



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 106 OF 2009

OSANGO FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

-VERSUS-

JOSEPH NDEGE & 7 OTHERS.....DEFENDANTS

RULING

On 19th may, 2010, the applicant, Osango Framers Co-operative Society Limited moved this court by way of Notice of Motion for an Order against the respondents; **Joseph Ndege, Onyango Nyiende, Jeremiah Abanga Omala, Leonard Ochola Onguka, Henry Mau Ndege, Michael Ochieng Onguka, Jeremiah Oyuoyi Onguka** and **Joseph Aturo Omala** in terms:-

“THAT this honourable court be pleased to enter summary judgment against the Defendants as pleaded in the plaint.....”

The applicant also prayed for costs of the application.

The application was anchored on the grounds that the applicant was the registered proprietor of the suit premises, the respondents were trespassers thereupon, their continued occupation of the suit premises was causing wastage and prejudice to the applicant and finally that this was a fit and proper case for summary judgment .

In support of the application, **Yonah Maina Koko**, the applicant’s chairperson swore an affidavit. Where pertinent he deponed that the applicant was the bonafide owner and registered proprietor thereof of land parcel numbers **South West/Wasimbete/924,162** and **1082** respectively, **“the suit premises”**. However, the respondents had since encroached on the same and frustrated the applicant’s efforts to develop them for members use. The applicant was desirous of commencing large scale farming and other developmental activities, beneficial to its members on the suit premises but cannot do so as the respondents have assumed actual possession thereof to the exclusion of the applicant. In the light of the foregoing the applicant had demanded of the respondents to give up vacant possession of the suit premises to no avail making this case fit and proper one for summary judgment.

From the plaint filed it appears that on or about 1990 soon after the applicant acquired titles to the suit premises, the respondents without any colour of right or sanction encroached into the same and constructed homesteads therein in defiance of the protests by the applicant. On numerous occasions, the applicant had called meetings with the respondents in the presence of local provincial administration

whereat the respondents have admitted to their trespass and undertaken to move out but have failed to do so. It therefore prayed for an order of eviction to issue against the respondents.

The respondents filed a joint statement of defence in which they averred that the suit premises were acquired by the applicant fraudulently and had a case pending against it in this court being Kisii HCCC.NO. 99 of 2005. They further averred that they had stayed on the suit premises for over 30 years and have their homesteads thereon as it is their ancestral land. In the premises there can be no trespass or encroachment as claimed by the applicant. The respondents also denied the averment by the applicant that there was no other suit pending between the parties over the same subject matter. As far as they were concerned there was Kisii HCC.No. 99 of 2005 pending between the parties over the same subject matter and which ought to be heard first. Finally, they contended that in so far as the 1st and 2nd defendants are deceased, the suit was incompetent and bad in law. Thus they prayed for the dismissal of the suit.

The replying affidavits filed by 5th and 7th respondents were in terms as above. Suffice to add that the two confirmed the death of their father and grandfather as well as the 1st respondent in the years 1997 and 2001 respectively. They also deponed that being ancestral land and being adversely in possession, they were interested parties and summary judgment sought if granted would not augur well as they would have been condemned un heard.

When the application came up for interpartes hearing before me on 30th November, 2010 **Mr. Odeny** and **Mr. Odero**, both learned counsel for the applicant and respondent 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.

It is trite law that in an application for summary judgment previously under Order XXXV rule 1 and now Order 36 rule 1 of the **Civil Procedure rules**, the applicant is now required to make such an application only after entry of appearance but before defence is filed. The intent here is to avoid late applications for summary judgments. The current **Civil Procedure Act** and the rules made thereunder as amended incorporating the above requirement came into effect on 10th September, 2010. From the record the instant application however was filed on 19th may, 2010. Accordingly, Order 36 of the **Civil Procedure rules** as amended does not effect the application as filed.

The law on summary judgment is well settled. This is what the court of appeal has said over the years:-

1. In the case of **Nairobi Golf Hotels (Kenya) Limited .v. Lalji Bhimji Sangani Builders and Contractors, C.A. NO. 5 of 1997(UR)**

“.....it is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, a prima facie, the existence of bonafide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXV, is Shadowy or a sham is entitled to summary judgment.....”

2. In the case of **Continental Butchery Ltd .v. Samson Musila Nthiwa, C.A. No. 1977(UR)**, the court of appeal again rendered itself on the issue as follows:-

“.....With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for a claim of the plaintiff under the summary procedure provided by 0.35 subject to their being no triable issue which would entitle a defendant to leave to defend. If a bonafide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.....”.

3. Further afield and long time ago, **Lord Halisbury** stated in the English case of **Jacob .v. Boths Distillery Co. 85 LTR 262** thus:-

“.....There are some things too plain for argument, and where there were pleas put simply for the purpose of delay, which only add to the expense and where it was not in aid of justice that such things should continue Order XIV was intended to put an end to that state of things, and to prevent Sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.....”.

If I may summarise then, Order 36 rule 1 of the **Civil Procedure rules** provides for an application for summary judgment. However for the applicant to succeed, he must demonstrate that the respondent who has appeared has no defence or whatever he has or may have is a merely a sham defence. If however the defence put forth raises some triable issues even if it is only one, which require some investigations or interrogation at the plenary then the court is obliged to grant leave to defend either conditionally or unconditionally. In other words a prima facie triable issue ought to be allowed to go for trial just as a sham or bogus defence ought to be obliterated or rejected summarily. However that jurisdiction must be exercised sparingly, with greatest care and in clear and obvious cases.

Applying the above considerations to the circumstances of this case, I am satisfied that the respondents have demonstrated, prima facie, that their defence on record is not a sham but raises serious triable issues which must be allowed to be canvassed and or ventilated at the trial. The respondents have said that the 1st and 2nd defendants have passed on. Indeed they had already passed on by the time the suit was filed against them. That assertion has neither been countered or rebutted by the applicant. In that respect can a suit mounted against a dead person be competent? Is that not a triable issue.

The respondents too have raised the issue that even if the suit premises are registered in the name of the applicant nonetheless they have been in continuous and uninterrupted occupation of the same for well over 30 years and indeed have their respective homesteads thereon. In other words they are advancing a case of adverse possession. Is that also not a triable issue?. Besides the foregoing, the respondents are claiming the ownership of the suit premises as their ancestral land. I think that where a defendant raises an entitlement to land by way of ancestral rights which requires protection, the facts and issues are largely in dispute as the competency and authenticity of the title may be attacked. Such is a scenario which is not favourable for or amenable to a summary procedure.

Then there is the question of Kisii HCCC 99 of 2005 involving more or less the same parties and the same subject matter. In the said suit it would appear that the respondent have raised the issue that the acquisition of the suit premises by the applicant was fraudulent. They have reiterated the same claim in this suit. That other suit is much older than the instant suit. The issue that then arises is which of the two suits should proceed first and which suit should be stayed if at all. Above all the fact that indeed there was an earlier suit between the parties over the same subject matter flies in the face of the applicant's averment in the plaint to the contrary. That too is a triable issue.

From what I have been able to demonstrate so far, the defence put forward by the respondents raises triable issues and in the circumstances, they are entitled to unconditional leave to defend the suit. I have no doubt therefore that this is not a fit and proper case for summary judgment against the respondents. This application therefore fails and is dismissed with costs to the respondents.

Ruling dated, signed and delivered at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA
JUDGE