REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 12 of 2004

DAVID SANG KIPSOI

ROBERT S. KIPSOI ==========PLAINTIFFS/RESPONDENTS

V E R S U S

JOHN K. KOSGEI ==========DEFENDANT/APPLICANT

R U L I N G

By a plaint dated 6/2/2004, the plaintiffs sought an injunction to restrain the defendant from evicting them from the suit property, Plot No.699 Kitalale Scheme.

On the same date, the plaintiffs filed an application for an interlocutory injunction. That application was set down for hearing on 4/10/2004.

Meanwhile, after the defendant was served with the plaint, he filed his defence and counterclaim on 16/3/2004. As far as the defendant was concerned, the plaintiffs had trespassed onto the suit property without any justification. Therefore, the defendant was asking the court to grant an order for the eviction of the plaintiffs.

There is no record on the court file as to what, if any, transpired on 4/10/2004 when the plaintiffs' application was supposed to have been heard.

Thereafter, on 9/2/2005, the defendant filed an application to strike out the plaint. By the said application, the defendant also asked that the court should have the counterclaim listed for hearing. That application was heard on 13/4/2005.

After giving due consideration to the application, the learned judge struck out the plaint, with costs to the defendant.

Thereafter, on 26th July, 2005, the defendant filed an application for summary judgment. That application was scheduled for hearing on 14/11/2007. However, as the plaintiffs had filed a notice of a preliminary objection, the said objection was canvassed first.

The notice of preliminary objection was worded as follows;

" 1. ***The application is misconceived in law.***

2. The applicant has instead of applying for formal proof abused the process of the court by instituting the instant application.

3. Summary judgment does not lie in the face of the application as drawn and presented.

4. The applicant has no title to date.

5. That the issues raised in the plaint can only be determined on evidence adduced on oath and not on affidavit."

When canvassing the objection, Mr. Wambura advocate submitted that as there was no defence to the counterclaim, the defendant ought to have proceeded by way of formal proof.

In any event, given the date when the counterclaim was filed, the plaintiff's view was that the application herein had come too late in the day. The alleged inordinate delay is said to shut out the applicant.

Furthermore, the plaintiffs believe that the documents upon which the defendant relies, require proof by way of evidence, because in the opinion of the plaintiffs, the issues arising could not be determined on affidavit evidence.

As far as the plaintiffs were concerned, if the defendant had had title, he could then have sought summary judgment. But in this case, the defendant only had a letter. Therefore, the plaintiffs insist that the defendant had to take the witness box. They say that the defendant should not be permitted to take a short-cut, to achieve his goals.

Another issue raised by the plaintiffs was to the effect that the defendant should have sought summary judgment at the time he sought the striking out of the plaint. As he did not do so, the plaintiffs insist that the defendant now had to go through the full procedure of formal proof.

If the reliefs sought were granted, the plaintiffs feel that pertinent facts would be shut out from the court. Therefore, the plaintiffs submitted that it was only through formal proof that the truth would be established.

In answer to the preliminary objection, the defendant submitted that it had no merits, as it was not limited to pure points of law.

As regards the alleged delay in bringing the application, the defendant submitted that that is a matter of discretion. With that, I am in agreement with the defendant, because whether or not there was such delay as would, in any particular case, bar the applicant from the reliefs he was seeking, is a matter of discretion. The court would first need to make a finding whether or not the period in issue constituted inordinate delay. Secondly, the court would need to determine whether or not the delay, if any, had been reasonably justified by the applicant.

Therefore, the issue of delay, per se, would not constitute a valid ground for not entertaining the substantive application herein.

It is noteworthy that the plaintiffs did concede that, in principle, summary judgment can be obtained on a counterclaim. In so saying, the plaintiffs said that they did accept the decision of the Hon. Mugo J. in ***PASARA CAFÉ & BAR LIMITED VS KENYA COMMERCIAL BANK STAFF, NBI HCCC NO.1300 OF 2005.***

Therefore, in principle, the plaintiffs could not argue that a defendant who has a counterclaim, could not seek summary judgment.

I therefore understand the plaintiffs to be saying that summary judgment was only unavailable to the defendant herein because of the circumstances prevailing in this case.

To my mind, that too would be an issue for the discretion of the court. In other words, the court would be open to persuasion, by both parties, as to whether or not summary judgment should be granted in the light of the facts and other circumstances prevailing in the case.

In the case at hand it is common ground that the plaint was already struck out. In that respect, the case is comparable to that in the case ***of PASARA CAFÉ & BAR LIMITED VS KENYA COMMERCIAL BANK STAFF*** (above-cited), in which the learned judge expressed herself as follows;

" ***In the present case, I am of the considered view that the Plaint ought be struck out first before summary judgment on the counterclaim can be considered."***

That holding seems to provide an answer to the plaintiffs' contention that the defendant should have applied for summary judgment simultaneously with his application to strike out the plaint.

In the case of ***FURSYS (K) LIMITED VS SYSTEMS INTERGRATED LTD T/A SYMPHONY, MILIMANI HCCC NO.1237 OF 2002,*** the Hon. Azangalala J. held that pursuant to Order 8 rule 13 of the Civil Procedure Rules, interlocutory judgment cannot be entered in favour of the defendant in default of a defence to a counterclaim.

Earlier, the Hon. Onyango-Otieno J. had reached a similar decision in the case of **BOC KENYA LTD V CHEMGAS LTD, HCCC NO.935 OF 1999.**

And the Hon. Harris J. had been even more emphatic on the issue, when in the case of ***KABURU BUS SERVICES VS PRAFUL PATEL [1979] KLR 213***, he said;

" ***Neither Order VI nor Order IXA of the Civil Procedure Rules gives the court jurisdiction to give judgment on a counterclaim in default of a defence to a counterclaim."***

That being the legal position, I failed to understand how the plaintiffs expected the defendant to proceed to formal proof, whereas he had not, and could not obtain interlocutory judgment.

Finally, whether or not the defendant could prove his case on the basis of the affidavits, is an issue for the court's discretion. If the plaintiffs satisfied the court that the allotment letter was insufficient to give title to the defendant in the absence of further evidence, the court would not grant summary judgment. But first, the court needs to hear the submissions on the issue, instead of barring the defendant from making his case.

As both parties would be heard on the substantive application, I hold that by giving them a hearing, there cannot rouse any injustice, as was contended by the plaintiffs.

In the event, I am in agreement with Mr. Kiarie, learned advocate for the defendant, that the preliminary objection herein is unmeritorious. It is thus overruled, with costs to the defendant.

The defendant may now take steps to prosecute his application for summary judgment.

Dated and Delivered at Kitale, this 22nd day of January, 2008.

FRED A. OCHIENG

JUDGE