



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environment and Land 1535 of 2007

1. Land & Environment Law Division

2a) Civil Practice & Procedure – Summary Judgment Order XXXV Civil Procedure

Rules.

2b) Subject of main suit. Land.

- i. Three parcels of land adjacent to each other situated in Kibera Estate Nairobi. Two having no title, one title LR 209/11813, grant No IR73/65 measuring 0.8262 "Mashimoni/Lindi Primary School.
- ii. The Board of Trustees African Inland Church claim ownership having purchased same in 1986,1990 respectively and allocated by government respectively
- iii. Defendants – break away pastors of church.
- iv. Seized the three properties in 1993 and refused to surrender same.
- v. Suit filed 2005 nearly 12 years later to claim possession in injunction filed 2005 testifying defendants from developing properties.

To reinstate and testify full possession within 14 days.

- vi. Mutungi J (23.6.2005) granted injunction only ordered hearing be done speedily.
- vii. 1st hearing date not reached.
- viii. Applicant (plaintiff file application 2. October 2006 for serving Judgement.

3. Summary Judgement application 2.10.2006.

I. Preliminary Objection taken by respondents that application does not comply with section 86 of the Civil Procedure Act.

II. Objection upheld and conceded by applicant.

Certain para and amenities struck out as having been made in Kiswahili Language without translation.

III. The summary application relied on 3rd property

II: Hearing

(i) That the defense is a sham and discloses no cause

In reply

Pastors no locus to depone to affidavit. Defense not a sham.

4. Held: 1. Summary judgement should be applied in the clearest circumstances.

2. Application herein for Summary Judgment has no merits and is dismissed with costs to respondent/defendants.

3. Parties to proceed to trial on main civil after compliance of pretrial under their own suspicion.

5. Case law - nil

6. Advocates

K. Katwa instructed by Katwa, Kemboi & Co. Advocates for the plaintiff/ applicant – present

F. Etole instructed by Cheloti & Etole & Co. Advocates for the defendant /respondent - present

BOARD OF TRUSTEE AFRICAN INLAND CHURCH.....
.....APPLICANT

VERSUS

TIMOTHY MULEHI 1ST
DEFENDANT

REUBEN OMWAKA 2ND
DEFENDANT

FRANCIS LIYAYI 3RD
DEFENDANT

MESHACK MANDU 4TH
DEFENDANT

DUNCAN MWANGI KURIA 5TH
DEFENDANT

BENSON ONGUTE 6TH
DEFENDANT

MEDINA ABDUL 7TH
DEFENDANT

RULING

APPLICATION FOR SUMMARY JUDGEMENT 2 OCTOBER 2006

I BACKGROUND

1. The subject of the main suit concerns land. There are three parcels of land which I presume are adjacent to each other situated in the Kibera Estate of Nairobi. Two plots have no title and one has a title being LR 209/11813 grant IR73/65 measuring 0.8262 "Mahimoni/ Lindi Primary School.

2. The board of Trustees, African Inland church (the plaintiff applicant herein) claim ownership of the said properties having allegedly purchased the same in 1986, 1990 respectively and allocated the third to them by the Government of Kenya respectively

3. The 1st defendant is alleged to have been a pastor with the church. Sometime in 1993 he broke away from the church and formed his own. He left with others who are sued herein as defendant 2 to 8. At their departure they formed a new break away church and in the process seized the three properties and refused to surrender the same.

3. Almost 12 years later the plaintiffs in the year 2005 file this present suit claiming possession of the three parcel of land. They also filed, under certificate of urgency, an injunction against all eight defendants to restrain them from begging new developments on the property. They further requested for an injunction compelling the defendants to return the said property to the plaintiff within 14 days.

4. The said application for injunction dated the 8 February, 2005 came up for hearing before Mutungi J. He granted orders of injunction against the defendants on

23 June, 2005 restraining them from undertaking any new developments. He declined to make orders by way of an application of a mandatory injunction to restore the property back to the plaintiffs. He nonetheless ordered that the matter be heard speedily.

5. The plaintiff took hearing dates for 23 January, 2006. No hearing was heard. Those were the days before this Division, on land, was established. Instead of pursuing a fresh date the plaintiffs pursued a new application for summary judgment dated 2 October, 2007 the subject of this Ruling.

II: SUMMARY JUDGMENT 2 OCTOBER 2007.

6. The defendants had filed a defense to this suit. There is no copy on the court record but their advocates kindly showed a copy to this court.

7. The applicants/plaintiff state that the whole defense is a sham and ought to be struck out. Before though the hearing of the application on which the advocate for the applicant/plaintiff was interpreted, the respondent/ defendants advocate raised a Preliminary Objection to the application. This being that there were annexures referred to two properties that had indeed been in contraction of section 86 of the Civil Procedure Act. Namely, that the language of the High Court is English and that of the subordinate court is English and Kiswahili. In the High Court all documents not in English require to be compared with a translation in English. The respondent/defendants prayed that the annexures be expunged from the records. The applicant/plaintiff's advocate conceded to this stating that this was an oversight. The same was accordingly expunged from the record.

8. Nonetheless, the application was still alive. The applicant plaintiff argued that the defence being a sham ought to be struck out. The 3rd property herein has a title in four of the applicant plaintiff. The defence disclose no cause.

9. In reply the respondents argued that the applicant's defendant had no locus to depon to the affidavit. There are triable issues to be determined.

10. This is that the said property plots referred to are totally different from the ones cleared by the applicant/plaintiffs. The issued is the identity of the property land.

II: **OPINIONS**

11. It is now trite law that an application for summary judgment must be applied for only in the most clearest circumstances.

12. In this application it was applied for in order to access the court in the shortest possible time.

13. Mutengi J. in his ruling stated

"Naturally there exists such close relationship between the land and its ownership with the raises institutions thereon; such as the school and the church that a decision on the ownership of either of them would tend to dispose of the entire suit. That cannot be done at the interlocutory stage. There is need for full trial and calling of evidence before such weighty matters can be determined."

Emphasis supplied.

14. It was for that reasons that the parties through the plaintiffs set down this matter for hearing, then applied for the said application when they were not heard.

15. On the merits of the application the respondent/defendant is challenging the fact that the said applicant/plaintiff be dealing with the wrong property. They require to go on full trial to determine the mattes in issue.

16. I hereby rule that this application for summary judgment has no merits and is hereby dismissed. The parties are to proceed to the main suit for hearing on compliance of pre-trials proceedings being undertaken under their own suspension.

17. I award the costs of this application to the defendant respondent.

DATED THIS 10TH DAY OF APRIL 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

K. Katwa instructed by Katwa, Kemboi & Co. Advocates for the plaintiff/ applicant – present

F.Etole instructed by Cheloti & Etole & Co. Advocates for the defendant/ respondent