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

Civil Case 1039 of 2006

MACDONALD MAKAKA …..……...……..PLAINTIFF

VERSUS

KENYA CIVIL AVIATION AUTHORITY ……...……...DEFENDANT

RULING

In an application dated and filed in this Court on 2nd November 2006 the plaintiff/applicant sought to be struck out a defence filed herein by the defendant on 25th October 2006 disputing a claim lodged against the said defendant over the alleged encroachment by the latter on the formers land otherwise known as ***L.R. No. 9042/698 Nairobi.***

This application was based on the grounds specified on the face thereof, namely that the plaintiff is the registered proprietor of the suit premises, that the defendant wrongfully encroached onto the said property, that the plaintiff had not consented to any acts of trespass by the defendant and that the plaintiff wishes to develop his property but cannot do so as the defendant is wrongfully in possession of the same.

There was also an affidavit in support of this application which was filed together with it; in which the applicant has repeated being the registered proprietor of the suit plot with the defendant being the registered owner of the adjacent plot.

The plaintiff complains in the affidavit that he had recently visited his plot with a view of commencing developments thereon but that he had found the defendant had wrongfully and without his consent or authority fenced off and occupied the plaintiff's plot all round thus making it look like it is the same plot as the defendant's adjacent plot.

That by his letter dated 25th July 2005 the plaintiff requested the defendant to remove its illegal fence from his plot but the defendant had flatly refused to do so for reasons best known to it.

That on advice from his advocate which he believes to be true, the defendant's actions are illegal as it has no proprietary rights or any other claim at all to the said property.

That the plaintiff wishes to undertake developments on his said plot but is unable to do so unless the defendant vacates the same and removes the offending fence there from and believes that unless the defendant is commanded to remove the offending articles from the plot, he will not willingly do so.

When the defendant was served with this application, it filed a replying affidavit through its Acting Corporation Secretary, *one Zadarack Achoki;* who is also an advocate of the High court of Kenya

eponed in respect of paragraph 5 of the supporting affidavit that his Director-General was never served with the notice specified therein, hence the plaintiff's suit was incompetent as it was instituted without compliance with *Section 7E* of the Civil Aviation (Amendment) Act, of 2002; therefore the application lacks merit.

The deponent stated that due to the failure by the applicant to comply with the provisions of *Section 7E* aforesaid the respondent would at the earliest possible opportunity apply that the suit and this application be struck out with costs.

That in the deponent's view the applicant's application was premature and a vain and shallow attempt to circumvent the due process of the law.

That what the defendant is concerned with is the manner in which the plaintiff obtained his title, including misrepresentation, fraud and illegality all of which should be tested at the hearing of the main suit during a full trial.

The deponent avers that since the 1970's the defendant has been in occupation of the suit parcel of land through its department; the East African School of Aviation, and that if the orders sought are granted the orders sought without the authenticity of the process by which the plaintiff obtained its title documents then the defendant stands to be greatly prejudiced as it may be deprived of its own property causing upon it and the tax payers who find its operations grievous and irreparable harm, loss and damage.

Paragraph 9 of the replying affidavit show the defendant's intention to amend the defence after taking further steps to unearth further illegal and fraudulent activities through which it believes the plaintiff obtained his title and that if the order sought is granted the defendants effort to see that justice is done in this case will be unduly fettered.

That as per annexure ***ZAI*** the defendant is yet to identify all the parties it intents to sue by way of counterclaim and that the applicant's present application is clearly a misadventure and misconceived as the defence on record raises serious triable issues.

That the plaintiff is attempting to abuse the due process of the law by seeking to prevent the defendant from advancing any evidence in support of the defence.

Zadarack Achoki also swore a further affidavit which was filed in Court on 11th June 2007.

In it the deponent referred to a *Kenya Gazette Supplement Number 91 – Legal Notice No. 193 of 2006* in which the Minister for Transport vested all immovable and other properties of the Directorate of Civil Aviation held on its behalf by the Government of Kenya to the defendant/respondent herein.

That the said Directorate of Civil Aviation had through its training branch the East African School of Aviation been allotted and reserved a parcel of land known as ***L.R. No. 39/1/R*** measuring 87 acres for its exclusive usage to which title in the same was held by the Government of Kenya on its behalf and to which title was passed to the defendant/respondent by the vesting order.

That it was upon the Gazettement of the vesting order that the defendant was able to continue the follow-up of title to L.R. 39/1/R allotted and reserved for its usage and it resisted such attempts and had taken steps to protect its interest in the said parcel; including:

(a) Reporting the matter to Ndungu Land Commission,

(b) ***Reporting the incident to its parent Ministry for intervention***.

That in or about September 2006 the plaintiff herein with various officers at the Commissioner of Lands Office informed in very strange and suspicious circumstances to the officers of the Defendant Stations at the East African School of Aviation that its title had been processed and was awaiting collection.

However, upon collection of title documents which was now issued as ***L.R. No. 9042/664***, (*original being L.R. No. 39/1/R*) various anomalies were noted which led to a complaint being made.

That the processing of title to ***L.R. No. 9042/664*** in the defendant's name was done in a suspicious manner therefore in that

(a) Though the defendant had applied for parcel reserved for its use, known as L.R. 39/1/R it was not issued with an allotment letter prior to processing of title documents.

(b) ***The defendant did not pay any stand premium and other fees related to the processing of title and does not know the identity of persons who paid out such monies***.

That no evidence of the parcel of land ***L.R. No. 9042/698*** exists as attempts to obtain a survey map is yet to yield results or benefits; and:

(a) No officers from the Survey Department visited the defendant when surveying its parcel as required.

(b) The defendant has paid no survey fees.

(c) No beacon certificates have been issued to the defendant.

That the plaintiff/applicant has failed to provide sufficient or in controvertible evidence of proof of ownership of the said parcel. Such proof would include:

(a) His application for allotment to the President of the Republic of Kenya,

(b) An approved and duly executed approval by the President of the Republic of Kenya to allotte the plaintiff the said parcel;

(c) An actual letter of allotment from the Ministry of Lands,

(d) Payment receipts of stand premium, Survey fees and other relevant dues.

That the plaintiff is yet to provide any evidence of the defendant's occupation or invasion of the suit parcel to warrant the grant of orders sought.

That due to the foregoing the deponent verily believes that the plaintiff's application ought to be dismissed with costs to enable the matter herein to proceed to full trial.

In this Court on 14th June 2007 ***Mr. Meenye*** and ***Miss Masika*** appeared to submit for the parties. ***Mr. Meenye*** for the applicant referred the Court to the application, the grounds on the face thereof and the supporting affidavit; adding that the plaintiff was the registered owner of the suit plot under a grant number ***I.R 98393 – Plot No. 9042/698***.

That the adjacent land to that of the applicant is ***I.R. 102083*** but that the defendant had wrongfully fenced off and occupied the plaintiff's land so as to make it look like the two (2) plots are one.

According to counsel the arguments of the defendant that he applied to the commission of Lands for 87 acres and only got 40 acres has no relevance to the plaintiff's title.

That the commissioner of Lands allocated to the defendant what was available as shown on ***I.R. No. 102083*** adding that the defendant did not get 40 but 57 acres.

That what was alienated was 30 acres and that the plaintiff got 15 acres out of this.

That title to the plaintiff's property is indefeasible and that a complaint as to the irregular manner the Commissioner of Lands allocated the land has nothing to do with the Plaintiff.

Counsel stated that the defence filed by the defendant was a sham, deals with matters extraneous to the plaintiff's title and does not raise triable issues. He asked that the same should be struck out.

Miss Masika for the defendant opposed the application and relied on the replying affidavits deponed to by ***Zadarack Achoki*** on 29th January and 11th June 2007.

She submitted that the defendant came into existence on 24th October 2002 but that before this, its predecessor was the Directorate of Civil Aviation a department of the Ministry of Transport which had been in occupation of a piece of Land ***L.R. No. 39/1/R*** measuring 87 acres since 1975.

That title (***MM2***) in the name of the plaintiff is a grant issued to the defendant in 1998 but Kenya Civil Aviation Authority did not come into existence until the year 2002.

That there is no proof that the plaintiff's land ***L.R. No. 9042/698*** is adjacent to the defendant Land ***L.R. No. 9042/664*** and that even the deed plans and ***MMI*** and ***MM2***; do not show if these pieces of land are adjacent to one another.

That there is no proof that the defendant is in occupation – (active) of the plaintiff's land.

According to counsel, demand notice marked as ***MM3*** has been denied by the Director General of the defendant and that under ***Section 7E*** of Civil Aviation (Amendment) Act of 2002 it is a mandatory provision that any party wishing to commence proceedings of a civil nature against the authority to serve a one month's written notice to the defendant's Director-General or his agent.

That service of such notice has been denied and that there is no evidence of such service. That if there is no such notice then the suit filed herein is null and void which is a triable issue.

According to counsel it is normal conveyancing practice for deed plan to precede the issuance of grant because it determines which position is going to be granted.

But counsel suspects the transaction herein where the grant was allegedly given on 1st January 1993 when the deed plans were prepared on 26th April 2005.

That this same anomally is indicated in the title of the land to the defendant where the grant was given on 1st May 1998 when the deed plan was prepared on 13th July 1998.

That coupled with the fact that prior to 2002 the land was occupied by the Directorate of Civil Aviation, it is logically impossible for the grant to be genuine because by then KCAA had no mandate to have the title in its name in 1998, that it never received any allotment letter nor pay the stand premium.

That even the applicant himself has not shown the Court any allotment letter or receipt for payment of any stand premium in respect to his alleged ***parcel number 9042/698***, giving rise to suspicion that the origin of these titles is not genuine.

Zadarack Achioki gives details of the reasons for the suspicion in the further affidavit sworn by him on 11th June 2007 through an investigation report, namely that he applicant is the person who went to KCAA to ask them to go and collect the title from the Lands Office, doing so in his capacity as an official of the Lands Office; and that he is the same person now suing the same authority over the same land. That the defendant has shown an intention to file a counter-claim and to enjoin the Commissioner of Lands to these proceedings.

According to counsel, there are several triable issues raised by the defence and it should not be struck out

as sought in the application.

That the various anomalies pointed out on the issue of titles are bona find issues to be decided at the full trial when evidence has been called and that is not a plain and obvious case where a defence should be struck out.

In my view the plaintiff's suit filed in Court on 29th September 2006 was straight forward and simple.

He says he is the registered proprietor of all that piece or parcel of land known as ***L.R. No. 9042/698*** Nairobi, worth Kshs.60,000 million, while the defendant is the registered owner of an adjacent piece of land known as ***L.R. No. 9042/664***, all situate in Embakasi, Nairobi.

That the defendant has without any colour of right or consent of the plaintiff encroached and trespassed into the plaintiff's said parcel of land and erected a fence around the same thus making it look like both parcels belong to the defendant. That as a consequence of the defendant's illegal acts the plaintiff has been wrongfully denied access to the suit premises and is unable to develop the same as intended and has suffered loss and damage. That the plaintiff contends that the defendant's actions amount to trespass and conversion and are illegal and tortuous.

That in spite of several protests and requests made to it to remove the illegal fencing and stop any acts of trespass the defendant has failed and/or refused to remove the fence and persists in its action of trespass and conversion.

The prayers sought in the plaint are

(a) an order that the defendant do forthwith remove its illegal fence from and vacate L.R. No. 9042/698 Nairobi and in default it be evicted therefrom;

(b) an injunction restraining the defendant, whether by itself, its servants or agents from entering into, remaining on, fencing or otherwise interfering with the suit premises.

(c) Damages for trespass and loss of user

(d) Costs of the suit.

The defence filed by the defendant raises non-compliance of ***Section 7E (a)*** and ***(b)*** of the Civil Aviation (Amendment) Act, 2002 by the Plaintiff as fatal to the suit and puts the plaintiff on notice of its intention to raise a preliminary objection.

The defence also lays claim to the original land ***L.R. No. 39/1/R*** measuring 87 acres which is being used for training and educational purposes and currently in possession of the East African School of Aviation, a department of the defendant.

That defendant is aware that this land has been subdivided into various portions as shown in paragraph 6 of the defence but maintains that all these portions belong to it.

That the defendant had made many attempts through the Commissioner of Lands to obtain title to its 87 acres of land, now in dispute without success and that in paragraph 10 of the defence, the defendant attributes non-action on the part of the Commissioner of Lands in this regard to fraud. Particulars of this fraud are all spelled out in paragraph 10 aforesaid sub-paragraphs (a) to (h)

These particulars of fraud are directed at the commissioner of Lands the plaintiff, and though the said Commissioner of Lands is not a party to this suit the defendant has given notice of its intention to amend its defence upon the discovery and disclosure of further fraudulent and illegal activities (see paragraph 11 of the defence).

The defendant avers in paragraph 12 of the defence that the plaintiff's title to the parcel of land he claims to own is null and void and that the defendant is justified in maintaining the perimeter fence.

There is a reply to the defence filed herein whose contents are self- explanatory.

The application which is the subject of this ruling is brought under ***Section 3(A)*** and ***Order VI Rule 13(a) (b)*** to ***(d)*** of the Civil Procedure Act and Rules.

Section 3A of the Act is a saving section of the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

On the other hand ***Order VI Rule 13(1)(b), (c)*** and ***(d)*** under which the application was made states as follows:

"***13(1).At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-***

(a) it is scandalous, frivolous or vexatious; or

(b) It may prejudice, embarrass or delay the fair trial of the action be explicable in a reasonable way,

(c) It is otherwise an abuse of the process the Court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.

I have endeavoured to put down the statement of claim and defence in precise form. Looking at the particulars of the defence and in particular the allegation of fraud and the particulars thereof as set out in paragraph 10 of the defence, can one sensibly term this defence

(a) Scandalous, frivolous and vexatious? Or

(b) One which will prejudice, embarrass and/or delay the fair trial of the action? Or

(c) That it is otherwise an abuse of the Court process?

A scandalous defence should be one based on rumours which causes anger or disgust and a frivolous one, a foolish, amusing, not serious or of time wasting, kind; and vexatious one, a worrying or annoying pleading.

The defence facts I have enumerated do not fit in these descriptions neither can I say at this stage and without hearing more that the defence I have described herein before will prejudice, embarrass or otherwise delay the fair trial of this case or that it is an abuse of the process of the Court.

As has been started time and time again, the power to strike out pleadings should only be exercised in plain and obvious cases, ***Per Chitty J***. in ***Republic v. Peruvian Guano Company 36 Ch. Div. 489*** at pages 495 and 496.

As this power is normally exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

In ***Moore v. Lawson & Another (1915) 31 LTR 418*** at page 419, ***Swinfen Eady L.J.*** said:

"***It is a very strong power indeed. It is a power which, if it not be most carefully exercised might conceivably lead to a Court to set aside an action in which there might really after all be a right and in which the conduct of the defendant might be very wrong and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon.***

It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved".

Denman J. in ***Kellaway v. Bury (1982***) 66 LT 599 at pages 600 and 601 was even more liberal when he stated:-

"***That is a very strong power and should only be exercised in cases which are clear and beyond all doubt … the Court must see that the plaintiff has got no case at all either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."***

And in ***D. T. Dobie & Company (Kenya) Limited v. Muchina*** [1982] KLR 1 The late ***Madan JA***, was even more liberal when he said in an obiter dictum at page 9 that***:***

"***The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable and amendment.***

As long as a suit can be injected with real life by amendment, it should not be struck out".

I am aware the D.T. Dobie case as one other cases cited were dealing specifically with striking out of plaint but since striking out provisions for either plaint or defence are the same, (see ***Order VI Rule 13(1***) of the Civil Procedure Code); these decisions would equally apply to striking out of a defence.

Given what I have stated herein before and the authorities quoted, I am satisfied the defence filed herein clearly raises bonafide triable issues and is not a sham and that the authorities of ***Civil Appeal No. 53 of 1995 Michael Githinki Kimotlho v. Nicholas Muratha Mugo*** and ***High Court Civil Case No. 79 of 2005 Damisha Building Contractors Limited v. Auto Spring Manufacturers Limited*** cited by counsel for the applicant do not apply here.

The defendant is asking various questions in its defence; how it could be allocated ***plot number 9042/664*** without an allotment letter being first issued; how it can be allocated that plot without paying any stand premium, rates and rent and how the plaintiff, an officer in the Commissioner of Lands Office comes from the blue to inform the defendant that its title for the suit land was ready for collection only for him to come up to claim part of the same plot!

That the defendant is not aware of any survey having been carried out on the land before the sub-divisions giving rise to ***plot numbers 9042/664*** and ***9042/698*** amongst others as shown in paragraph 6 of the defence!

All these are valid questions which required that an investigation be carried out to get proper answers and that this will only be done during the full hearing of the case.

This plot in dispute was allocated under the Registration of Titles Act and while under the Registered Land Act a first registration is indefeasible, under Section 23(1) of the Registration of Titles Act the allegation of fraud is a contestable issued. ***Consequently I dismiss this application with costs.***

Delivered, dated and ***signed*** at Nairobi this 10th day of July 2007.

D. K. S. AGANYANYA