REPUBLIC OF KENYA

High Court at Machakos

Civil Case 15 of 2007

KENYA AFRICAN NATIONAL TRADERS & FARMERS alias **KANTAFU**

COMPANY LIMITED…….....……...PLAINTIFF

VERSUS

JONAH PAUL NGULI…….....……...1ST DEFENDANT

FRANCIS NGIGE WAWERU…….....……..2ND DEFENDANT

LUKENYA RANCHING AND FARMING COOPERATIVE SOCIETY LIMITED.....3RD DEFENDANT

RULING

On 20th February, 2007, the plaintiff took out this originating summons (O.S) under the then order XXXVI rules 3D of of the Civil Procedure rules, Section 38 of the Limitation of Actions Act, Sections 30 & 143 of the then Registered Land Act and all other enabling provision of the law. In the O.S, the plaintiff sought to be declared to have acquired title by adverse possession to all that piece of land known as Mavoko Town Block 3/2103, "*the suit premises*". Secondly, that the registration of **Francis Ngige Waweru,** "*the 2nd defendant*" as the proprietor thereof and or any other person deriving title from the 1st defendant or the 3rd defendant based on the land previously known as Plot No 441, the precursor to the suit premises be cancelled and the Land Registrar do rectify the register and enter the name of the plaintiff as the registered proprietor. He also asked for costs.

The grounds in support of the O.S were that the plaintiff's members had since 1994 been in an actual, open, physical and uninterrupted possession of the suit premises for a period in excess of 12 years thereby acquiring title by adverse possession and claims to title by any of the defendants based on the original allocation of the same to the 1st defendant as plot as Plot no 441 and the registration of the 2nd defendant through the 1st and 3rd defendants of the suit premises had been extinguished by adverse possession of the suit premises by the plaintiff and its members.

In response, the 1st defendant stated that, yes although he entered into the sale agreement with the plaintiff with regard to the suit premises, the plaintiff breached the terms of the agreement by not paying the final instalment of the purchase price and had not done so to-date. The taking of possession of the suit premises if at all, could not have been open in the circumstances. Time for purposes of adverse possession could only have started running on payment by the plaintiff of the balance of the purchase price in the sum of Kshs. 170.000/=.

On his part, the 2nd defendant took the position that he was registered proprietor of the suit premises having bought the same from the 1st defendant in 2006. When he bought the suit premises as aforesaid, he was not aware of the plaintiff's interest in the same as it was not noted in the register. He was therefore an innocent purchaser for value without notice and as such his interest cannot be extinguished. In any event by the plaintiff's own admission, there was a case between him and the 1st defendant being in *Machakos SPMCCC NO. 235 of 1998*- over the suit premises. That meant that the plaintiff's occupation of the suit premises if all was interrupted during the pendency of the suit. The plaintiff could not therefore claim to have occupied the suit premises openly and uninterrupted for 12 years.

On 9th May, 2007, the 1st defendant took out a Chamber Summons application, the subject of this ruling, seeking to have the O.S struck out on the basis that it is scandalous, frivolous and vexatious and indeed abuse of the process of this court.

Order VI Rule, 13(1)(b) & (d) – of the Civil Procedure Rules that were applicable as of 9th May 2007 when the application was filed are cited as the basis upon which the application is founded. Further grounds in support of the application are that in so far as the suit is based on the sale agreement dated 23rd March 1994, it was un-maintainable for want of consent to the transaction by the relevant Land Control Board and in any event the threshold of adverse possession had not been attained. The affidavit in support merely expounded and elaborated the above grounds.

The plaintiff replied by stating that that the application lacked merit both in law and fact. The application was calculated to try the whole case by way of an interlocutory application. That the filing of *PMCC NO. 325 of 1998* by the 1st defendant was undertaken to recover the balance of the purchase price from the plaintiff and did not interrupt the plaintiff's continuing possession and lastly, the suit raised serious and triable issues which can only be determined at the formal hearing of the suit and there was no justification for the shortcuts that the 1st defendant was taking in the disposal of the suit.

When the application came before **Kihara Kariuki, J** *(as he then was*) on the 23rd February, 2011, he directed that the same be canvassed by way of written submissions. However, by the time all the submissions were on board, the good judge had left the station on transfer. The task of concluding the application therefore fell on me. On the 17th September, 2012, parties appeared before me and urged me to proceed with the application from where the judge had left. That meant that I should craft the ruling.

The principles applicable in the applications of these natural are well settled by our courts and there are numerous authorities, but one that quickly comes to mind is *D.T Dobie & Company Limited vs Muchina [1982] K.L.R I*where the following principles were laid down.

The words "*reasonable cause of action*" in Order VI Rule 13 (1) means an action with some chances of success when the allegations in the plaint only are considered.

As the power to the strike out a pleading is exercised without the court being fully informed of the merits of the case through discovery and oral evidence it should be exercised sparingly and cautiously.

The power to strike out should be exercised only after the court has considered all the facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike our pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing of the case.

Applying the aforesaid principles to this case, can this suit really be said to be scandalous, frivolous, vexatious, or is otherwise an abuse of the process of the court?

In answering this question it is important to note the following:-

- The 1st defendant who is the applicant does not deny that he sold the suit premises to the plaintiff pursuant to a sale agreement dated 22nd March 1994. The applicant also does not dispute that he

was paid the purchase price which is substantial. He has retained that amount to date, yet has not effected the suit premises to the plaintiff as had been expected.

- Despite the foregoing, the defendant without any qualms whatsoever comes to this court asking it to shut out the plaintiff from having his case heard on merit on the basis that the Plaintiff's suit is frivolous and vexatious. Neither does he suggest whether he will refund the amount. In other words the applicant seeks this courts assistance to unjustly enrich himself. I do not think that it is the policy of the law to come to the aid of persons in the position of the applicant. He cannot come to equity when himself is abusing the tenets of equity.

- The applicant further contends that because the Plaintiff's suit is based on a sale agreement of 22nd March 1994, it is time barred by the Limitations of Actions Act as read together with provisions of *sections 6(1) (c)*of the Land Control. The latter Provisions of the law deals with consents of the relevant Land Control Board with regard to transactions of this nature. He contends that the Land Boards Consent was not obtained with regard to the sale transaction. However the plaintiff's answer is that indeed the sale agreement rendered void by operation of the law as the consent of the Land Control Board was not procured within 6 months of the agreement as provided under Section (1) of the Land Control Board. But had already taken possession of the suit premises, it automatically became an adverse possessor.

The Court of Appealin*Waweru vs Richu,[2007]I E.A.L.R,403* held that after a sale agreement is rendered is rendered void in circumstances where the consent of the Land Control Board is not obtained, then if the purchaser has taken possession of the land, such possession is deemed to be adverse to the rights of the owner and that time for the purposes of a claim based on an adverse possession starts running from the date the sale agreement is rendered void and when the purchasers occupation is deemed to be illegal by operation of the law. However the issue as to when time started running in favour of the plaintiff is debatable and therefore a triable issue. Was it from the date when the sale agreement was entered into, or when the balance of the purchase price was paid if at all. How does *Machakos SPMCC NO. 235 of 1998* impact on the running of time for purposes of adverse possession in the case? All these are issues best left to be interrogated at the plenary hearing of the O.S.

It is interesting that whereas the 1st defendant asserts that time started running in 1998, s the plaintiff takes the view that it was from September, 1994. That is what the trial court will have grappled with. In my view where a conflicting interpretation is made by parties then it would require a full trial and evidence to enable this court make a finding as to whether the Plaintiffs possession was adverse from September 1994. This cannot be done at this stage and certainly not on the basis of the pleadings without taking evidence.

In Parklands Properties Limited vs Patel [1981] K.L.R-52 **– *Madan, J*** held that the issue as to whether a party's possession of a piece of land is adverse is a matter for evidence and a decision thereon depends on whether the party alleging adverse possession successfully establishes the particulars of adverse possession pleaded. This decision affirms the position taken by the Respondent.

What the applicant is asking this court to do is to consider the merit of the whole case which would be wrong and to further consider the merits of his defence which is also wrong in law. If he has a good defence, that is a matter to await the full trial of the suit.

It is instructive that by a Chamber Summons dated 15th May 2007 which was filed pursuant to the provisions of Order XXXVI Rule 8A of the Old Civil Procedure Rules,directions in this matter were given on 21st May 2008 on the following terms that the Originating Summons dated 20th February 2007 be heard through *viva voce* evidence as well as the affidavit evidence on record. It is instructive that these directions were given while the Chamber Summons dated 9th May 2007 was pending.

On what basis then should the 1st defendant be asking for summary procedure? On this account, I would agree with the plaintiff, the application to strike out the O.S was rendered otiose because of necessity, the order of 29th May 2008 for the hearing of the O.S by *viva voce* and the affidavit evidence on record in my

interpretation meant that the suit will have to go to full trial and cannot be struck out until the *viva voce* evidence has been taken

Until the orders given as to the mode of trial are complied with or otherwise vacated the provision of Order VI Rule 13 do not come to the Applicants aid.

Finally, can it be said that the Plaintiff's case as pleaded is scandalous, frivolous or an abuse of the process of this court. I do not think so. The suit raises genuine and serious triable issues against all the defendants that are best left to be ventilated at the trial.

For all the above reasons, the application dated 9th May 2007 is without merit and is accordingly dismissed with costs.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this 14TH **ay** of **DECEMBER, 2012.**

GEORGE DULU
JUDGE