

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 68 of 2000

AGNES WANZA WAEMA.....PLAINTIFFS

VERSUS

GERALD RAMAKER

LOISE TABU KARISA..... DEFENDANTS

RULING

The defendants herein, Gerald Ramakar and Loise Tabu Karisa took out a summons pursuant to order VI rule 13 rule (a), (b), (c) and (d) of the Civil Procedure rules in which they asked for an order to strike out and dismiss the plaintiff's action. The summons is supported by the affidavit of Yusuf M. Aboubakar. The plaintiff, Agnes Mwanza Waema, resisted the summons by filing grounds of opposition dated 23rd May 2007.

The main reason raised by the defendants in support of the application is that the suit relates to a boundary dispute which can only be heard and determined by the Land Registrar under section 21 of the Registered Land Act. The plaintiff on her part is of the view that the suit is principally based on the tort of trespass by the defendants on L.R. no. Kwale/Galu Kinondo/1348 and not merely a boundary dispute.

I have considered the material placed before me and the submissions made by learned counsels on both sides. The substantive suit is expressed in the plaint dated 8th February 2000 in which the plaintiff is seeking for the following orders:

- (i) An order of eviction
- (ii) Damages for loss of use of the land
- (iii) Costs of the suit

In paragraph 4 of the plaint the plaintiff states as follows:

“4. sometimes in 1995, the defendants without any colour of right, excuse or legal justification and without the plaintiff's consent moved into the said property and erected permanent structures and planted coconut trees on the said land which occupation amounts to trespass in law and this is causing the plaintiff damage and loss of use of her land. The plaintiff has requested and demanded that the defendants vacate but without success.”

At paragraph 5 of the plaint, the plaintiff states:

“5. The defendants have been repeatedly summoned by the Land Registrar Kwale District under S. 21(2) of the Registered Land Act in efforts to resolve the matter which summons went unheeded thus the plaintiff had no option but to approach the High Court.”

It is obvious from the above quoted paragraphs of the plaint that the plaintiff is seeking for remedies based on the tort of trespass. The plaintiff is saying that she attempted to resolve the dispute through the Land Registrar's Office as a boundary dispute in vain. The defendants in their defence state that the acts complained of in paragraph 4 of the plaint were done inside L.R. No. Kwale/Galu Kinondo/1066

In both the defence and the plaint there is no averment that Kwale/Galu Kinondo/1066 and Kwale/Galu Kinondo/1348 a boundary. The law expresses itself clearly under section 21(4) of the Registered Land Act as follows

“21(4) No court shall entertain any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”

It was incumbent upon the defendants to show on a balance of probabilities that the suit facing them is purely a dispute over boundaries. In any case I have already pointed out that the plaintiff's action is based on the tort of trespass. In fact the plaintiff is seeking for an order of eviction, damages and mesne profits. I am not convinced that this suit is vexatious nor frivolous.

In the final analysis, I find the summons dated as lacking in merit. I dismiss the same with costs to the plaintiff.

Dated and delivered this 18th day of February 2008.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Buti h/b Abubakar for defendant and Miss Matara h/b for Tindika for plaintiff.