



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 588 OF 2008

PETER KIMATA
WACHIRA.....PLAINTIFF/APPLICANT

V E R S U S

FOLDERTEK INVESTMENTS
LTD.....DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff's case is that his late father Stanley Wachira was a member of Githunguri Constituency Farmers Cooperative Society Limited (later renamed Githunguri Constituency Ranching Company Limited) having bought a share therein at KShs. 105/= on 30th July 1968. The deceased successfully balloted for a plot. On 30th November 1995 he gifted the plot to the plaintiff who was then issued with a share certificate. The Plaintiff was subsequently issued with a title deed ("PK-1") following registration on 13th March 1996. The plot measures 0.4992 Hectares and is known as Ruiru/Kiu Block 2 (Githunguri)/3620. He states that this was a first registration. He complains that the Defendant, one Daniel Muiruri Njoroge, and other unknown persons committed acts of fraud and illegality and caused the suit property to be transferred to the Defendant on 26th September 2008 and another title deed issued.

The suit was filed for a declaration that the suit property belongs to the Plaintiff and that the transfer and registration of the same in the name of the Defendant was illegal, null and void. An order was sought for the rectification of the register to remove the name of the Defendant and replace it with that of the Plaintiff. Also sought was an order of permanent injunction.

The Defendant also holds title deed to the suit property following registration on 26th September 2008. It is "M.C.M.4". Its case is that following Agreement of Sale ("M.C.M.2") dated 16th September 2008 it bought the property for KShs. 400,000/= from the said Daniel Muiruri Njoroge, and that this was following a search ("M.C.M.3") which revealed that Njoroge was the registered proprietor. It states that it is a purchaser for value without notice, and denied allegations of fraud against it.

The Plaintiff has applied that the Defendant's defence be struck out with costs and judgment be entered as prayed in the plaint because the defence:-

- a) is scandalous, frivolous or vexatious;
- b) may prejudice, embarrass and delay the fair trial of the suit; and
- c) is an abuse of the process of the court.

The application was made under Order 6 rule 13 (b) (c) and (d) of the Civil Procedure Rules. The intention must have been to bring it under Order 6 rule 13 (1) (b), (c) and (d). The same was prosecuted by Mr. Gachimu. It was defended by Mr. Munga whose client swore a replying affidavit through its director Mugachia Chege Maina. I am grateful to counsel for their oral and written submissions.

It is material that after the Defendant filed its defence the Plaintiff went to the Lands Registry at Thika where the land is registered and found that the property was first registered in the name of the Government on 26th October 2003 and on the same day it was transferred to Njoroge who transferred it to the Defendant on 26th September 2008 and title deed was issued on 29th September 2008. "PK-10" refers. He alleges that this was never Government land and that the records at the Registry that passed the land to either Njoroge or the Defendant were fraudulent and illegal. The court will have to establish whether the origin of this land was Githunguri Constituency Ranching Company Limited or the Government. In all this, and now that the Plaintiff attacks the register at the Thika Lands Registry and has sought rectification of the same, it will be necessary to join the District Land Registrar, Thika and the Attorney General; just like it will also be necessary to join Githunguri Constituency Ranching Company and Njoroge. Fraud has been alleged against the Registry and Njoroge. The lands office will have to indicate which of the two titles is genuine.

Further, whether or not the Defendant is a purchaser for value without notice and whether or not it is guilty of fraud are issues upon which it will be necessary to receive evidence and findings made thereon one way or the other.

In other words, the Defendant's defence raises several issues that have to go to trial for resolution. Such a defence cannot be said to be an abuse of the process of the court (**Intercountries Importers And Exporters Ltd. -Vs- Nairobi City Council HC (Milimani Commercial Courts) CC No. 1070 of 2001**). The defence does not allege anything that is indecent, offensive or improper acts, omissions or motives against the Plaintiff which are unnecessary in the proof the case. It cannot therefore be said to be scandalous in anyway. The Defendant has raised a defence that fairly notifies the Plaintiff of what case he will meet. Such a defence cannot be said to be intended to prejudice, embarrass or delay the fair trial of this case.

I am aware that the power to strike out any pleading or any part of it is not only discretionary but also quite drastic and draconian in effect as it denies the other party the opportunity to have his case heard and determined on merits after a full hearing (**D.T. Dobie & Co. Ltd Joseph Mbaria Muchina [1982] KLR 1**). This summary jurisdiction cannot be exercised where a defendant has a defence that raises a number of *bona fide* triable issues, like is the case here.

In conclusion, I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E