



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE 18 OF 2005**

**SARAH CHELEL BOIT:.....PLAINTIFF**

**VERSUS**

**DAVID SITIENEI SOIN & 14 OTHERS:.....DEFENDANTS**

**RULING**

The applicant is the Plaintiff herein. She has taken out a Notice of Motion under Orders 1 Rule 8, VI Rule 13(1) ©, XXV Rule 1(b) and XXXVI Rule 3d of the Civil Procedure Rules praying that the Defendants' defence and counterclaim be struck out and judgment be entered in favour of the Plaintiff as prayed for in the plaint, and for costs of the application and the suit. It is based on the grounds that the defence as presented is a sham and raises no triable issues, that the defence is merely evasive and intended to delay the quick disposal of the suit and that the defendants being mere squatters they cannot have any conceivable defence to the action. The further grounds are that the counterclaim in so far as it seeks orders in favour of the Defendants, their children among others is defective as the defendants purport to act in a representative capacity without first complying with statutory provisions governing the commencement of representative actions and that a claim for adverse possession can only be commenced by way of an Originating Summons and not any other way.

The application is supported by the supporting affidavit of the Plaintiff wherein she deposes that she is the registered owner of the suit land and that the defendants are on the suit land without any colour of right. The deponent adds that the defence as filed is a sham merely intended to delay the conclusion of the matter and that she is advised by her advocates and she believes such advice, that the defendants cannot lay claim to her land and a representative suit requires leave of the court before it can be instituted and finally that a claim for adverse possession can only be brought by way of an Originating Summons and not otherwise.

The application is opposed. A Replying Affidavit is sworn by **DAVID SITIENEI SOIN** one of the defendants who states that he has authority to swear it on behalf of the other fourteen defendants and for himself. He deposes That the application is brought in bad faith and with malice, is without merit and is mischievous and fatally defective, brought only to derail the court from determining facts and the truth about the subject matter of the suit. He adds that the defendants have been in the suit land with the full knowledge of the Plaintiff and her deceased husband and brother and the fact that she is now the registered owner through probate does not conclusively settle the matters in issue. He further deposes that the issue before court being the ownership rights of the parties herein cannot be determined by summary application and that the court is bound to look at the circumstances under which the Plaintiff

became the registered owner of the suit land and that she has a duty as the legal administrator of the estate of the original owner of the suit land to equitably distribute the estate to those of the Defendants who have a legal interest. The further averment is that the Plaintiff should not be allowed to wish away the interests of the defendants and that the deponent has been authorized by the other defendants to conduct the case on their behalf. He finishes by saying that he has been advised by his advocate that it is not true that they should have sought leave of the court to bring a representative suit and that a claim for adverse possession need not be brought by Originating Summons.

At the hearing of the application **Mr. Manani** Advocate for the Plaintiff/Applicant submitted that the defence as filed raises no triable issues and the claim is for the recovery of land owned and registered in the Plaintiff's name. He submitted that such application is contemplated by order 35(1) b of the Civil Procedure Rules and can be entertained by way of summary application. Counsel relied on S.23 of the Registration of titles Act cap.281 of the Laws of Kenya which vests title absolutely in the Plaintiff. The claim by the defendants in their defence that they had lived on the land for a period in excess of 70 years was seen as just that, a claim without a demonstration of a right as to title. He submitted that the defence and the counterclaim were contradictory as wherein in the defence the defendants claimed title by the duration of time they have been on the land in the counterclaim they claim under trust and yet there is not an entry in the title document for a trust. **Mr. Manani** further submitted that the claim under adverse possession as in paragraphs 13, 14 and 15 of the Amended defence and counter claim must fail as they were brought not as provided for under Order 36 (1) of the civil Procedure Rules. He added that paragraph 6 of the defence and 14 of the counterclaim claimed for the defendants themselves, their parents and grandchildren and as no leave was sought to bring a representative action then the defence must fail. He relied on various cases to prove that the Plaintiff has a fool- proof case.

**Mrs. Kittony's** submission were that if the orders sought are granted they will deny the parties the right to be heard as the Amended defence, counterclaim and Reply to defence show that evidence is needed to resolve the issues. She submitted further that as the Plaintiff put the Defendants to strict proof of certain issues and similarly the defence put the Plaintiff to strict proof of some other issues, then those issues must be resolved by adducing evidence as that cannot be done by affidavits and submissions by counsel. Counsel's further submissions were that striking out must be used only in plain cases and this one was not one such plain case as the defendants rights have been recognized by the original owner of title before his death and registration of the Plaintiff by transmission through probate and registration under S.23 of the RTA could be challenged on fraud. Counsel also relied on an authority to fortress her case.

Counsel for the defendants conceded that a claim for adverse possession must be brought vide an originating summons but stated that parties could be allowed to amend pleadings. She said that this was not a representative suit as the defendant's are numbers 1 to 15 and they did not need leave of the court to be represented. She described the plea for a claim for parents and grandchildren as a mention in passing as those persons were not mentioned by name as only then would leave be sought. She concluded that it is only fair and just to proceed to full hearing.

In a brief reply counsel for the Plaintiff stated that the defendants never raised an issue during the process of obtaining Grant of representation by the Plaintiff as they filed an objection that they soon withdrew. He concluded that Order 35 of the Civil Procedure Rules does not state that land matters must go to full hearing and putting a party to strict proof is merely a way of closing pleadings. He said that not one triable issue had been shown to exist and prayed that the application be allowed and the defence and counter-claim be struck out.

I have given this matter due consideration. The Plaintiff prays for a declaration that the defendants are unlawfully on the suit land and further that the defendants and anyone claiming through or under them be evicted from the suit land. On their part in their defence and counterclaim and later in the Amended defence and counterclaim the defendants deny that they are trespassers or that they are on the suit land unlawfully. They claim, in paragraph 13 and 15 of the counter-claim, by adverse possession.

In paragraph 16 of the Amended Defence and Counter claim the defendants pray for subdivision of

the land among themselves, **their children, servants and/or agents (emphasis mine)** clearly that is a claim whose representation is representative by nature. True, the Defendants 1 to 15 need no leave to bring the claim for themselves, those of them that are still alive. However when they attempt to also claim for others then they must comply with Order 1 Rule 8 which is completely different from Order 1 Rule 12. And a party is bound by their pleadings and it cannot therefore be said that paragraph 16 of the counter-claim was “a mention in passing.” Empowered by the said 16 of the counter-claim is struck out as having been filed for parties not in the suit without leave of the court.

**Mrs. Kittony** Counsel for the Defendants easily conceded that a claim for adverse possession can only be brought by Originating summons. There is no legal position that a claim for adverse possession can be brought by way of a counter-claim. Giving leave to the Defendants to amend their defence and counter claim cannot cure the defect as the Plaintiff’s suit is by plaint and a counter claim for adverse possession can only be brought as under order 36. Consequently paragraphs 13 and 15 of the counter-claim are struck out.

It is the courts that have held that striking out pleading is a drastic remedy to be invoked only in plain and obvious cases . That is my guiding principle herein. However in plain and obvious cases the court will not hesitate to exercise its jurisdiction in regard there with. To my mind that is what I have just done above, and that is how I have exercised my judicial discretion.

There is the defence of a trust in paragraphs 15(a) and (d) of the Defence and counter-claim. That defence raises a trial issue in my view. In the case of **HD HASMARI –V-S- BANQUE DIS CONGO BE/GE EACA CIVIL APPLCIATION No.9 of 1938** it was held that the summary process must not be exercised where the defence raises even one triable issue. And if a triable issue is found to exist, then the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed at the trial see **SHAH V. PADAMSHI CA.5/82**. In the premises therefore I order that the suit do proceed to hearing in respect of the claim under trust and for the avoidance of doubt the claim under adverse possession as brought is unsustainable and the same is struck out.

There will orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 13<sup>th</sup> DAY OF MAY, 2009.**

**P.M.MWILU**

**JUDGE**

**IN THE PRESENCE OF:-**

Paul Ekiatela - Court clerk

Mr. Manani - Advocate for the Plaintiff/Applicant

Ms. Kittony - Advocate for the Defendant/Respondent