



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 532 OF 2009

ELIJAH KARIUKI KURIA.....PLAINTIFF

VERSUS

KENNETH OBAE.....DEFENDANT

RULING

ELIJAH KARIUKI KURIA, the Plaintiff in this matter, sued the Defendant over a parcel of land known as LR NO. 21190. That land is registered in the name of National Social Security Fund Board of Trustees (NSSF) but according to the plaintiff, the land was subdivided and a portion thereto was transferred to him as a purchaser.

The Plaintiff claims that the Defendant wrongfully entered into his land on or about 8th February, 2008, and started construction. The Plaintiff's claim as presented in the plaint is for a declaratory order that he is entitled to exclusive and unimpeded right of possession of the suit premises. He is also seeking for an order of injunction to restrain the Defendant from constructing any structures or remaining in occupation of the suit property. The Plaintiff also sought for general damages for trespass.

The Defendant filed a written statement of defence in which the claim by the Plaintiff is denied generally and in particulars. The Plaintiff also filed an interlocutory application for injunction and by a ruling of **Okwengu, J** (as she then was) dated 18th February, 2011, the following order was made:

“10. Nonetheless, in view of the fact that the respondent is the one in possession of the suit property, and taking into account that the applicant has not revealed when he was given possession of the suit property by NSSF, and how and exactly when he lost possession to the respondent, I would not find it appropriate to issue an order of injunction in the terms sought by the applicant but would only grant the application to the extent of restraining the respondent from constructing or erecting any structures on the suit property pending the hearing and determination of the applicant's suit.

11. In accordance with Order 40 rule 6 of the Civil Procedure Rules 2010 the interlocutory injunction shall lapse within 12 months from the date hereof if the suit is not heard and disposed of within that period. The parties are therefore advised to comply with Order 3 Rule 2 and Order VII Rule 5 of the Civil Procedure Rules 2010 and finalize all the pre-trial procedures.”

While those orders were subsisting, the Plaintiff filed a notice of motion on 10th October, 2011, which sought to have the defence struck out and summary judgment be entered for the Plaintiff. The application is based on the grounds that the defence discloses no triable issues, and it is unmeritorious as the Defendant is a trespasser on the suit land. This application was supported by the Plaintiff's affidavit sworn on 7th October, 2011. According to the Plaintiff, LR No. 21190/111/109 belongs to NSSF. On 22nd

June, 2009, he entered into a Tenant Purchase Agreement with NSSF over a portion of that land. The Plaintiff is duly recognized by NSSF as the owner of the plot while awaiting the registration of his title after it was approved by the Nairobi City Council.

Mr Makumi, learned counsel for the Plaintiff submitted that the defence is a mere sham, the Defendant is a mere trespasser who has invaded the Plaintiff's parcel of land without any colour of right.

On the part of the Defendant, this application was opposed as per the grounds of opposition filed on 2nd December, 2011. It was argued that the defence raises substantial issues which should proceed for trial by way of oral evidence. The Plaintiff is not the registered owner of the suit property and even the copy of title exhibited in support of the application belongs to NSSF. The Plaintiff alleges that there are subdivisions of the suit property but there are no documents such as deed plans or other survey maps to indicate the Plaintiff's portion. Moreover, NSSF is not a party to this suit yet they are the registered owners of the suit premises. There is no material before court to show that the suit premises exist on the ground.

This application seeks for summary judgment which can be granted under the provisions of **Order 36 of the Civil Procedure Rules**. A pertinent issue to consider is whether the defence raises triable issue[s] which should entitle the Defendant a right to defend the suit at the trial. A triable issue can be demonstrated by a statement of defence or a replying affidavit which should be considered against the Plaintiff's claim. The dispute in this matter is over a piece of land which the Plaintiff claims was a subdivision that he purchased from NSSF.

That piece of land is a portion whose boundaries or identity is not shown to court. This is a dispute over ownership/ occupation of a piece of land. The Defendant has denied the Plaintiff's claim and challenged the Plaintiff's ownership. This is a triable issue. In the case of **DT DOBIE & COMPANY (K) LTD VS MUCHIRA [1982] KLR 1**, 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 course of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a course 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 to act in darkness without the full facts of the case before it."

Striking out the defence in this case would be tantamount to acting in the dark for reasons that the Plaintiff's proof of ownership of the plot, the exact portion or its locality are not known.

Accordingly, I find no merit in the notice of motion filed on 10th October, 2011, which is hereby dismissed with costs to the Defendant.

Ruling read and signed this 3rd day of February, 2012.

MARTHA KOOME
JUDGE OF APPEAL

Note:

This application was heard and concluded on 6th December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceed to write and append my signature thereto in my new capacity.