



No. 354

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 42 OF 2010

MATHEW LEKAOTA SINTERIA.....PLAINTIFF

VERSUS

FRANCIS SILAO MEMANTIKI.....DEFENDANT

RULING

Before me are two applications dated 30th March, 2010 and 9th October, 2010 respectively. The 1st application is by way of Notice of Motion expressed to be brought under **Orders XXXV rule 1(b) and (2) and VI rule (b) (c) & (d) of the Civil Procedure rules, sections 3A and 63(e) of the Civil Procedure Act, 27, 28 and 143 of the Registered Land Act and 29 of the Land Adjudication Act.** In the main the applicant who is **Mathew Lekaota Sinteria** seeks to have struck out the statement of defence dated 24th march, 2010 and filed by the respondent, **Francis Sialo Memantiki**. Consequent upon the striking out of the defence, summary judgment be entered against the respondent in terms of the plaint dated 13th February, 2010.

The grounds in support of the application are that the applicant was the lawful and registered proprietor of the land parcel **Trans-mara/Osinoui/143** hereinafter **“the suit premises”** as a result of the land Adjudication and demarcation process in Osinoni Adjudication section. The allocation arose after objections proceedings filed by the respondent were overruled by the Minister of Lands and Settlement in appeal number 167 of 1998. The decision by the Minister in respect of an adjudication dispute is final. The Registration of the suit premises in favour of the applicant were thus a first

registration. Consequently the applicants right in respect of the same are vindicated by section 143(1) of the Registered Land Act. The Respondent has no legal or equitable rights over the suit premises. Therefore his continued occupation amounted to trespass. The defence filed by the respondent did not raise any bonafide triable issues and is calculated to embarrass, delay and or defeat the due process of court. Infact it was otherwise scandalous, frivolous, vexatious and hopelessly or irredeemably bad. This was therefore a proper case for summary judgment in the circumstances.

The affidavit sworn by the applicant in support of the application merely reiterated the above grounds. Suffice to add that after the dismissal of the appeal filed by the respondent by the Minister, the respondent filed judicial review Proceedings challenging the decision of the Minister. The judicial Review proceedings were heard and determined on 22nd September, 2009 by this court and were dismissed. Notwithstanding the determination of the appeal by the Minister as well as the judicial Review Proceedings, the respondent had continued to occupy the suit premises which amounts to contempt or disregard of the due process of law. The registration of the suit premises in the name of the applicant being a first registration was indefeasible. The statement of defence on record did not raise or disclose any bonafide triable issues.

The application was met with a replying affidavit by the respondent. He deponed that the registration of the applicant as the owner of the suit premises was irregular and unlawful since the appeals were heard and determined by the District Commissioner without jurisdiction. In any event the District commissioner, Transmara who heard the appeals by the respondent and applicant respectively gave decisions that were at variance with each other. In appeal no. 157 of 1998, he awarded the suit premises to the respondent whereas in appeal number 167 of 1998 he awarded the same parcel of land to the applicant. Finally that the Minister for Lands and Settlement never heard the appeals nor delegated the hearing of the same to some other officers by Notice in the Kenya Gazette.

The 2nd application which is expressed to be brought pursuant to order **VIA rule 3(1), I(2),(5),(7) and 8 of the Civil Procedure rules, section 3A of the Civil Procedure Act** and all other enabling provisions of the law was filed by the respondent. He sought that leave be granted to him to amend his defence so as to include a counterclaim. The grounds in support of the application brought by way of chamber summons were that the proposed amendments are intended to bring before the court the real matters in controversy between the parties. The amendment are necessary for a fair and just determination of the real questions in controversy. Time allowed under the **Civil Procedure Act** and the **Civil Procedure rules** for amendment of pleadings had since expired. The proposed amendments will not occasion any prejudice to the applicant. The affidavit in support of the application were along the same lines as the grounds aforesaid. Suffice to add that the respondent annexed a copy of the proposed defence and counterclaim in his supporting affidavit.

Apparently this application by the respondent did not meet with any resistance by the applicant since no papers in opposition to the same was filed by the applicant. So that the averments of the respondents in support of his application are unchallenged and uncontroverted.

When the two applications came up for hearing before me on 2nd November, 2010 parties agreed to canvass the two applications simultaneously and by way of written submissions. They subsequently filed and exchanged the same which I have carefully read and considered alongside cited authorities.

I think that it would be prudent to deal with the application dated 7th October, 2010 for if I was to allow it, it would render the other application dated 30th March, 2010 superfluous. As already stated, the applicant neither filed a replying affidavit nor grounds of opposition to this application.

Consequently the written submissions filed in opposition to the application are so filed in a vacuum. It is trite law that a court should aim at sustaining a suit rather than terminating it prematurely. A suit should only be struck out if it is so weak that it is beyond redemption and or incurable by an amendment. It is also trite law that an amendment to pleadings can be sought at any given time before judgment. The respondent thus is not barred from seeking to amend his defence. Ofcourse the applicant has submitted that the application was lodged 7 months after he had lodged his application for summary judgment. The application was in the circumstances filed with unreasonable delay which had not been explained. The respondent was thus guilty of laches and is not entitled to the exercise of the discretion in his favour by the court. At any rate the filing of the application in the face of an application for summary judgment showed that the application was calculated to stifle the hearing of the application for summary judgment. Consequently, it is apparent that the application for amendment was not made in good faith. These complaints by the applicant may well be valid. However, they have come by way of written submissions and from the bar which is irregular. In any event, the respondent has explained away the delay on the basis that he had to comply with the statutory requirements before mounting the application and the counterclaim as against the Government.

Parties to the suit premises having been residing therein for four years now. I do not see what prejudice the applicant shall suffer if the amendment to the defence and counterclaim sought by the respondent can be granted. This will enable the court to adjudicate on the real issues in controversy once and for all. For this to be done effectively, it is only fair and just that the situation currently obtaining on the ground between the parties be maintained. This however will not be for long since once the amendments are carried out the suit shall be ready for hearing. The applicant and the respondent can for this short time tolerate one another.

In an application of this nature, the respondent is duty bound to demonstrate that he has bonafide triable issues capable of being ventilated in the intended amended defence and counterclaim. The respondent is also duty bound to show that the application was made timeously, in good faith and for purposes of furthering the interests of justice. Looking at the draft amended defence and counterclaim, annexed to the affidavit of the respondent; I have no doubt at all in my mind that it raises serious triable issues. There is the issue as to whether the appeals were heard by a person with jurisdiction or lack of it, there is the issue of the two contrasting decisions by the same person over the same suit premises and then there is the issue of fraud. The applicant has submitted that the respondent cannot plead fraud as he is time barred by virtue of Limitation of Actions Act as well as Government proceedings Act and Public authorities Limitation Act. However, it does appear to me that these are matters of evidence as to when the respondent came to know about the fraud and when is it that time started to run for purposes of Limitation.

On the whole, I am satisfied that the application to amend the Defence is merited and bonafide. It is necessary for purposes of determining the real questions in controversy between the parties, the intended amendments are not inconsistent with the original defence and such amendments will not cause any injustice or prejudice to the applicant. Though there was delay in mounting the application, the delay has sufficiently been explained. In the result I allow the application dated 7th October, 2010 in terms of prayers 1,2 and 3. However, I make no order as to costs. With this application having been granted, I do not think that it is necessary to consider the application dated 30th march, 2010. It has been overtaken by events. Accordingly it is dismissed with no order as to costs as well.

Ruling dated, signed and delivered at Kisii this 17th January, 2011.

ASIKE-MAKHANDIA

JUDGE

