



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 36 OF 2009

FRANCIS NJOROGI KIGUONGO.....PLAINTIFF

V E R S U S

**BERNARDOS MURAYA
KIIGE.....DEFENDANT**

R U L I N G

The Plaintiff has applied under Order 6 rule 13 (1) (b) and (d) of the Civil Procedure Rules to have the Defendant's defence struck out and judgment entered as prayed in the Plaint. This is on the basis that:-

- (a) the Defendant has no genuine defence against the claim;
- (b) the defence filed is sham, frivolous and vexatious; and
- (c) the Defendant has no lawful sustainable interest in the suit land.

The suit land Nairobi/Block 126/509 measures about 2.116 Hectares and is situated in Nairobi. The Plaintiff has a 99 leasehold interest over the land ("FNK1) that was registered on 25th July 2007 to run from 1st January 1993. The lease is registered under the Registered Land Act (Cap. 300). His complaint is that the Defendant has without authority entered the parcel and erected a semi-permanent structure thereon. He has further commenced cultivation of the land. The suit was filed for eviction, permanent injunction and general damages for trespass.

The Defendant has a Power of Attorney donated by one Jane Wambui Karuku who since 1992 has had

ownership and possession of the land following allocation by the Government of Kenya. She is the one who owns the structures thereon. The Defendant says he is a mere licensee of the said Karuku. He annexed the allocation of the suit land to Karuku contained in the letter of allotment (“BMK2”) dated 18th December 1992 for which she paid and was to wait for the lease. The Defendant exhibited a letter dated 15th November 2005 from the Commission of Lands to Ngundu Farmers Cooperative Society Ltd over the plot. It said the plot was as a result of the subdivision of L.R. No. 11593 which the Government had approved and that the issue of the lease to the plot would be undertaken as soon as there was formal acceptance of the special conditions and the payment of the prescribed charges indicated.

It is notable that according to the Certificate of Lease provided by the Plaintiff, the Government is the lessor and Ngundu Farmers Cooperative Society Limited is the lessee for 99 years to run from 1st July 1993. The Plaintiff further annexed an Agreement of Sale (“FNK 2”) showing that he bought the suit land for KShs. 400,000/= from the Society. It is after the purchase that he obtained the Lease. It is the Defendant’s case that the lease to the Plaintiff was fraudulently and illegally obtained in view of the earlier allocation of the suit land to Karuku who had paid for it and was waiting for the lease from the Government. This is why he opposed the application saying that he has a defence that raises triable issues which should go to trial.

I have considered the affidavit evidence, the annexures and the written submissions by Mr. Mbigi for the Plaintiff and Mr. Mwangi for the Defendant. The application is under Order 6 rule 13 (1) (b) and (d). It is therefore being alleged that the defence is:-

“*Scandalous, frivolous or vexatious*”

or that

“*it is otherwise an abuse of the process of the court*”.

In the case of **Trust Bank Limited –Vs- Amin & Company Ltd & Another [2000] KLR 164**, Justice Onyango – Otieno (as he then was) made reference to the Court of Appeal decision in **J. P. Machira – Vs- Wangechi And Nation Newspaper, Civil Appeal No. 179 of 1997** and the writer in **Bullen & Leake and Jacobs Precedents of Pleadings (12th Edition)** on chapter dealing with striking out pleadings at page 145 and held that a pleading is scandalous if it is indecent, offensive or improper; it is frivolous when it is without substance or is groundless or fanciful; vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble an expense; and is an abuse of the process of the court if it is brought merely to misuse the court machinery or process. In **Intercountries Importers And Exporters Ltd -Vs- Nairobi City Council, HC (Milimani Commercial Courts) CC No. 1070 of 2001**, Justice Ringera (as he then was) observed that where a defence discloses a reasonable cause of defence and it is articulated in a manner which does not offend any of the rules of pleading, it cannot be said to be an abuse of the process of the court. It should also be pointed out that a pleading that is scandalous or frivolous or vexatious would itself be an abuse of the process of the court.

It is now trite that striking out a pleading is a summary and draconian act which may only be resorted to in plain and obvious cases (**D.T. Dobie And Company Ltd. –Vs- Muchina And Another [1982] KLR 1**). The remedy should be resorted to where not even an amendment can save the pleading. The idea is that the Defendant should not be shut out from the seat of justice without being heard on merits.

A defence on merits does not mean a defence that must succeed, it means one that raises a triable issue: that is an issue which raises a *prima facie* defence, or a defence that is arguable (**Vaiwin Ltd. _Vs-**

Rasikbhai Manibhai Patel, Civil Appeal No. 248 of 1999)

Applying these principles of law to the facts of this case, I consider as follows. The Defendant has a Power of Attorney from Karuku over the suit land. He is on the land, he says, as a licensee of Karuku who was allotted the land by the Government earlier than the Plaintiff had acquired interest in the same. The said Karuku was waiting for a lease when the Plaintiff got one over the same land. The Defendant is saying that the Plaintiff's lease was subject to the interest of Karuku over the land; that the Plaintiff's lease is a fraud and an illegality. I am aware of the sanctity of title under sections 27 and 28 of the Registered Land Act (**Michael Githinji Kimotho –Vs- Nicholas Muratha Mugo, Civil Appeal No. 53 of 1995 at Nairobi**), but in this case the Defendant is raising a defence that attacks the title that the Plaintiff holds over the suit land and this is a matter that the court should inquire into in a full trial. There is nothing scandalous, frivolous or vexatious about this apparently legitimate complaint that the Defendant has regarding the title.

In conclusion, the application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E