



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Environmental & Land Case 451 of 2008**

**REGISTERED  
TRUSTEES OF  
SHREE CUTCHI**

**GUJARATI HINDU  
UNION.....  
.....P  
LAINTIFFS**

**VERSUS**

**CITY COUNCIL OF  
NAIROBI.....  
.....  
DEFENDANT**

**RULING**

**The Application**

1. The application before court is the Plaintiff's Chamber Summons dated 14/04/2009. The Plaintiff seeks one main prayer, that is to say that the amended defence lodged herein on 10/03/2009 be struck out and judgment for possession be entered for the Plaintiff as prayed in the plaint. The Plaintiff prays that the Defendant be ordered to give up vacant possession of the suit property known as LR No. 209/11323 on Ronald Ngala Street Nairobi (Temple Road) forthwith. The Plaintiff also prays for costs of this application.
2. The application is premised on the ground that the defence as filed does not deny the title of the Plaintiff; that the defence is a mere sham and is meant to delay the day of judgment; that the defence is an abuse of the process of court is scandalous, frivolous and vexatious. The application is expressed to be brought under Order VI Rule 13(1)(b) (c) (d) of the Civil Procedure Rules and the Constitution of Kenya as well as the Registration of Titles Act, Cap 281 Laws of Kenya.
4. The supporting affidavit is sworn by Bhimji Patel on 15/04/2009. He says that he is the Secretary of the Shree Cutchi Gujarati Hindu Union, which Union through its Registered Trustees owns plot LR 209/11323 (the suit property). He also says that the Union has built a school on the said property. The deponent avers that during the year 2003, the Defendant, without any colour of right or title took over the

said school to run it as a public school under the pretence that free primary education as ordered by the Ministry of Education entitles the Defendant to take over the school. The Plaintiff contends that the Defendant's action as described above is both unconstitutional and illegal on the grounds that no directive of the Ministry of Education can convert a private school to a public school. The deponent says that the Plaintiff still pays the rates and the rents for the suit property to the Defendant herein and to the Commissioner of Lands. The deponent says the following at paragraph 7 of the Supporting Affidavit:-

*"7. THAT if the Ministry or the City Council of Nairobi want to use the school as Government or local authority property, they have to follow the Constitutional provisions."*

5. The application is opposed. The Replying Affidavit is sworn by **KARISHA IHA**, Director Legal Affairs with the Defendant Council. The deponent's view is that the Applicant's application is devoid of any basis and merit. He urges the court to dismiss the application with costs to the Defendant. The deponent bases his argument on the following grounds, that is to say:-

*(a) there is nothing in the application and supporting affidavit demonstrate how the Defendant's defence is frivolous, scandalous and vexatious*

*(b) the Defendant's defence as filed raises triable issues which can only be determined at a full trial namely the ownership of the suit property and the management of the school*

*(c) it would be unjust and unfair to condemn the Defendant unheard*

*(d) the provisions of the Constitution as invoked on the face of the application are wrong and an abuse of the process of the court*

*(e) that striking out pleadings is draconian aimed only at dethroning a party to a suit from the throne of justice.*

### **The Plaintiff**

6. The Plaintiff filed its plaint dated 16/09/2008 on the 23/09/2008. The Plaintiff avers that LR No. 209/11323 situate along Ronald Ngala Street Nairobi, belongs to the Plaintiff as owners and landlords. The Plaintiff avers that sometime in the year 2003, the Defendant purported to take over the running of the school that stands on the suit property on the ground that the said school should run as a public school in keeping with the Government's Free Primary Education efforts started in the year 2003. The Plaintiff avers that the Defendant's actions are unlawful since the school stands on private property. The Plaintiff admits there is in existence another suit on the same subject property being HCCC No. 71 of 2003 between the Plaintiff and the Director of City Education. The Plaintiff prays for judgment against the Defendant for:-

*(a) Possession of LR No. 209/11323*

*(b) Mesne profits to be assessed by this Honourable Court from the date the Defendant took possession of the school until delivering of possession to the Plaintiffs*

*(c) Interest on (b) above*

*(d) Costs of and incidental to this suit.*

### **The Defence**

7. In answer to the Plaintiffs' claims the Defendant, vide its amended statement of defence dated 16/03/2009 and filed in court on 18/03/2009 denies the Plaintiffs' allegations and the Defendant denies in particular:-

(a) taking over the school as alleged at all

(b) that the status of the school is in any way in doubt as alleged

(a2) that the Plaintiffs constitutional rights have been violated or at all

(b) running the school under the pretext of free primary education

The Defendant denies ever having interfered with the Plaintiffs' ownership of the school. The Defendant asks the court to dismiss the Plaintiff's suit with costs to itself.

### **The Plaintiffs Submissions**

8. M/s Gadhia & Mucheru Advocates, represented in court by Mr. Mucheru, filed written submissions on 31/07/2009. The gist of the Plaintiff's case is that the Plaintiffs are the registered owners of the suit property and that the Defendant has no interest whatsoever in the said property and further that the Defendant makes no substantive response to the Plaintiff's case. The Plaintiffs' counsel submitted that the defence as filed consists of mere denials which do not counter the Plaintiff's ownership rights as exhibited in the copy of title annexed to the Plaintiffs' supporting affidavit and marked "BP1". Annexure "BP1" is a copy of Certificate of Title issued to the Plaintiffs under the Registration of Titles Act, Cap 281 (RTA) being Grant: Number IR 51563 for a term of 99 years from 1/11/1944. The LR Number in the Title is No. 209/11323. Under Special Condition No. 3,

*"The Land shall be used for Temple, Nursery School and Primary School Purposes."*

9. The Plaintiffs have averred that the Defendant's pleadings both in the Statement of Amended Defence and the Replying Affidavit do not challenge the Plaintiff's ownership of the suit property. The Plaintiff's also contend that though the Defendant is using the Plaintiff's property to run a public school, the Defendant has not demonstrated any investment it made on the suit property whereas the Plaintiffs have pleaded that they built the school using subscriptions from members pursuant to condition number 3 (above) of the Special Conditions of the Grant.

10. The Plaintiffs' also contended that the Defendant's action of taking over the Plaintiff's property constitutes a gross violation of the Plaintiff's rights under Section 77 of the Constitution. The Plaintiffs also rely on the provisions of section 23(1) of the RTA and pleads that he is entitled to protection of his proprietary rights. Section 23(1) of the RTA provides –

*"The Certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances easement restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on the grounds of fraud or misrepresentation to which he is proved to be a party."*

11. The Plaintiff's counsel submitted that no evidence has been adduced by the Defendant to defeat the Plaintiff's claim in any way; and that in the circumstances, the court should issue the orders sought so as to stop the actions of the Defendant, which actions are illegal, null and void. The Plaintiffs' counsel cited **HCCC No. 1474 of 2005 – SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED TRUSTEES –VS- CITY COUNCIL NAIROBI**. In that case, the Plaintiffs sued the Defendant for possession of LR No. 209/5996, mesne profits at the rate of Kshs.1,000,000/= per month from 1/09/2003 until the date of possession. The facts in that case were very similar to the facts in the instant case, and upon filing of the defence, the Plaintiff's moved the court for an order striking out the defence and counterclaim and that the matter do proceed to hearing on the issue of profits only. The court found that the Plaintiffs were the registered proprietors of the suit land under the RTA; that there was no entry showing the Defendant as had ever been a registered owner of the same property; that without proof of such ownership the Defendant's defence was liable to be struck out. The court struck out the Defendant's

defence.

### **The Defendant's Submissions**

12. The Defendant was represented by Mr. Mwela for Mr. Akide of M/s Akide & Company Advocates. The Defendant's submissions dated 6/08/2009 were filed in court on 10/08/2009. Counsel for the Defendant submitted that the Plaintiff's have not shown in what way the defence as filed is scandalous, frivolous or vexatious. The Defendant's counsel therefore argued that the Plaintiffs have not satisfied the test for striking out as set out in the case of **MPAKA ROAD DEVELOPMENT LTD –VS- KANA [2004] I.E.A. 124**. Ringera J (as he then was) held inter alia that

*“A matter would only be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned for example, imputation of character where character is not an issue. **A pleading is frivolous if it lacks seriousness**. It would be vexatious if it annoys or tends to annoy. It would annoy or tend to annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is ipso facto vexatious”.*

13. It is the Defendant's view that nothing contained in the defence comes close to being termed scandalous, frivolous or vexatious. The Defendant's counsel submitted that challenging the Plaintiffs' ownership of the suit property on the grounds that there are issues regarding ownership of the suit property and management of the school are triable issues which should be allowed to go to full trial.

### **The Issues and Findings**

14. The court has now considered the submissions made and the law. The only issue that arises is whether the Defendant's defence raises any triable issue that must proceed to full hearing. If not, can it be said that the said defence is scandalous, frivolous and vexatious and an abuse of the court process as alleged by the Plaintiff's herein? The main point raised by the defence is that there is contention between the parties regarding the ownership of the suit property and management of the school. What does the Certificate of Title say?

15. The Certificate of Title annexed to the supporting affidavit of Bhimji Patel sworn on 15/04/2009 shows that the Plaintiffs herein were granted a leasehold of the suit property for a term of 99 years from 1/11/1944. The Certificate of Title was issued on 30/01/1991 and since then there has been no other entry on the Title to show that the suit property has changed hands from the Plaintiffs to either the Defendant or anybody else. That means that until the contrary is proved, section 23(1) of the RTA applies wholly in this case that is to say that the said Certificate of Title is conclusive evidence that the person named therein, (the Plaintiffs in this case) as the proprietor of the land is the absolute and indefeasible owner.

16. The court has scrutinized the Defendant's Replying Affidavit and finds the same wanting. There are no annexures thereto to show that the title in the suit land has been transmitted to it or that there is a dispute over the suit property. If there was such a dispute, the Defendant would not have failed to annex copies of correspondence to show the genesis of the dispute and where the dispute now stands. It therefore means that the Defendant's allegations that there is contention between the parties over the ownership and management of the suit property are empty allegations. Going by the definition of what "land" is under section 2 of the RTA, "land" includes "land and benefits to arise out of land or things embedded or rooted in the earth, attached to the earth, or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is so attached or permanently fastened to anything so embedded, rooted, attached or any estate or interest therein, together with all paths, passages, ways, waters, course, liberties, privileges, easements plantations and gardens thereon or thereunder lying or being unless specifically excepted". In light of the above definition, the suit property belongs to the Plaintiffs absolutely and indefeasibly. The Defendant has made no allegations of fraud or misrepresentation against the Plaintiffs in the manner in which the Plaintiffs acquired the suit property.

17. Against the backdrop of the above findings, the court is satisfied that the Defendant's amended

statement of defence filed herein on 18/03/2009 is scandalous, frivolous and vexatious. There is no truth whatsoever in the Defendant's allegations that there is a dispute as to the ownership of the suit property. Nor is there any truth in the Defendant's allegations that there is a dispute over the management of the school. The Plaintiffs have shown that they have title to the suit property and that all the buildings standing on the suit property were put up by the Plaintiffs. The Defendant has not placed evidence before this to show how it came to be that it is now running the Plaintiff's school? Information that is so clearly not true is scandalous. What the Defendant has alleged cannot possibly be admitted in evidence as those allegations are untrue. Further, the court finds that the Defendant's allegations that it has an interest in the Plaintiff's suit property to be frivolous. The Defendant cannot possibly be serious in saying so since it has not shown any entry on the Certificate of Title that it has ever been registered owner of the suit property.

### **Conclusion**

18. The summary of what the court has said above is that there is no substance in the Defendant's amended statement of defence filed herein on 18/03/2009. The said defence is therefore scandalous, frivolous and vexatious. Consequently, there is merit in the Plaintiff's application dated 14/04/2009. The application is allowed as follows

*(a) the amended defence filed herein on 18/03/2009 be and is hereby struck out.*

*(b) Judgment for possession of the suit property be and is hereby entered for the Plaintiff as against the Defendant*

*(c) The claim for mesne profits do proceed to hearing*

*(d) The Plaintiffs shall have the costs of this application.*

It is so ordered.

Dated and delivered in Nairobi this 16<sup>th</sup> day of November, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Miss ngetich (present) For the Plaintiffs/Applicant

No appearance For the Defendant/Respondent

Weche - court clerk