-Striking out Pleadings
-Test: Reasonable Cause

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 5 OF 2008

TAHIR SHEIKH SAID……PLAINTIFF

-VERSUS-

PROFESSOR ABDALLA SAID BUJRA……DEFENDANT

RULING

By a Chamber Summons application dated 24th January 2011 made pursuant to Order 2 rule 15 (1) (b) and (d) of the Civil Procedure Rules and section 3A the applicant seeks that the Plaint dated 20th February 2008 and filed on 21st February 2008, be struck out and judgement be entered in favour of the Defendant/Applicant as prayed in the Defence dated 28th April 2008. It also prays that the Plaintiff`s suit be dismissed.

The application is premised on grounds that;-

1. The Plaint is scandalous as the cause of action relates to land portion No.620 Malindi yet Defendant is not the owner of the said portion. No search of the property has been pleaded by the Plaintiff to show how the Defendant owns the portion of land adjacent to his portion which is the subject matter of this suit.

2. The Plaintiff is the allotee and owner of land portion No.786 Malindi(Originating No.621/2 Malindi).

3. The Plaintiff has not appealed against the ruling delivered by this court on 22/06/10 showing that Plaintiff has made allegations which he does not support and the Plaint is frivolous for making such allegations and vexatious as the facts pleaded cannot be proved nor do they have a chance of being proved.

4. The Plaintiff's suit is an abuse of court process as the evidence on record remains unchallenged following the court`s ruling to the effect that Defendant is the allotee of Plot No.786 Malindi.

The application is supported by the affidavit sworn by Professor **ABDALLA SAID BUJRA**(Defendant) who defines that he is not the owner of Plot No.620 Malindi, which he owns plot No.786 as confirmed by a copy of Official Search Certificate annexed and marked PASB1. He was confirmed as the owner of the land given up seaward by the receeding Indian Ocean by a letter of allotment marked PASB2. The land which applicant owns is adjacent to the sea and abutts onto the Indian Ocean and has no relationship with

Plot No.620, He does not know where the Plaintiff`s land is or whether there have been any interferences.

The application is opposed, and on the grounds of opposition filed, which state that;-

1. The application is frivolous, vexatious and an abuse to the court process, defective and lacks merit.

2. The application is brought in bad faith to settle the Plaintiff`s suit before it is heard.

3. Dismissal of the interlocutory application for want of documentary evidence such as survey report does not bar the Respondent/Plaintiff from furnishing and adducing such evidence at the full trial.

4. The orders sought are very drastic and will occasion gross injustice to the Plaintiff and no prejudice will be occasioned to the Defendant by the determination of this suit on merit and no prejudice will be occasioned to the Defendant/Applicant.

At the hearing of the application, **MR MWENESI**(acting for applicant) sought that the grounds of opposition filed by the Respondent be disregarded as the same was served on him on the morning of the hearing, thereby offending the provisions of Order 51 rule 14 of the Civil Procedure Rule 2010. The court agreed with him and therefore restricted **MR OTIENO**(for Respondent) to responding only on points of law. **MR MWENESI** in his submissions drew this court`s attention to a ruling delivered at an interlocutory stage and argues that the respondents cannot now claim to have a survery report, saying they are bound by the Pleadings – he refers to the decision in **GULAM** and **ANOTHER V JIRONGO (2004) KLR page 158** holding NO. 6 that the court cannot consider an issue to be raised other than by pleadings. He argues that the facts presented to this court and even the pleadings subsequent to the defence have not dislodged the court`s finding at the interlocutory stage that there is doubt as to the probability of successful litigation in this matter.

MR MWENESI`S** contention is that subsequent to the court`s ruling, then it was necessary for the Plaintiff/Respondent to proceed under Order 2 rule 3 & 4 to specifically plead those matter which would show probability of success and correct the allegations they were making to their evidence. He further contends that in the absence of this, then there is no factual situation that would entitle the Plaintiff to obtain the relief he seeks for a permanent injunction against a wrongly sued person. Counsel has also urged this court to be guided by the decision in **V R CONSTRUCTION CO. LTD v MPAZA INVESTMENTS LIMITATIONS LTD HCCC No. 257 of 2003 holding No. (a) which was to the effect that;-

"(a) A reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chances of success when only the averments in the plaint are canvassed that is the test for the reasonableness of the cause of action is the possibility of the Success thereof when only the plaint is considered"

MR MWENESI argues that in the present situation, no life can be injected to the claim even by an amendment to the Plaint, as the claim is frivolous and vexatious**, MR MWENESI** winds it up by a quip that at least a certificate of search showing the land portion should have been included in the pleadings and the Plaintiff/Respondent cannot rely on the Registration of Titles Act (Cap 282) which does not result in creating portions of land.

MR OTIENO in response submits that the grounds relied on, by and large touch on matters of evidence, which should be dealt with at full hearing and whether the Defendant is the owner of plot 620 remains a triable issue yet to be disposed of. It is his contention that the searches are actually evidence which need not be pleaded and urges this court to be strictly guided by the provisions of Order 2 Rule 3 which is to the effect that only facts shall be pleaded and not evidence, so Plaintiff cannot be condemned for complying with the Civil Procedure Rules. He argues that, the fact that Plaintiff did not supply the documents at the interlocutory hearing, leading to dismissal of the application is not a bar to him adducing the documents at the full hearing and there was no point in appealing against the court`s ruling,

because it was a fact that the documents were not availed to the court at the interlocutory interpartes hearing and the applicant is still entitled to produce relevant documents at the substantive hearing.

MR OTIENO submits that the position taken that Defendant owns Plot No.786 and not the plot pleaded in the plaint does not mean it cannot be proved that he owns Plot 620 which is adjacent to Plaintiff`s land where the act of trespass is alleged to be committed.

**MR MWENESI`S** response is that there is nothing pleaded to identify the immovable property and that order 2 Rule 4 comes to applicant`s aid and that the application is not premised on evidence saying order 2 rule 15 require parties to show the evidence which they rely on so as to enable the adverse party respond with rebuttal evidence. He wonders why the court`s time should be wasted on hearing to prove ownership when the same can be addressed by striking out the Plaint.

This application is made under Order 2 Rule 15 which provides;-

'At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that;-

(a) It discloses no reasonable cause of action or defence in law
(b) It is scandalous, frivolous or vexatious
(c) It may prejudice, embarrass or delay the fair trail of the action or
(d) It is otherwise an abuse of the court process"

The basis for this application is the Applicant/Defendant`s denial of owning plot 620, saying he only owns plot 786. The case of **V.K.CONSTRUCTION** (infra) gives very good guidance as to what constitutes a reasonable cause of action and the test is the possibility of success when only the plaint is considered. Unlike in the interlocutory stage where the Defendant`s response was considered (to determine a prima facie case), here, it is only the Plaint. Now a look at that plaint (without taking into consideration the replying affidavit or the statement of defence), discloses a claim for an injunction based on alleged acts of trespass by the Defendant/Applicant.
The act complained of is trespass – as to whether it is due to encroachment by Defendant whose land is cited as No. 620 Malindi, is a matter to be proved at the substantive hearing, and to my mind that is a matter of evidence. The distinction is so clear, at the interlocutory interpartes hearing, the standard was prima facie establishing success of litigation upon considering defendant`s response. For the substantive hearing the tests on reasonableness is possibility of success purely on the face of the Plaintiff`s pleadings and nothing else. The Plaintiff/Respondent passes that test on reasonableness.

Order 2 rule 3 provides that what is required to be pleaded are facts not evidence, introducing the certificate of search in the pleadings to my mind would be introducing evidentiary material, and I do not think that is what Order 2 Rule 3 contemplates.

Order 2 rule 3 (1) states;-

"Subject to the provision of this rule……. Every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim, or defence, but NOT the evidence by which those facts are to proved….."

The search certificate is the evidence which would prove the fact pleaded that Defendant/Applicant owns plot 620. What order 2 rule 4 (1) contemplates is specific pleadings on actions constituting the illegality not the evidence of those actions. In any event, the one alleging is the one to prove and certainly the findings at the interlocutory stage are not a bar to the Respondents introducing evidence at the main hearing to prove that the Applicant indeed owns the Plot No.620 or is a trespasser. To issue the orders sought, would in my view be tantamount to condemning the Respondent unheard based on the findings which were made at an interlocutory stage. My finding is that the Respondent has a reasonable cause worthy of being heard and so this application fails and is dismissed with costs to Respondent.

Delivered and dated this 15th day of June 2011 at MALINDI

H A OMONDI
JUDGE