



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 100 OF 2010

ABUD NOOR AWADH SWALEH GHALGANPLAINTIFF

VERSUS

BERNARD OMONDIDEFENDANT

RULING

The Notice of Motion dated 15th October 2011 is made under Order XXXV Rule 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Rules, section 1A, 1B, and 3A of the Civil Procedure Act seeking that summary judgment be entered against the defendant as prayed in the plaint and the defendant do forthwith give the plaintiff vacant possession of all those suit premises known as plot no. 2173 (original No. 2092/9 Malindi), and/or defendant be evicted from the suit premises.

The grounds are that:

- (a) The defendant, without the authority and permission of the plaintiff, entered the plaintiff's property and has had unlawful occupation of the said property since 2009.
- (b) Despite the plaintiff requesting the defendant to give vacant possession of the premises, defendant has ignored, refused and/or rejected to give the same.
- (c) The defence has no merits.

The supporting affidavit is sworn by Noor Awadh Swaleh Ghalgan (applicant) wherein he states that he is the registered proprietor of plot no. 2173 (original 2092/a) Malindi, measuring approximately 0.0469 Ha – he has annexed a copy of the title and certificate of official search. The property comprises a bungalow with servant quarters and a car park area. The defendant entered the said property and has had unlawful occupation of the house since 2009. He made requests to defendant to vacate, the provisions but this was ignored annexed is a demand letter number NAS (III).

The application is opposed and in a replying affidavit sworn by Bernard Omondi he states that there are triable issues in his statement of defence, pointing out that he is only a tenant on the suit premises which were leased to him by DORCAS WACUKA GATHUNGU by a lease agreement dated 18th May 2010 and marked as BO1. The lease subsists as between him and the landlord and that he is not a trespasser. He refers to the plaintiff as a stranger, saying DORCAS handed over the house to him after showing him a sale agreement between the late husband G. MOLINO aka GIUSEPPE MOLINO and VALENTINE

HINZANO PONDA and she further told respondent that there exists CRC no. 773 of 2005 and civil case no. 7 of 2005, in court, over the said property. He was also given a Grant of Letters of Administration issued to the said DORCAS to administer the estate of her late husband INAGO MOROSETTI.

In consequence of these, it would then be unfair both to respondent and his landlady, to have the matter determined in a summary manner especially because he occupies the premises with the landlady, and an order to evict him ought to be preceded with an order determining the landlady's right's through the cited cases.

The pleadings in Malindi HCCC No. 7 of 2005 are annexed as Bo2 involving VALENTINE HINZANO PONDA (AKA VALENTINE PONDA HINZANO) AND MOLINO GIUSEPPINA MOLINO (AKA GIUSEPPENA MOLINO) and involves this very suit property.

In that suit the plaintiffs pray for judgment against defendant for ownership of the same property and immediate eviction of the said DORCAS for the same property. The basis of that suit is that DORCAS was a licensee, whose licence was revoked on 21st December 2004.

Further that when HCCC 7 of 2005 was scheduled for hearing in June 2009, the court was informed that the Title to the suit property was held as security by the bank and would not be used in any transaction before the case was determined.

Respondent's suggestion is that HCCC 7 of 2005 should be consolidated with this suit and determined together and a summary judgment will not solve the web span in the two cases.

Counsel agreed to dispose of this matter by way of written submissions – Mr. Kilonzo appeared on behalf of the applicant whilst Mr. Matini appeared for the respondent.

It was submitted by Mr. Kilonzo that the defence case rests on claims that DORCAS WACUKA GATHUNGU was the legal owner of the suit premises by virtue of being the legal representative of the estate of INAGO MOROSETTI.

The plaintiff/applicant's position is that she is the registered owner of the suit premises and the said DORCAS has never been a beneficial and/or legal owner of the suit premises hence incapable of passing any legally recognizable tenancy right to the defendant in the premises.

Mr. Kilonzo drew this court's attention to the supplementary affidavit filed by the applicant saying as at 18th May 2010 when the defendant entered into a lease agreement with the said DORCAS, she (plaintiff) was already registered as the owner of the suit premises so the defendant could not validly and legally enter into an agreement with DORCAS who had no legally recognized interest to the suit premises, so defendant is a trespasser and the said agreement is inadmissible by dint of section 19(1) of the Stamp Duty Act (Cap 480).

The plaintiff is not privy to the other pending suits mentioned nor has her proprietorship in those suits been challenged.

Further that the alleged mortgage over the suit property came before the sale of the property to the plaintiff and there was no restriction or inhibition to the suit premises.

However respondent in a further affidavit stated that the suit premises were sold to plaintiff irregularly as Valentino Hinzano Ponda and Molino Giuseppe were charged for concealment of the title to the suit premises with intention to defraud as can be seen in a copy of the charge sheet (Bo2) and witness statements (Bo3) and the applicant's intention by filing this application is to defeat the other pending suits.

Under the provisions of Order XXXIV Rule 1 (1) (b).

“b) The recovery of land, with or without a claim for rent or mesne profits by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for nonpayment of rent for breach of court or against persons claiming under such tenant or against a trespasser.

Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed or part thereof and interest, or for the recovery of land and rent or mesne profits.”

Rule 2(1) of the same order recognizes that a defendant may show either by affidavit or by oral evidence or otherwise, that he should be granted leave to defend the suit.

It is Mr. Kilonzo’s submissions that the plaintiff has proved she is entitled to the orders she seeks, as she has shown that since 21st August 2009, she became the registered proprietor of the suit premises, pursuant to an indenture dated 17th August 2009 from one G. Molino and Valentine Hinzano Ponda, which was duly registered on 21st August 2009, and the same had no encumbrances. So her right of ownership has been proved and she was issued with a Title under the Land Titles Act (Cap 282). Mr. Kilonzo’s contention is that under section 21 of the Land Titles Act, the certificate of ownership is conclusive proof that plaintiff is the owner of all the coconut trees, house and buildings on the land unless there is noted in memorandum, to the contrary effect. Counsel points out that in the present case, there is no memorandum to the certificate showing that the defendant or any other third party has titles to the property.

Mr. Kilonzo sought to rely on the decision of Wamwea v Catholic Diocese of Muranga Registered Trustees KLR (2003) pg 389 which held that:

“(a) once a party acquires legal title over a parcel of land, such a party is entitled to not only to possession but also to occupation of the land.

(b) A party who refuses to give vacant possession, becomes a trespasser, notwithstanding that the party refused to take any compensation given, if such refusal or compensation does not confer a legal interest in the land.”

Mr. Kilonzo urges this court to adopt the same line of reasoning and make a finding that the act of registration of plaintiff as owner of the suit property has not been challenged by the defendant or any other Third Party, so she is entitled to possession and occupation, and defendant should be declared a trespasser and be evicted.

As regards the defence raised Mr. Kilonzo submits that it has no merit and is merely intended to delay the expeditious disposal of the plaintiff’s suit. It is his contention that had defendant/respondent been diligent enough and carried out a search when entering into the lease agreement with Dorcas, he would have found out that the property did not belong to the so-called landlady and therefore she had no legal interest to pass on to the plaintiff.

Further that the tenancy is illegal, being a one year rent free tenancy agreement as the very consideration for tenancy is payment of rent.

The defendant has not shown that he executed the tenancy agreement with the rightful owner of the premises. He draws from the provisions of section 116 of the Evidence Act which provides:

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who approves that he is not the owner.”

On the strength of this, Mr. Kilonzo argues that defendant has failed to disprove that plaintiff was not the owner of the suit property and in possession of the same as at 18th May 2010 when the alleged tenancy was executed.

Mr. Kilonzo also submits that the defence does not raise any triable issue.

In any event, Mr. Kilonzo points out that the lease agreement is not admissible both under the Land Titles Act (Cap 282) for want of registration under the said Act, and under section 19 (1) of the Stamp Duty Act, for failure to be stamped.

He referred to section 57 of the Land Titles Act which provides;

“After the issue of a certificate of ownership of a holding under this Act, every document affecting the holding or any interest in the holding shall subject to the provisions of this part, be registered in the register.”

Section 58 further addresses the effect of non registration, that:

“Every document unless so registered, shall be deemed to be void against all parties claiming an adverse interest thereto.”

It's on account of this provision that Mr. Kilonzo submits that the tenancy agreement, being a registrable instrument under the said Act, is void.

It also does not bear stamp duty and Mr. Kilonzo urges me to be guided by the decision in **GLENCOR GRAIN LTD V GRAIN MILLERS (2002) KLR Pg 606 at page 607.**

As for the pending criminal case it is applicant's argument that the same does not affect applicant and the doctrine of *LIS PENDEN* cannot even rescue the defendant because plaintiff was not privy to those suits, and an application by DORCAS to obtain injunction orders in HCCC 7 of 2007, to stop any sale, mortgage and/or disposal of the suit premises was rejected by Hon. Justice Ouko on the basis that the applicant therein had not established a prima facie interest on the suit. The applicant then was DORCAS WACUKA GATHUGU who had wanted to stop any sale, change, mortgage and/or disposal of the suit premises, at the interlocutory stage, but this was declined.

Mr. Kilonzo's argument is that in so far as the plaintiff applicant was not a party to the suit, and also on the strength of the orders issued by Hon. Justice Ouko, then this court should not pay regard to the existence of the two mentioned suits and the court should not draw an inference that the defendant has a good defence based on those suits.

I did not receive written submissions by the respondent's counsel, but there was a list of authorities to demonstrate why the application should not be granted. The position taken by the defence is that;

(a) Defendant is a bona fide tenant who believed that DORCAS was the legal owner of the premises, having been shown a certificate of postal search dated 2nd December 2005 which bore among the registered owners Margaret Wanjiru Monasetti and Anne Wambui Manosetti and the Letters of Administration issued to the said DORCAS. This was fortified by the witness statements recorded by Joseph Karisa Mwarandu, an advocate who recorded police statement relating to one Morosetti Inago and his dealings with the said property.

There is a claim that he had bought the property for DORCAS from Valentine Hinzano Ponda and Morino Guiseppina who now refers to DORCAS as a licensee and has filed HCCC No. 7 of 2005 to get her out of the land. As a matter of fact related to that is a criminal case no. 73 of 2005 where Valentine Hinzano Ponda and Morino Guiseppina Ponda are jointly charged with the offence of concealing Deeds contrary to section 288 of the Penal Code. Whereas Mr. Kilonzo has gone full throttle to show why plaintiff is justified in claiming a right to own the land, the respondent is required to just demonstrate that he has at least one triable issue which the court ought to give him a chance to ventilate at a hearing – I refer to the decision in **DHAMJAL INVESTMENTS LTD V SHABANA INVESTMENTS C.A No. 232 of 1997 (unreported)**

The defendant has demonstrated to this court, through various annexures, including a ruling in HCCC No. 7 of 2005, that the question as to who actually owns the property is far from settled, despite the fact that plaintiff has title, whose origin may well become of essence courtesy of the ruling on HCCC No. 7 of 2005 where Valentine Hinzano Ponda and Guiseppina Molino had sought to take possession of the same property from DORCAS WACUKA GATHUNGU and have her evicted. The issue of proprietary interests featured although the court declined to issue injunction orders which DORCAS had sought. However the court did not determine whether the property had been sold to Morosetti or not.

(b) The criminal case, which casts a cloud on the Pondas dealing with the said property and in which DORCAS is a complainant.....granted the plaintiff is not a party to those suits, yet the court cannot ignore their existence and the fact that respondent has alluded to them as being the basis of his belief that his tenancy is legitimate. There may be loopholes regarding certain procedural requirements such as Stamp Duty and registration of the document under provisions of the Land Titles Act, yet these cannot cast a total eclipse to the fact that the issue of whether indeed INAGO MONSORETTI for whom DORCAS WACUKA GATHUNGU obtained Letters of Administration for his estate had purchased the parcel from Valentine and Giuseppina and thereby making Dorcas an owner, or whether she was a licensee as they claim, and so had no capacity to pass on any legal interest in the property to a Third Party.

A triable issue does not mean an issue which will guarantee success, it is simply a matter which ought to be given a chance to be fairly considered before a conclusion is made. In the case of **KENYA TRADE COMBINE LTD V M. M. SHAH CIVIL APPEAL NO. 193 OF 1999 (Unreported)** the Court of Appeal stated:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect, a defence which raises triable issues does not mean a defence which must succeed.”

So the ruling by Justice Ouko does not affect the standards expected in an application such as this one – that one had as one of its standards, the probability of success.

Were the court to summarily make a finding that plaintiff owns the house and that defendant has no legal basis being in occupation, then it will in effect have defeated the other two pending matters and concluded that DORCAS has no share or interest in the matter, yet it is from DORCAS that defendant draws his occupation.

My finding is that defendant has raised triable issues regarding:

- a) The legality of his tenancy
- b) The ownership of the property (which despite plaintiff having a title) still the subject for litigation in both civil and criminal cases pending in Malindi.

Since the status of DORCAS in this matter is in issue – is she a licensee or an owner, and to avoid going in circles and causing delay, I direct that parties in this matter and in HCCC No. 7 of 2005 must list the two matters of hearing on one day, with a view to having the same consolidated, and I direct the Deputy Registrar to ensure that a copy of this ruling and order is served on the parties and their advocates in HCCC No. 7 of 2005.

I therefore decline to grant the prayers sought, and the application is dismissed with costs to be borne by the applicant.

Delivered and dated this 28th day of **March 2011** at Malindi.

H. A. Omondi
JUDGE

Mr. Matini for respondent
Mr. Kilonzo for applicant