



THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS KENYA REGISTERED TRUSTEES.....PLAINTIFFS/APPLICANTS

VERSUS

FRANCIS NZIOKA NTHENGE & 13

OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The Application before the Court is the **Notice of Motion** dated **24/02/2010** (“Application”). In the main, it seeks orders that the Statement of Defence and Counterclaim by the 1st through 7th and 11th Defendants (hereinafter simply “Defendants”) be struck out; and that, consequently, judgment be entered for the Plaintiff as against these Defendants. The Application is supported by the Supporting Affidavit of **Hesbon Otieno Usi** sworn on **24/02/2010** (“Supporting Affidavit”).
2. The Application is opposed by the Defendants. In opposition, they have filed three Repeating Affidavits – one each by **Francis Nzioka Nthenge**, **Willy Musembi Kimeu**, and **Tabitha Mbithe**. They are all dated **8th September, 2010** and were filed on **9th September 2010**.
3. The Application was scheduled to be heard on **03/11/2010**. On that day, the parties’ attorneys appeared before *Justice Waweru*. The parties agreed to argue the application by way of written submissions. The court ordered the parties to file and exchange Written Submissions within **30 days**. **Mrs. Waitende, advocate** for the Plaintiff, also made an oral application to amend the Application to indicate that it is only brought under **Order 35, Rule 1(1)(b) & 2** of the **Civil Procedure Rules**. There being no objection from the advocate for the Defendants, the oral application was allowed. The Application before the court then is that dated **24/02/2010** as amended orally in court on **03/11/2010**.
4. The parties also agreed to canvass the Application by way of Written Submissions. They duly filed their Written Submissions which was confirmed by **Justice Kihara Kariuki** on **18/05/2011**. **Justice Kihara Kariuki** was, however, unable to give his ruling before he left the station. The matter was mentioned before me on **25/11/2011**. **Mr. Njeru** was present for the Plaintiff with no appearance for the Defendants. At **Mr. Njeru’s** request, the Court directed that the ruling will be given based on the record as it then stood.
5. This Application, if successful, will be dispositive of the case. It therefore behooves the Court to exercise utmost vigilance in analyzing the uncontested facts and law before pronouncing on the Application. The Court is guided by the admonition of the Court of Appeal in the case of *D.T. Dobie & Company (Kenya) Ltd vs Muchina* (1982) KLR 1, that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the pleadings are beyond redemption. Where a reasonable cause of defence is disclosed, it would be improper to strike out a defence. As Madan JA (as he then was) put it in the *Muchina case* (supra):

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.

6. The facts of this case are hardly complicated. The Plaintiff is the registered owner of the property referred to as L.R. No. 337/1632 situated in **Mavoko Township of Machakos District** (hereinafter, “Suit Property”). A copy of the Certificate of Title (“Title”) is annexed to the Supporting Affidavit. The Title shows that the Suit Property was first granted to **Trupki Limited** on **14th June, 1994** on a lease for **99 years** beginning on **1st July, 1979**. The Title also shows that the Suit Property was transferred to the Plaintiffs vide an instrument registered on **9th March, 2006**.

7. The Defendants do not challenge that the title was issued by the Commissioner of Lands (See paragraph 3, Statement of Defence). Instead, they deny that it has any legal validity because, they assert, it was acquired “illegally, unlawfully and without following due process.” (Paragraph 3, Defence). Later on, in their Intended Amended Statement of Defence and Written Submissions, the Defendants allege that the title was acquired fraudulently. I will return to these allegations shortly.

8. The Plaintiff’s case is, therefore, straightforward: as the registered, *bona fide* owners of the Suit Property, they seek a declaration that it is the owner of the suit property and the concomitant incidences of ownership: vacant and peaceful possession. The Plaintiff also prays for an order for eviction against the Defendants.

9. In their Defence, the Defendants raise two issues:

a. First, they question the validity of the Plaintiff’s title;

b. Second, they claim ownership of the Suit Property through:

- i. Adverse possession
- ii. Prescription
- iii. First occupation and/or
- iv. Ancestral Lands

10. In the Written Submissions, the Defendants seem to raise a fifth basis for entitlement of the Suit Property – namely that it is Trust Land to which they are entitled to occupation.

11. Against this backdrop, the Plaintiff filed the instant Application. It is the Plaintiff’s case that the Defence is a sham and does not raise any triable issues which warrant a full trial. The Plaintiff also argues that the counterclaim discloses no reasonable cause of action. Hence, the Plaintiff argues, both the Defence and Counterclaim should be struck out.

12. Naturally, the Defendants have strenuously opposed the Application. Their position is that there are weighty and contested issues raised by the Defence and Counterclaim that should await a full trial for ventilation and resolution.

13. What are the contested issues which the Defence and Counterclaim raise which warrant a full trial? It is appropriate to let the Defendants’ advocate speak for them directly on this. He summarizes the triable issues thus:

...[I]s it alright for unscrupulous individuals to join hands with government employees and issue certificates of title in disregard of those already in occupation of land?

Was the right procedure followed by the plaintiff to acquire the certificate of title they now exhibit before court?

History has taught us that some of the sections we find in our laws were imported into African minds and

thoughts to safeguard what has been taken by the gun. Is it right to continue following such sections of the law without question even when it is very clear such laws are adverse to the rightful owners of the land in issue?

Can trust land held by the government or municipal council as in this case be given out to 3rd parties in disregard of those already in occupation?

Is the doctrine of prescription and first occupation available to the defendants?

14. This is from the Defendants' counsel's written submissions. It seems the Defendants' arguments can be grouped into three:

- a. First, they question the validity of the title to the Suit Property; assert that it was unprocedurally issued; and, finally, assert that the Plaintiff was privy to the fraud and illegality;
- b. Second, they raise the legal argument that trust land could not be "given out" to third parties in disregard of those already in occupation; and
- c. Third, they make a claim for the property based on sundry doctrines. They seem to interchange the doctrine of prescription with that of adverse possession.

15. I will analyze these arguments now. First, the Defendants question the validity of the title. They do not say so directly, but two triable issues would be implicated here. One, the Defendants impugn the procedure followed in granting the title. Two, they allege fraud and collusion on the part of the Plaintiff. I should pause here to note that while the Defendants expressly alleged illegality in their Defence, they merely alluded to fraud and did not particularize the alleged fraud as required by **Order 2, rule 10**. The Defendants have now filed an application seeking to amend their Defence to, among other things, particularize the alleged fraud. I do not, however, believe that even their Intended Amended Defence is successful in this regard. Other than to make general allegations that there was impropriety and collusion, the Defendants offer little particulars on what fraud they believe happened to which the Plaintiff was privy. It seems, their main complaint is that since they were in occupation, the Plaintiff should never have purchased the land from the original grantee. Unfortunately, there is no legal basis for this just as there is no factual basis for their allegation that the Plaintiff colluded with government employees to "grab" land.

16. The "particulars" of fraud which the Intended Amended Defence contains are, really, no particulars of fraud – at least as far as the Plaintiff's alleged conduct is concerned. They generally allege that the Defendant was fraudulent because it should not have dealt with the property knowing the Defendants were in occupation. With respect, this cannot be the legal position. Mere occupation of land, without more, triggers no legal rights except under the doctrine of adverse possession which I will discuss shortly. It is no fraud to purchase land from the registered owner thereof and to transfer it to oneself even if one is aware of the presence of third parties on the purchased land. It is often unwise to do so because of the legal and social costs one might incur; but it is not fraudulent at all.

17. Both in their Written Submissions and documents filed in Court, the Defendants claim that the Certificate of Title was issued illegally. If allowed to go to full trial, they promise, they will demonstrate that the title is void. This allegation is not enough to transform their case into a triable one. This is especially in light of **section 23** of the **Registration of Titles Act (Chapter 281, Laws of Kenya)** and the weight of judicial authorities interpreting that section. See *Wreck Motor Enterprises v The Commissioner of Lands & 3 Others* (Nairobi Civil Appeal No. 71 of 1997 (unpublished)) and *Nairobi Permanent Markets Society vs Salima Enterprises and Others* (1995-98) 1 E.A. 232).

18. **Section 23** of the **RTA** provides:

The Certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as

proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

19. The Plaintiff urges me to allow the Application on the basis of this statutory law and existing case law. The Plaintiff has established, and it is undisputed that it purchased the Suit Property from **Trupki Limited** on or about **August 2005** and was registered owner thereof on **9th March, 2006**. The Plaintiff also argues that the Defendants do not challenge the Plaintiff's proprietorship on the grounds of fraud or misrepresentation. The Plaintiff relies on *Wreck Motors* (supra), which, in material part held:

The pleadings do not disclose any fraud.... In such event, therefore, the Second Respondent is a *bona fide* purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctifies the title...

20. The Defendants response to this is that the Intended Amended Defence now discloses fraud on the part of the Plaintiff. As I have discussed above (see paragraphs 15 and 16 above), I have rejected this position. I am of the view that even if the Defendants were to be permitted to amend their Defence as intended, as particularized, the facts do not disclose fraud on the part of the Plaintiff even assuming the facts in a light most favorable to the Defendants.

21. What about the Defendants' cause of action based on prescription, adverse possession, and/or ancestral rights or first occupation? I have, reluctantly, come to the view that the Defendants' counterclaim in this respect does disclose a reasonable cause of action. I have assumed that the Defendants really mean "adverse possession" every time they speak of "prescription." Prescription is a method of acquiring an easement upon another's land. What the Defendants claim, though, is not just an easement but the right to own the land. The doctrine of adverse possession is, therefore, probably what they have in mind. I am not sure that the Defendants' can sustain any claims based on "ancestral lands" and doctrine of first occupation. However, all the Defendants have to do to be entitled to trial is to demonstrate one triable issue. In my view, that triable issue is whether they are entitled to the Suit Property by virtue of the doctrine of adverse possession. I will briefly explain why below.

22. Adverse Possession is a method of acquiring title to property through the possession of the property for a stipulated statutory period – twelve years for Kenya. It is the exclusive, continuous, uninterrupted, visible and notorious entry onto, and possession of the land of another for the statutory period.

23. In Kenya, for the adverse possession to ripen into ownership, the person claiming adverse possession must show;

- a. That there was actual possession;
- b. That the possession was hostile i.e. inconsistent with the rights of the true owner of the property;
- c. That the possession is open and notorious;
- d. That the possession is exclusive;
- e. And that the possession has been continuous for the statutory period of twelve years.

24. It does not appear that, in Kenya, one need have any colour of title to succeed under a claim for adverse possession.

25. While I cannot credit the Defendants' Defence or Intended Amended Defence as a marvel of precision in pleading, I cannot say that the Defendants have not properly pleaded adverse possession. They aver that they have been in open, continuous and uninterrupted use and occupation of the Suit Property for over **30 years**. That, right there, is a basis for a claim of adverse possession. It is true that the Plaintiff

denies any such possession by the Defendants for that period of time. Yet, this only puts the issue squarely in the category of triable issues.

26.The Plaintiff also seeks to rebut the claim of adverse possession with the argument that that claim cannot lie against the Plaintiff since the Plaintiff was only registered as owner of the property in **2006**. I note, however, that the Suit Property was registered and **Certificate of Title** issued in **1994**. A proper claim for adverse possession can lie from **1994**. In law, it matters not, that the Plaintiff purchased the property in **2006**. The Plaintiff is taken, at law, to have purchased the property subject to any adverse possession claims that could be raised against the previous registered owner.

27.All that this ruling has established is that there is at least one triable issue in the case if the Defendants are permitted to amend their pleadings. This entitles the Defendants to have the case set down for hearing and all the issues fully ventilated.

28.Consequently, I would dismiss the **Notice of Motion** Application dated **24/02/2010** as amended orally in court on **03/11/2010** with costs to the Defendants, which I hereby do.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI

JUDGE