates Ltd vs Ashok Kumar Kapoor (1976-80) 1 KLR 1394 it was held by Chesoni J. (as he then was) that the ordinary time for making an application for summary judgment is after the Defendant has appeared, and when the defence has not been filed, but such an application may be made after the defence has been filed, in which case the Plaintiff must satisfy the Court that the delay is justifiable. It was also held by the Court of Appeal in Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695 that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure.

Summary judgment is therefore not available in this case for two reasons, the first is that both the 1st and 2nd Defendants' Defences are still on record and will need to be canvassed, and secondly, the Plaintiff's claim does not qualify as one in which summary judgment under Order 36 Rule 1 of the Civil Procedure Rules can apply as she is not a landlord claiming recovery of land from a tenant.

The Plaintiff's Notice of Motion dated 25th February 2013 is therefore hereby disallowed for the reasons given in the forgoing.

The costs of the Notice of Motion shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ___29th___ day of ___May___, 2013

**P. NYAMWEYA
JUDGE**