REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 186 of 2009

JOSEPH TAITA ROTICH)
SAMWEL NGETICH SANG).....**PLAINTIFFS**
STEPHEN KIPKOECH A. MITEI)
WILSON KIPRONO TERER)

-VERSUS-

DANIEL KIPNGETICH LANGAT.....**DEFENDANT**

RULING

By a Notice of Motion application dated 2nd November, 2009 and filed in court on 16th November, 2009, the applicants sought as against the respondent prayers in terms that:-

> *" i) The Honourable court be pleased to enter summary judgment against the Defendant/Respondent herein, in terms of the Plaint dated 23rd September,2009 and lodged in Court on even date.*
> *ii) In the alternative and without prejudice, the Honourable Court be pleased to strike out and/or order struck out, the statement of Defence dated 21st October,2009 and lodged in Court on the 22nd October,2009.*
> *iii) Consequent to prayer 2 being granted, the Honourable Court be pleased to enter Judgment in favour of the Plaintiffs/Applicants in terms of the Plaint.*
> *iv) Costs of this Application and the main suit be borne by the Defendant/Respondent.*
> *v) Such further and/or other orders be made, as the court may deem fit, in the interest of justice."*

The application was supported by the affidavit of *Joseph Taita Rotich,* the 1st respondent. That affidavit merely elaborated and expounded on the grounds in support of the application aforesaid. Accordingly, I need not reproduce the same here.

On being served with the application the respondent reacted by filing a replying affidavit in opposition to the application. In pertinent paragraphs he deponed that he stays on the land parcel *Trans-mara/Kimintet"D"/210, "the suit premises"* with his family and had no other place to call home That if the orders sought were granted he will be rendered destitute. That summary judgment will not give respective parties chances to explain to court the position on the ground and finally that the defence filed raised triable issues.

What did the respondent say in his defence in answer to the plaintiffs' claim; he denied that the applicants were the proprietors of the suit premises, that he did not in or about 1992 lodge objection proceedings in respect of *Plot no.210,Kimintet D,Adjudication section.* He also denied that the said objection proceedings were heard and determined with the consequence that his objection was dismissed. Posing here for a moment, it is quite apparent that the respondent is being economical with the truth. He is not being candid with the court at all. A careful reading of the pleadings and other documents filed in court shows clearly that the applicants are indeed the registered proprietors of the suit premises; that during land adjudication in the area where the suit premises are situate, the respondent raised his objection which objection was duly heard and dismissed. Now if the respondent can lie on such mundane things even touching on his own actions, what else is he not capable of lying about . A litigant who seeks court's discretion in his favour should not in the face of the court appear to be less than candid. If the court was however to form such an impression it should be a good ground for the court not to exercise the discretion sought in favour of such a litigant. On an application of this nature, whether or not to grant leave to the defendant to defend the suit is an exercise in discretion. I must say that on this score the respondent has not acquitted himself very well.

The other aspects of the defence raised are that he has been in occupation of the suit premises since 1973 and has nowhere else to go, that he was never served with the Notice of Institution of the suit and finally that the suit was bad in law and he would raise a Preliminary Objection on a point of law at the first hearing of the same. It cannot be a reason for one to remain on another person's land merely because he has been in occupation of the same for years and that he would be rendered destitute and homeless if the was ordered to vacate. In any event the respondent has made no counterclaim nor has he filed suit for adverse possession. The issue regarding failure to serve Notice of

Intention to file suit before instituting the same would be relevant for purposes of condemning a party to costs. It cannot therefore on its own amount to a valid defence. With regard to the preliminary objection, nothing turns on it. Apparently, the objection was going to be that the dispute herein fell within the provisions of the Land Disputes Tribunal Act and therefore this court had no jurisdiction to entertain the same. I should observe that though the respondent had threatened in his defence that he would raise the issue as Preliminary Point he never did so. In any event he has not said in his defence, that the dispute was about his right to work land, boundary dispute and or even trespass. As I understand it his entitlement to the suit premises is on the basis of his long occupation of the same. That alone should give him a right to possession of the suit premises perhaps on the basis of prescriptive rights. However the plaintiff has made no such counterclaim in his defence.

In support of the application *Mr. Ochwangi*, learned counsel submitted that the defence as filed does not raise any triable issue. The applicants were registered proprietors of the suit premises. The respondent had no basis to remain in occupation of the same. Accordingly this was a fit and proper case for summary judgment.

In support of the submissions, counsel cited the following authorities:
Industrial Commercial Development Corporation .V.Daber Enterprises Ltd(2001)1 EA 75 and Elijah Ntaiya .V.Lekinini Kulale & 3 others,KISII HCCC NO. 29 OF 2007 (UR).

What was the respondent's take on the submissions of the applicants? His counsel, *Mr. Nyawencha*, was contended with relying entirely on the replying affidavit.

Striking out a defence and thereafter entering summary judgment is such a drastic and draconian action that it must be exercised with utmost caution, restraint and in the clearest of cases. As correctly observed in the case of ICDC (supra) *"….unless the matter is plain and obvious, a party to a Civil Litigation is not to be deprived of his right to have his case tried by a propertrial.……"* On the other hand "*summary procedure is applied to enable a plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or, if a arguable, plainly unsustainable, summary judgment should be given….."* I have no doubt in my mind that is a fit and proper case where the defence ought to be struck on the basis that it does not raise any triable issue at all. The alleged point of law raised is nothing but hot air and in any event not bonafide.

It is common ground that the applicants are the registered proprietors of the suit premises following adjudication process. It is also common ground that, that registration is a first registration. It is also common ground that the respondent is in occupation of the suit premises. That occupation can only be on the basis of a trespasser as he has no legal or equitable right over the suit premises. On the basis of the documents exhibited in the affidavit support of the application, it is also common ground that after the demarcation and adjudication of the suit premises, the respondent as required under the Land Adjudication Act lodged an Objection to the allocation of the same to the applicants, Vide Objection number 178 of 1997. The same was subsequently heard and determined by the Land Adjudication Officer, Trans-mara in favour of the applicants. Undettered , the next stop by the respondent was at the doors of the Minister for Lands & Settlement by way of appeal being *appeal number 52 of 2001*. On 31st October, 2002, the Minister found in favour of the applicants and dismissed the appeal. The respondent's appeal to the Minister having been dismissed as a foresaid, the respondent in my view, has no claim to the suit premises either legally or equitably. This is the essence of *section 29(1) (b) of the Land Adjudication Act.* It specifically provides that the minister's decision on appeal is final. By dismissing the appeal, the Minister determined that the suit premises belonged to the applicants. That determination is final as provided by the section of the law aforesaid. The respondent took no steps to challenge that decision. That being the case, he is bound by it. To allow this case to go forward will be tantamount to re-canvassing the same and or in a rather unorthodox manner challenging the minister's decision on appeal. It was open to the applicant to challenge the decision by way of Judicial Review proceedings. He did not do so. Accordingly he is bound by the Minister's decision.

The respondent's defence is a mere denial. To cap it all he even denies his own actions and matters and or events in his own personal knowledge and in which he participated actively.. A mere denial by the respondent cannot and can never be, in law, a proper defence.

As observed by *Musinga J* in the case of Elijah Ntaiyia (Supra).. "*in application for summary judgment, the duty is cast on the defendant to prove that he should be given leave to defend by showing prima facie, existence of triable issue(s)…".* I agree. The same observation were made in the case of *Nairobi Golf Hotels (K) Ltd .V. BhinjiSanghan Builders Contractors,C.A.No.5 of 1997(UR).* In my view, the respondent has failed to show that he has a valid defence to the applicants' claim. The defence on record raises no triable issues at all. To allow the same to go forward will be sacrificing valuable judicial time on a defence which is clearly hopeless and irredeemably unsustainable. For all the aforesaid reasons, I would strike out the defence filed. In consequence therefore I enter summary judgment in favour of the applicant in terms of the plaint. The applicants shall have the costs of this application as well as the main suit.

Dated, signed and delivered at Kisii this 4th March, 2010.

ASIKE-MAKHANDIA
JUDGE