



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 778 of 2005

JAMES KINYUA KAIRU.....PLAINTIFF

VERSUS

STANLEY MWANGI KIMAMO.....DEFENDANT

R U L I N G

1. The application before court is the Chamber Summons dated 26/08/2008. The application which is expressed to be brought under Order IV Rule 5, Order VI Rule 13(1) to C & D (sic) of the Civil Procedure Rules and all other enabling provisions of the law seeks an order for the striking out of the Plaintiff's suit on the ground that this suit is an abuse of the process of the court, is scandalous and vexatious. The Applicant/Defendant also prays that costs be provided for and for such other and/or further order as this honourable court may deem fit and just to grant.
2. The application is premised on the grounds that the Plaintiff has failed and/or ignored to serve the Defendant with summons to enter appearance, thereby stalling any forward movement of the case. The Applicant also says that the Plaintiff has no lawful claim over the suit premises known as Ruiru West Block 1/3351. Finally the Applicant says that the Plaintiff has failed to take steps to prosecute this suit.
3. The application is also supported by the sworn affidavit of Stanley Mwangi Kimamo dated 26/08/2008. The deponent reiterates what is stated in the grounds on the face of the application. He also says he is the registered proprietor of the suit land though the Plaintiff has alleged in the plaint that the Applicant has trespassed on his (Plaintiff's) parcel of land. The deponent also says that the Plaintiff has developed cold feet over the claims of trespass. The Applicant says that the Plaintiff's suit lacks merit, is bad in law and a non-starter and ought to be dismissed with costs to the Defendant.
4. The application is opposed. The Plaintiff filed his replying affidavit dated 22/10/2008. The Plaintiff says that the reason for the delay in prosecuting this matter is the failure on the part of the police to arrest the Defendant for having a fake title deed. He alleges that he has the original title deed to the suit property which property he says he bought from one Stephen Kariuki Kanja. The Plaintiff says he is the one paying rates for the suit land. Annexed to his Replying Affidavit are annexures of copies of the following documents among others:—

(a) JKK 1" – Certificate of lease issued on 11/06/2007 in the name of James Kinyua, ID No.1669782.

(b) *JKK 2 – Certificate of Official Search dated 19/06/2007 in respect of LR No. Ruiru West Block 1/3351.*

(c) *JKK 8 – Sale Agreement dated 8/10/2002 between Stephen Kariuki Kanja of Box 31 Ruiru and James Kinyua Kairu of Box 156, Ngewa via Ruiru.*

(d) *JKK 7 – being copy of ID records for identity card numbers issued on the title being as being that of Pamela Abura and not the Defendant.*

5. The Applicant swore a Further Affidavit dated 9/02/2009. He says that the reason given by the Plaintiff for the delay in prosecuting this case, namely police failure to arrest the Defendant/Applicant has nothing to do with the prosecution of this matter; and further that the allegations by the Plaintiff imputing criminality on the part of the Defendant with respect to the title deed have no basis whatsoever and that those allegations are only meant to mislead the court. The Defendant counters the Plaintiffs allegations by saying that the title deed exhibited by the Applicant is a fraudulent document. The Applicant says his correct ID No. is 6450303 and not 6540303. He has annexed to his Further Affidavit a copy ID of Stanley Mwangi Kimamo ID No. 6450303, issued on 16/05/1996.

6. The application was duly served upon the Plaintiff/Respondent on 6/10/2009, but neither the Plaintiff nor his advocates, M/s Mutali Wanyama & Co. Advocate appeared for the hearing of the application. Mr. Njenga for the Applicant urged the court to allow the application and grant the orders sought. Mr. Njenga submitted that no cogent reason had been given by the Plaintiff for the delay in serving the Summons to Enter Appearance upon the Defendant/Applicant.

7. The court has now considered the application, the grounds in support thereof both on the face of the application and in the Supporting and Further Affidavits sworn by the Applicant. The court has also considered the Replying Affidavit and its annexures. The issue that arises for determination is whether the Plaintiff has acted with diligence since filing of the suit on 23/06/2005.

8. In his plaint dated 23/06/2005 and filed in court on the same day, the Plaintiff claims that the Defendant/Applicant trespassed on the Plaintiff's parcel of land known as Ruiru West Block 1/3351. The Plaintiff therefore prays for judgment against the Defendant for:—

(a) *A permanent injunction restraining the Defendant from transferring, disposing, alienating and/or in any other way whatsoever dealing with land parcel Number Ruiru West Block 1/3351.*

(b) *Cost of the suit*

(c) *Any other relief this Honourable Court may deem fit and just to grant.*

9. It is not denied by the Plaintiff that Summons to Enter Appearance have never been served upon the Defendant herein. There is no evidence on record from the Plaintiff that any efforts have been made to serve the Summons upon the Defendant, nor to show that the summons have been issued. Under Order IV Rule 2(5) of the Civil Procedure Rules, it is obligatory for a Plaintiff or his advocate to prepare the summons and to file it with the plaint to be signed by the judge or an officer appointed by the judge and sealed with the seal of the court in accordance with subrule 2(2). It not denied by the Plaintiff herein that no summons have ever been issued in this case, some four years down the road since the suit was filed. The Plaintiff says that he is waiting for the Defendant to be arrested before he can take further action in the matter. The Plaintiff has not shown the nexus between the Defendant's impending arrest and issuance of the court summons. Does it mean that the Plaintiff does not know what it is that he wants to do with this case against the Defendant or is the Plaintiff simply holding the Defendant at ransom?

10. In view of the Plaintiff's state of indecision, the court considers that he is abusing the process of this court. The Plaintiff either has a case which he wants to prosecute against the Defendant or he does not. The Plaintiff must also choose whether he wants to proceed with a civil case against the Defendant or whether he wants to institute criminal proceedings against the Defendant. By instituting a suit which he

does not want to prosecute, the Plaintiff is being vexatious and he is abusing the process of the court.

11. In the result, the court finds that the Defendant's/Applicant's application dated 26/08/2008 has merit. The same is allowed. The Plaintiffs suit is hereby dismissed for being an abuse of the process of the court, scandalous and vexatious. Costs of the application and of the suit shall be paid to the Defendant/Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of November, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

No appearance for the Plaintiff/Respondent

Mr. Kiiru (present) for the Defendant

Weche - court clerk