REPUBLIC OF KENYA

High Court at Machakos

Civil Case 16 of 2009

SIMEON MUSYOKA MAVUA……...……...PLAINTIFF

VERSUS

JAMES MUTUNGA MAVUA……....……..1ST DEFENDANT

NDUKU NZIVO MAVUA……...……..2ND DEFENDANT

NGULA MAVUA…….…….3RD DEFENDANT

JEDIDAH MWENGA…….....……4TH DEFENDANT

KENYA MWEMA…….…....…….....5TH DEFENDANT

MBITHE NZOMO ……..…..…….6TH DEFENDANT

RULING

By an amended plaint dated 3rd November, 2009, the plaintiff has sued the defendants jointly and severally seeking a permanent injunction to restrain them from in any manner dealing with land parcel Mitaboni/Mutituni/1780, hereinafter "*the suit premises*" pending the hearing and determination of the suit. The plaintiff also prays for general damages, *mesne* profits, costs, interest and an order of eviction.

The suit is informed by the fact that at all material times, the plaintiff was the registered proprietor of the suit premises measuring 2Ha. On diverse dates from 2006, the defendants have unlawfully, and without any reasonable cause and excuse trespassed on the suit premises by constructing structures and cultivating the same. Despite repeated demands by the plaintiff for the defendants to bring to an end their trespass, they have vowed to continue with the trespass and acts of waste unless restrained by an order of injunction; hence the suit.

By their joint amended defence and counterclaim dated 16th November 2009, the 1st to 4th Defendants respectively deny in total the plaintiff's claim. They assert instead that the plaintiff is not the lawful owner of the suit premises and only holds the same in their trust. The suit premises were family land, the plaintiff had obtained title to the same secretly and that they had permanently settled on the suit premises. They further averred that the plaintiff's suit was *res judicata* since the issue of ownership of the suit premises was raised, heard and determined by a competent court in the award made in Tribunal Case No. 63 of 1998 which was adopted as the judgment of the court in Machakos Senior Principal Magistrate's Court Misc. Case Number 67 of 2001. In the premises the suit was brought in bad faith and was infact a gross abuse of court process. By way of counterclaim the defendants prayed for a declaration

that the plaintiff holds the suit premises in their trust and an order directing the plaintiff to transfer the suit premises to them, costs of the suit and the counterclaim.

Subsequently thereto, the plaintiff filed a reply and defence to the counterclaim dated 15th September, 2010 in which he reiterated his averments in the plaint and denied the averments of the defendants in their defence and counterclaim.

Earlier on 18th February, 2009, the 5th and 6th defendants had also filed their joint statement of defence in which they averred that that plaintiff lacked the *locus standi* to bring the suit, they had been in occupation of the suit premises since 1997, they were therefore strangers to the plaintiff's claim and in the premises they had not trespassed on the suit premises. This defence was never amended unlike that of the 1st to 4th Defendants following the filing and service of the amended plaint.

The pleadings had since closed. Yet none of the parties had seen the need to have the suit set down for hearing. Instead on 28th February, 2012, the 5th and 6th defendants filed an application seeking that the suit be struck out as against them and in the alternative, the plaintiff be ordered to deposit Kshs. 200,000/= as security for costs.

The application was filed pursuant to the provisions of Order 2 rule 14 of the Civil Procedure rules, section 3A of the Civil Procedure Act and all other provisions of the law.

The grounds advanced in support of the application were that the plaintiff's claim against the 5th and 6th defendants was scandalous, frivolous and vexatious as no cause of action had been demonstrated against them. In the premises the plaintiff's claim against them was an abuse of the process of court.

The 5th defendant swore the affidavit in support of the application on his own behalf and on behalf of the 6th defendant. Where pertinent he deposed that he had purchased a portion of Mitaboni/Mutituni/1784 from the 3rd defendant which sale was actually witnessed by the plaintiff. That parcel of land was not part of the suit premises. In the premises he should not be incurring expenses defending the suit which at this juncture ought to be struck out in *limine.*

In response the plaintiff deposed in affidavit dated 10th July, 2012 that the application lacked merit, was an abuse of the process of court, calculated to delay the trial and in particular to circumvent **Ngugi,J's** directions issued on 2nd February, 2012. That all the defendants had trespassed onto constructed and cultivated the suit premises without his consent. The subject matter herein was different from land parcel Mitaboni/Mutituni/1784. The claim for security for costs was in any event premature.

When the application came before me for *interpartes* hearing on 19th July, 2012, **Mrs Mutua** and **Mr. Milimo** holding brief for **Mr. Mulei,** learned counsel for the plaintiff and defendants respectively agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The 5th and 6th defendants want the suit as against them struck out on the grounds that it is scandalous, frivolous and vexatious. As stated by **Ringera,J** (*as he then was)* in the case of **Mpaka Road Development Co. Ltd vs Abdul Gafur Kana t/a Anil Kapari Pan Coffee House, HCCC No. 318 of 2000[UR],**

"… a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned… and I would say a pleading is frivolous if it lacks seriousness. If it is not serious, then it would be unsustainable in court. A pleading would be vexatious if it was not serious or it contained scandalous matters which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and or frivolous pleading is Ipso factor vexatious…"

Looking at the amended plaint and the subsequent pleading thereto, I cannot discern anything that is scandalous, frivolous and vexatious in the suit. The plaintiff has averred that the defendants have jointly and severally trespassed on the suit premises. The defendants denied such trespass. The 1st to 4th defendants have pleaded that infact the plaintiff holds the suit premises in trust for himself and themselves. Whereas the 5th defendant has claimed that the parcel of land he is in occupation of was a portion of Mitaboni/Mutituni/ 1784 which he purchased and had nothing to do with the suit premises. The position of the 6th defendant is however unclear. As I have already stated, the 5th and 6th defendant's never amended their defences to raise all these matters. They have simply introduced them in the affidavit in support of the application. Indeed even such evidence is suspect. All that the 5th defendant has deposed to is- ***"that by a sale agreement dated 2nd November, 1997 I purchased a portion of L.R. Parcel No. Mitaboni/Mutituni/1784 from the 3rd defendant (annexed and marked 'KMI' is a letter to that effect)."*** Since when has a mere letter conveyed an interest in property? This evidence if at all is in any event premature. But again even if he was in occupation of a portion of the said parcel, can that *perse* mean that he cannot trespass in other people's land and more so the suit premises? The answer must be pretty obvious.

The plaintiff has deponed that he is the registered proprietor of the suit premises. The 1st to 4th defendants concede that much. Only that they think that he was so registered in trust for them. He has further deponed that the 5th and 6th defendants together with the rest of the defendants have trespassed into the suit premises. He has attached photographs showing maize crops on the suit premises which he claims were planted by 5th and 6th defendants. These defendants in turn have retorted that there was no way of ascertaining that the photographs are indeed a true representation of what is obtaining on the ground. It is possible that the plaintiff may have photographed his own crops. To my mind whether or not the maize crops are growing on the suit premises or Mitaboni/Mutituni /1784 is an issue of evidence that will have to wait to be canvassed at the plenary hearing of the main suit at an appropriate time. Again whether the 5th and 6th defendants are in occupation of the suit premises by way of trespass or in their own parcel of land is also a question for determination at the hearing by way of evidence.

The Defendants too have sought in the alternative that the plaintiff be called upon to deposit Kshs. 200,000/= as security for costs. This prayer is anchored on the feeling on the part of the said defendants that since the suit is bad in law; they should not be called upon to incur costs in defending it. However, as it has been demonstrated the plaintiff's suit is neither, scandalous, vexatious, frivolous or hopeless. Nor is that a ground for ordering security for costs. Security for costs can only be ordered if it is shown that a party against whom the order is sought is impecunious. Hardship *perse* on the part of such a party is not a ground for seeking security for costs. In the case of **Sir, Lindsay Parkinnerson and Company Ltd vs Triplan Ltd [1973] 2 WLR 632**, the Court observed that the matters that the court should consider in exercising its discretion in an application for security for costs include whether the company's claim is *bonafide* and whether the company has a reasonably good prospects of success. As already stated I do not think that the plaintiff's suit is wish washy nor has it been demonstrated that he is impecunious.

In the end therefore, the application before court is devoid of merit and is accordingly dismissed with costs to the plaintiff.

DATED, SIGNED, and **DELIVERED** at **MACHAKOS** this **31ST**day of **OCTOBER 2012.**

ASIKE-MAKHANDIA
JUDGE