REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 170 OF 2011

JAMES JUMA KIMUYU ..... PLAINTIFF/APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI ..... DEFENDANT

RULING

The Plaintiff filed this suit against the Defendant settling for three principal orders among others to wit:

"a) a declaration that the Plaintiff is the beneficial owner of Plot No. A08 Komarock II Shopping centre "A";

b) an order that the Defendant removes all other persons occupying the Plaintiff's plot and puts the Plaintiff into possession;

and

c) an order that the Defendant removes all other persons occupying the Plaintiff's plot and puts the Plaintiff into possession."

The Defendant filed a defence in which all the allegations contained in the plaint were generally denied. In particular, the Defendant stated under paragraph 7 of the plaint as follows:

"The defendant is a stranger to the allegations in paragraph 14 of the plaint and invites the plaintiff to a strict proof FURTHER and on a WITHOUT PREJUDICE the defendant avers that if it is allocated the plot to the plaintiff as purported (which is denied) then it was the plaintiff's duty to safeguard his own private property and the particulars of breach of duty in paragraph (a) to (e) are denied and the plaintiff is invited to strict proof."

On 10th May, 2011, the plaintiff filed a notice of motion under the provisions of ***Order 2 Rule 15 (1) (c) and (d) of the Civil Procedure Rules***. The plaintiff shall for the defence filed be struck out as it discharges no reasonable defence in law and it is an abuse of the court process. The application is supported by the grounds stated on the body thereto and the matter deposed to by the Plaintiff/Applicant in the supporting affidavit sworn on 10th March, 2011.

According to the applicant, the defence constitutes a general clause without answering the particulars set out in the plaint. The defence is frivolous, vexatious and an abuse of the court process thus the defence

should be struck out and the matter be ordered to proceed by way of formal proof. Mr Kinyua, learned counsel for the plaintiff also filed written submission and relied on several authorities to support his client's case. In the case of ***RAGHBIR SINGH CRATTE VS NATIONAL BANK CIVIL APPEAL NO. 50 OF 1996 KISUMU***, the judgment of Akiwumi, JA. His Lordship cited the case of ***LANCASTER (JOHN) RADIATORS LTD VS GENERAL MOTOR RADIATORS CO LTD (I) 1946 2 ALL ER 685*** and recited the following holding:

"In an action in which the plaintiff's alleged that the defendants had wrongfully and maliciously conspired to defraud and injure the plaintiff's in their business, the statement of claim set out (inter alia) several acts alleged to have been done by the defendants in furtherance of the conspiracy. The defence contained a clear and comprehensive denial of the alleged conspiracy, a general denial of all the acts alleged to have been done in furtherance thereof, and a denial of every item of damage. It further stated: 'The defendants...deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied seratim.' The defence did not, however, set out, and deal specifically with, each allegation. The plaintiff's appealed to have the defence struck out under R.S.C. Order 19 r. 27, on the ground that it tended to prejudice, embarrass and delay the fair trial of the action:

HELD: it was obligatory on a defendant to deny one by one each allegation in statement of claim, and, as the defendants had denied every allegation of fact in the statement of claim, it could not be said that the defence tended to prejudice, embarrass of delay the fair trial of the action. (Adkins v. North Metropolitan Trammways Co. (1) applied). Whether the defendants had denied unnecessarily allegations which were not really in dispute, and thereby increased the costs of the action, was a matter for the trial judge."

On the part of the defendant, the application was opposed, reliance was placed on the replying affidavit sworn by I.J. Ndonga, the Defendant's Director of Housing Development on 6th April, 2011. It is argued that the defence is not mere denial as the defendant has a legitimate to be afforded a fair hearing. Moreover, the defendant is not expected to provide information to the plaintiff. Further, although the plaintiff claims to have purchased a plot from Wilfred Njeri, the defendant was not a party to that agreement. There was no proof that the Defendant withheld the plot to the plaintiff. Further, as alleged in paragraphs 11 and 12 of the plaint, there are parties who will be affected if the defence is struck out and yet there are not parties to this suit.

Mr Wanjala, learned counsel for the Defendant also relied on his oral and written submissions. It was submitted that there were no direct dealings between the plaintiff and the defendant. The defendant did not revive the purchase price from the plaintiff. The parties who transacted with the plaintiff are not parties to this suit, so are the parties who have allegedly encroached on the plaintiff's plot. Thus counsel urged the court to dismiss the plaintiff's application. In an application to strike out the defence, the Court of Appeal has variously emphasized especially in the case of: ***DT DOBIE VS MUCHIRA [1982] KLR*** as per Madan, JA that:

"The Court should aim at sustaining a suit than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption. As long as a suit can be injected with life by amendment, it should not be struck out."

Although the plaintiff's case is so eloquently presented, it has to be looked at against the defence and the key elements that guide the court in regard to summary procedures. All parties are entitled to a fair trial.

I have taken into consideration the issues raised in the defence and the replying affidavit. The issues regarding the third party who sold to the plaintiff the suit plot and the fact that the defendant, who is the owner of the plot, is not a party to that agreement.

The issue in regarding to the parties who are alleged to have encroached the plaintiff's plot, and the cancellation of their letters of allotment. These parties are likely to be affected by the order of summary judgment and yet they are not parties.

The above issues cannot be glossed over and ignored, that would not amount to the defendant being given

a fair hearing. The plaintiff's case is not a simple straight forward claim, it is a complex land matter that can be determined after a full hearing. For the aforesaid reasons, this application is dismissed with costs to the Defendant.

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

M. K. KOOME

JUDGE OF APPEAL

Note:

*This application was heard and concluded on **10th November, 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*.