



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1085 of 2003

AFRISON EXPORT IMPORT LTD

HUELANDS LIMITED..... .
.....PLAINTIFFS/APPLICANTS

VERSUS

**PASTOR JOHN NDUATI Sued as the Chairman and on behalf Of GOD'S
POWER**

**CENTRE, GLORY OF CHIRST
MINISTRIES.....DEFENDANT/RESPONDENT**

RULING

The facts as gathered from the pleadings are that by letter dated 4th October 1997 the 1st Plaintiff with the authority of the 2nd Plaintiff at the request of the defendant on behalf of the Church God's Power Centre, Glory of Christ Ministries, OFFERED FOR SALE ONE (1) ACRE OF LAND WITHIN THE Plaintiff's land title LR NO. 78791/4 for a sum of Shs.50,000,000/=. After several written and oral communications between the parties herein by the letter dated 15th March 2002 the defendant on behalf of Church accepted the offer. The church had in the meantime in or about 1997 taken possession of the said 1 acre erected structures thereon and has ever since been in occupation thereof. But since the taking of possession of the said portion, the church has never paid anything in earnest towards performance of its obligation under the said sale. This forced the Plaintiff to file this suit against the defendants seeking judgment for:

- (a) Possession of the suit premises and eviction of the Defendant and or the church from the suit premises.
- (b) Mesne profits in lieu of rent of Shs.100,000/= per month since the time of occupation and
- (c) Costs of the suit and interest.

The Defendant on being served with summons filed with summons filed a defence denying the Plaintiff's claim and stated that he was put in possession by the official receiver and not the Plaintiff and raised another issue of there being civil suit between the Defendant and the official receiver.

On 12th February 2003 the Plaintiff filed an application by way of a Chamber Summons seeking orders to strike out the Defendant's defence and an interlocutory judgment be entered for the Plaintiff in terms of the Plaintiff and the matter do proceed for assessment of mesne profits. The application is based on the grounds that the Defendant's statement of defence is materially mala fides, it is composed of mere denial and is thus a sham and is therefore unsustainable and lastly that it is frivolous, vexatious, scandalous, embarrassing and merely calculated to delay the fair trial of the suit and thus an abuse of the process of the court.

This application was heard ex parte by Ojwang J who delivered his ruling on 25th October 2004 in which he struck out the Defendant's defence and entered interlocutory judgment in terms of the plaintiff filed on 23rd October 2003.

On 6th April 2005 the Defendant brought this Chamber Summons for review to have that interlocutory judgment and all the consequential orders set aside. The Defendant's application is based on the ground that the Defendant's Advocates were not aware of the hearing that took place on 15th June 2004; that serious material facts were not disclosed to the court when the Plaintiff's application was heard.

The application is also supported by an affidavit sworn by Amos Kale in which he avers that the Plaintiff on one hand and the official receiver of the Continental Credit Finance Ltd in (liquidation) on the other hand are respectively claiming ownership of the suit property and the official receiver has filed a separate suit being HCCC 862 OF 2002 seeking similar orders against the Defendant; that the Defendant had filed an application on 11th March 2005 seeking orders to have the two suits consolidated which application is still pending; that upon filing the said application, he served the same upon the Plaintiff and it was by consent agreed that the said application be heard on 25th October 2004 but on that date the matter was not listed and that he was not aware of the Plaintiff's application to strike out the Defendant's defence.

On an application to strike out a pleading under Order VI Rule 13 of the Civil Procedure Rules on the ground that the defence is a sham, the truth of the allegations contained in the plaintiff is assumed and evidence to the contrary is inadmissible.

The Plaintiff applied to strike out the defence. This exercise of summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the fact of it unsustainable. At this stage as Madan JA as he then was said in DT DOBIE & CO. LTD VS. JOSEPH MBARIA MUCHINA & ANOTHER CA NO. 37 OF 1978 (unreported) the court ought not to deal with any merits of the case for that is the function solely reserved for the Judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way.

This being a land dispute arising out of a sale agreement ought not to have been dismissed summarily. The Court of appeal (9TUNOI JA) had this to say in SAMPSON NDERITU KARITU VS. MARTHA WATETU KARITU AND ANOTHER.

“I need not reiterate here that it is an established practice of this court that all land disputes, wherever possible, should finally be determined by this court, and that no party who desires to be heard by the court should be driven out of the seat of justice by technical application of rules.”

This suit having been heard ex parte and the Defendant having expressed his wish to have his case heard by this court should not be denied the right to do so.

I exercise my discretion in favour of the Applicant and grant the application as prayed.

The costs of this application be costs in the suit.

Dated and delivered at Nairobi this 20th day of July 2007.

J.L.A. OSIEMO

JUDGE