



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 18 of 2006

MATIAN OLE KISARIGOL PLAINTIFF

VERSUS

1. FRANCIS PAPAI KETIANY

ALIAS KFRANCIS PAPAI 1ST DEFENDANT

2. OLE KISONGO KILINKAT 2ND DEFENDANT

RULING

On 27th November 2007 the plaintiff filed an application by way of notice of motion and sought the following orders:

“1. The Honourable court to enter summary

judgment against the defendant/respondent

herein in terms of the plaint dated

6th February 2006 and lodged in court

on 7th of February 2006.

2. In the alternative and without prejudice, the honourable court be pleased to strike out and/or order struck out the statement of defence dated 11th March 2007 and lodged in court on the 14th day of March 2007.

3. Consequent to prayer to 2 being granted, the honourable court be pleased to enter judgment in favour of the plaintiff/applicant in terms of the plaint.

4. Costs of this application and the main suit be borne by the defendant/respondent.

5. Such further and/or other orders be made as the court may deem fit in the interest of justice.”

The application was served upon the defendant’s advocates, M/S Job Obure and Company on 13th

January 2008 but the said advocates neither filed a replying affidavit nor grounds of opposition. They did not also attend court when the same came up for hearing on 20th May 2008.

The plaintiffs' application was supported by an affidavit sworn by the plaintiff. He deposed that he was the registered proprietor of L.R.No.TRANSMARA/ENDONYO NKOPIT/84, hereinafter referred to as "*the suit land*", which measures approximately 3.2 hectares. The plaintiff further deposed that prior to obtaining the title deed for the suit land he had obtained grant of letters of representation in respect of the estate of NAPKUYOK NAIBARTUN KETIAN (deceased). The said grant had also been confirmed. No application for nullification of the said grant has ever been filed by anyone.

On or about 10th June 2005 the defendant, who is a son to the plaintiff's sister, entered upon the suit land and commenced erecting temporary structures thereon without the plaintiff's permission. As a result the plaintiff was constrained to file this suit. The plaintiff also filed an application for a temporary injunction which was heard and granted on 26th April 2007.

In his statement of defence, the defendant averred that the plaintiff was wrongfully, illegally and fraudulently registered as the legal proprietor of the suit land. In the particulars of fraud the defendant stated, inter alia, that the plaintiff filed the succession cause secretly without involving him. He also alleged that the plaintiff failed to disclose material particulars in respect of the suit land.

The defendant averred that he had always lived in the suit land was therefore in rightful possession. He urged the court not to grant the plaintiff's prayer for a declaration that he was the lawful proprietor of the suit land.

In his submissions, Mr. Oguttu for the plaintiff stated that the plaintiff's title over the suit land had not been challenged. The plaintiff therefore had exclusive right of enjoyment of his property. He further stated that the statement of defence did not raise any bona fide triable issues. The defendant had not instituted any proceedings seeking a revocation of the grant of representation that was issued to the plaintiff. There was also no counterclaim by the defendant to challenge the registration of the plaintiff as the bona fide proprietor of the suit land.

I have considered the plaintiff's application and the submissions made by his advocate. It is not in dispute that the plaintiff is the registered proprietor of the suit land. A title deed was issued to him on 14th May 2003. Prior to that the plaintiff had obtained a grant of letters of administration in respect of the estate of the deceased. The said letters were issued on 9th of May 2002 and a certificate of confirmation of the grant was issued on 19th December 2002. To date the said grant has never been challenged by any one.

The registration of a person as the proprietor of land vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, see section 27 of the Registered Land Act. Such rights are not liable to be defeated except as provided in the said Act. The defendant has not instituted any proceedings to challenge the plaintiff's title over the suit land and neither did he file any counterclaim to the plaintiff's action.

In my view therefore, the statement of defence does not disclose a reasonable cause of defence.

In an application for summary judgment the defendant has to prove that he should be granted leave to defend the suit by showing existence triable issues. The defendant herein has failed to discharge that burden. On the other hand, if a plaintiff shows that a statement of defence is a sham or contains no triable issues he is entitled to summary judgment. See NAIROBI GOLF HOTELS (K) LTD VERSUS BHIMJI SANGHANI BUILDERS CONTRACTORS, Civil appeal No.5 of 1997 at Nairobi (unreported).

Consequently, I strike out the statement of defence and enter summary judgment as prayed by the plaintiff. The defendant shall bear the costs of the suit including the costs of this application.

DATED, SIGNED and DELIVERED at KISII this 27th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi for the Plaintiff

N/A for the Defendants

D. MUSINGA

JUDGE