



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 89 of 2007

GABRIEL MUTISO MAANDA.....PLAINTIFF

VERSUS

DAVANIS SUPPLIES LTD AND 4 OTHERS..... DEFENDANT

RULING

Application dated 23.06.08 by Chamber Summons.

The application seeks orders that defences filed by 1st, 2nd, 3rd and 4th Defendants to be struck out and order to enter judgment for the Plaintiff in the sum of Kshs. 4,243,500 /= being the balance claimed under paragraph 22 (B) ii of the plaint and costs of this application on the grounds that the defences of those Defendants may prejudice, embarrassed or delay the fair trial of the action herein. And secondly, that the first Defendant through 2nd and 3rd Defendants sold a plot LR. 25158 to the Plaintiff and executed transfer and obtained all documents from the lands Office in connection with that title, in favour of the Applicant.

The 4th Defendant was aware that the said plot 25158 was carved from Plot No. 18474 which plot is gazetted Export Processing Authority Zone, with that situation existing, these Defendants proceeded to obtain the issuance of Grant No. 85540 and 85540/1 which was illegal.

Out of the payments paid out by the Plaintiff in respect of this land to the Defendants Kshs. 1,250,000/= has been paid /refunded as part payment to the Plaintiff by these Defendants.

I have read and considered the supporting affidavit of the applicant and the respective defences file herein. I am convinced that the defences filed are general denials which raises no triable issues but just a ploy to delay the trial of this suit. The 4th Defendant being the custodian of all legal documents concerning land and land registration was bound to ascertain that the processing of documents in the name of Plaintiff concerning Plot No. 251558 was legal and according to law.

The application was argued by Mrs. Makole submitted that 2nd Defendant David K. Mundui filed a replying affidavit. He said he had been authorized to swear on behalf of the 1st Defendant but he had shown no authority under the company seal to the court.

However, in paragraph 5 of that affidavit he placed the blame on the survey and delineation of the plot

and preparation of grant elsewhere. He swears that later when the Applicant moved in the plot, 5th Defendant laid a claim of ownership over the said plot. Furthermore, the parties discovered that plot No. 25158 and plot No. 18474 are two different and separate plots. All in all the 1st, 2nd and 3rd Defendants deny any liability to the Plaintiff at all.

It is to be noted that no Replying Affidavit or grounds of opposition were filed by the 4th Defendant. There is clear admission that the 1st, 2nd and 3rd Defendants did purport to convey the plot in dispute and according to the sworn affidavit of 2nd Defendant, they did whatever was required to effect transfer and did transfer to the Plaintiff the said plot. And that indeed they received the money claimed by the Plaintiff, a substantial sum has already been repaid to the Plaintiff.

In support, the Plaintiffs claim is buttressed by submissions filed on 21.07.2008. The Plaintiff relies on the case of National Bank of Kenya Ltd. –vs- Innovative Advertising Ltd. & 2 others (2005) eKLR, where the Defence admitted the principal claim and disputed interest. The court found that the interest was contractual. The court proceeded to strike out the statement of defence finding it a sham and frivolous.

Regarding 4th Defendant it is submitted that his statutory duty is to ensure that any conveyance that he is a party to is a valid conveyance, therefore, his statement of defence that he was only carrying out statutory duty is a sham and frivolous and ought to be struck off.

The 4th Defendant failed to disclose that the true owner of the property was 5th Defendant not 1st Defendant. Relying on the search certificate the Plaintiff paid Kshs. 3,475,800 /= a substantial part of consideration. The actions of 4th Defendant in this case amounts to an illegality and he is not in a position to sustain any defence. Even Cap 39 Section 3 (p) because this is not a fort but land matter which falls under Cap 22 Laws of Kenya.

The Plaintiff further relies on the authority of *Fremar Construction Company Ltd –vs- Minakkshi Navin Shah, Civil Appeal No. 85 of 2002 (2005) eKLR*, where it was held “

“trials are not merely held to glorify the hallowed principal that disputes ought to be heard and determined on oral evidence in open court.....”

The court has power to reject manifestly frivolous and vexatious pleading or suits and to protect itself from abuse of the process. This is a Court of Appeal decision which is good in law.

Also, the Plaintiff relies on the decision in the case of *Priscilla Nyambura Njue t/a Nairobi Miscow Airways –vs- Countryside Supplies Ltd. HCC No. 573 2004 (2005) eKLR*. In this case, the 1st, 2nd & 3rd Defendants refunded kshs. 1,250,000 /= which amounts to acknowledgement of the whole debt. The denials to the claim is a sham.

The decision of the Civil Suit No. 191 of 2003 Lilian Njeri Mwangi –vs- Municipal Council of Nakuru, the Court ruled in favour of Plaintiff striking out the defendants defence finding it to be a sham, the facts were that the Plaintiff acted on the Defendants conduct and purchased the plot paying all land rates/rents due but upon the Plaintiff asserting her proprietary rights the Defendant declared the land to be public utility. The defence was found to have been filed for the sole purpose to prevent Plaintiff from enjoying her proprietary rights.

Upon perusing and considering the application, all affidavits and the statements of Defence, 1st, 2nd, 3rd and 4th Defendants filed and considering the circumstances of this case, I am convinced that the said statements of defence ought to be struck off as being sham and frivolous and an abuse of the court process.

I do allow the application and strike out the statements of defence filed by 1st, 2nd, 3rd, and 4th

Defendants. Consequently, judgment is entered against the said Defendants in the sum of Kshs. 4,243,500 /= as prayed in the chamber summons.

Costs of this application shall go to the Applicant to be paid by the 4 Defendants.

It is so ordered.

DATED this 3rd day of November 2008.

JOYCE N. KHAMINWA

JUDGE