



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION
ELC NO. 100 OF 2007

SAMVO LIMITEDPLAINTIFF/APPLICANT

VERSUS

**DELTA HAULAGE SERVICES
LIMITED.....DEFENDANT/RESPONDENT**

RULING:

The Applicant herein **Samvo Limited Company** has brought this application dated 5/11/2012 against the Defendant (Respondent) **Delta Haulage Services Ltd**, seeking various Orders. The application was premised under **Section 1A, 1B, and 3A of the Civil Procedure Act, Cap 21 and Order 36 of the Civil Procedure Rules**. The Applicant sought for these orders:-

- a. That Summary Judgement be entered for the Plaintiff against the Defendant and the Plaintiff be entitled to recovering of the Land Parcel known as NO 2/75 (Original 2/35/2), Ndemi Road, which the Plaintiff acquired under conveyance, dated 8th June 1998 from Swarana Devi Vohra
- b. That the Defendant by itself, its officers, agents, servants, workers or otherwise, if in occupation of the Plaintiff Land Parcel **No. 2/75, Ndemi Road**, do remove themselves forthwith from the premises at their own cost, failure which the Plaintiff to forcefully remove them at the Defendants expense.
- c. That the Defendant by itself, its officers, agents, servants , workers or otherwise be restrained , unless lawfully allowed by the Plaintiff or any lawful order from entering upon or approaching the Plaintiff's Land Parcel, Ref No. 2/75, Ndemi Road.
- d. Cost of the application and suit be paid to the Plaintiff.

2. The application was supported by the grounds on the face of the application. These grounds are:-

The Plaintiff herein was filed on 31/1/2007 and the Defendant filed Defence on 6/3/2007 .That the Plaintiff was a purchaser for value of the property for land parcel no. 2/75, Ndemi Road. The Plaintiff is the recognised owner and rate payer to the City Council of Nairobi since it acquired property. The Plaintiff pleaded that Defendant is a trespasser upon the Plaintiff's property.

That the Director of Surveys has confirmed that Deed Plan No. 30098 held by the Plaintiff is genuine and Deed Plan No. 228698 uttered by Defendant and his Grant IR 10382 is dubious as it does not appear in their records. That the Defendant does not have any valid Defence to the Plaintiff's claim and the Defendant is a trespasser and summary judgement should be entered against it and an eviction order

issued against the Defendant, their agents, servants or workers.

3. The application was also supported by the affidavit of **Jagit Singh Ahluwala** who is a Director of the Plaintiff. He averred that the Plaintiff is entitled to summary judgement as the Defendant has no plausible Defence to the Plaintiff's claim. The deponent referred to several annexures to his application. The application herein was not opposed as the Defendant did not file their Replying Affidavit. When the suit was filed, the Defendant herein was represented by the firm of Wetangula, Adan Makokha & Co. Advocates who filed the defence on 6/3/2007 (from the Plaintiff's annexures). It is also evident the file went missing and the same was reconstructed through an application dated 4/9/2007.

However, on 13/2/2013, the Firm of Gakoi Maina & Co. Advocates filed a Notice of change of Advocates. Neither the Firm of Wetangula, Adan & Makokha Advocates nor Gakoi Maina & Co. Advocates filed any Replying Affidavit herein. The application was therefore not opposed.

4 Even if this application is not opposed, is the same merited?. Briefly, this is the background of this case:- the Plaintiff vide Plaint dated 31st January, 2007 and filed in court on even date, instituted this suit against the Defendant herein. The Plaintiff sought for these orders:-

- a. A declaration that the Plaintiff is the registered proprietor in fee simple of the land Reference No. 2/75 since 22/12/1999, having acquired it under a conveyance dated 8th June 1998, from **Swarana Devi Vohra**.
- b. The Defendant by itself, its officers, agents, servants, workers or otherwise be restrained from wasting, damaging, alienating or occupying the Plaintiff's Property, Land Registration No. 2/75, Ndemi Road.
- c. The Defendant by itself, agents, servants, workers or otherwise if in occupation of the Plaintiff's land registration No. 2/75 Ndemi Road Nairobi, do remove themselves forthwith from the premises at their own cost failing which the Plaintiff to forcefully remove them at the Defendants expense.
- d. The defendant and its officers be restrained from entering the suit property.

5. The Defendant filed their Statement of Defence on 6/3/2007 and denied the averments contained in the Plaint. The Defendant alleged that he has a better title and is registered proprietor pursuant to a letter of allotment dated 1st July, 1999 issued to one Ali Mohammed Egal by the Commissioner of Lands. The Defendant denied trespassing on the Plaintiff's land and alleged the suit premises belonged to it. Defendant also denied that Plaintiff is the owner of the suit premises and it also denied any forgery, falsification and misrepresentation as alleged by Plaintiff. Defendant accused plaintiff of fraud and forgery. There was allegation by the applicant that the file went missing. Indeed the file that the Court is dealing with is a reconstructed file. There is also evidence that applicant herein had filed an application to strike out the Defendants Defence for non-compliance with *Order X Rule 20 of the Civil Procedure Rules*. The same was dismissed by Ang'awa Judge on 8th May 2008.

There is no evidence of any other action on the file until when this instant Application was filed on 6/11/2012.

6. I have considered the instant Application, the pleadings and the annexures therein and I make the following findings. The Application is premised upon order 36 of the Civil Procedure Rules which reads as follows:-

"In all suits where the plaintiff seeks judgement for

- a. A liquidated demand with or without interest of,
- b. The recovery of land with or without 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 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 judgement for the amount claimed or part thereof...**

The provisions of order 36 rule 1(a) & (b) are thus invoked in two instances.

- i. Where the Defendant has Entered Appearance
- ii. But has not yet filed Defence.

The purpose of Order 36 is therefore to allow a Plaintiff who has a straight forward case and in which the Defendant cannot possibly raise a bonafide defence to obtain a summary judgement. Such action therefore save on the delay and expense that would ordinarily follow if the Defendant was allowed to defend the claim. In the case of **Cooperative Bank of Kenya Ltd Vs Lake Publisher and Enterprises Ltd and 3 others, Kisumu High Court Civil Case No. 127 of 1998, Warsame Judge (as he then was) held that:-**

“ The purpose of Summary judgement is to eliminate delays in an action filed by a party, so that he can enjoy the fruits which are due and to allow a person to enjoy his property for there is no triable issue in his part”

The Application under Order 36 therefore takes effect upon the filing of an Appearance by the Defendant but before the Defendant files a Defence. This application is available immediately the Defendant Enters Appearance. If the Defendant has filed his Defence, then the proper procedure would be an application to strike out the defence for being a **sham** or **frivolous**. In the instant case, the Defendant herein, filed his defence on 6/3/2007. I would therefore find that the proper application would have been an application for striking out the Defence for being a **sham** or **frivolous** but not summary judgement.

7. The Defendant herein, filed a Defence and denied the allegations contained in the Plaint. There is also evidence that Defendant has a ‘title’ to the suit land and so does the plaintiff. The Defence therefore raises triable issues and it cannot be ignored. As was held in the case **of Mugambi Vs Gatururu (1967) EA 196 .**

“ Where a defence has been filed, the Court cannot ignore it in an application for summary Judgement”.

Again in the case of **Karen Enterprises Ltd Vs Lawrence Musango Oketch & Others , Kisumu High Court Civil Case No. 59/2005, Warsame Judge (as he then was) also held that:-**

“ Summury Judgement cannot be entered unless the matter is plain and obvious as a party to litigation is not to be deprived of his right to have his case tried and determined through proper trial”.

In the instant case there is a Defence on record, which was filed on 6/3/2007. The said Defence raises triable issues which now ought to go for full trial.

8. The application was premised upon Section’s 1A, 1B and 3A of the Civil Procedure Act. Section 1A, deals with the **overriding objectives**, of the Act and Rules. Such objectives are the **just** and **expeditious** disposal of civil disputes . It is also the duty of the court to ensure **timely disposal** of the proceedings in court. Section 3A also gives the court *inherent power to make such orders that are necessary for ends of justice and to prevent abuse of process of the court.*

In the instant case, I find that the ends of justice would best be served if all the parties herein are given an opportunity to have their day in court and ventilate their issues. It will not be in the interest of justice to condemn any party unheard. The parties in litigation have a duty also to assist the court to achieve the overriding objectives. The parties herein should strive to ensure that this matter is disposed off expeditiously given that we are now dealing with a reconstructed file. The letter dated 7th of March, 2012 from the Ministry of Lands, that the Applicant counsel relied on to bring this application could only be used as one of the plaintiff’s exhibit in support of its case.

9. Having now considered the Notice of Motion dated 5/11/2012 in totality, the Pleadings therein and the

relevant law, the Court finds that though the same is not opposed, it is not merited.

The Applicant's Notice of Motion dated 5/11/2012 is dismissed with costs in the cause.

- It is so ordered.

Dated, Signed and delivered this 14th day of June 2013.

L. N. GACHERU

JUDGE

In the presence of:

Mr. Onindo holding brief Mr Mwenesi for the Plaintiff

None attendance for the Defendant

Anne: Court Clerk.

L. N. GACHERU

JUDGE