



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

Civil Suit 85 of 2005

MOSES WAFULA KHAOYA.....PLAINTIFF

V E R S U S

NABAYI MULTI-PURPOSE CO-OPERATIVE SOCIETY.....DEFENDANT

R U L I N G

The defendant has moved the court by a chamber summons which was brought pursuant to Order 6 rule 13 (1) (a) (b) (c) and (d); Order 35 rule 1 of the Civil Procedure Rules; as read together with sections 3 and 3A of the Civil Procedure Act.

It is the defendant's prayer that the suit herein be struck out or dismissed because the verifying affidavit was full of falsehoods.

According to the defendant, the plaintiff had deponed that there was no other case which was pending between him and the defendant, whilst he was well aware that there was another case, still pending before the High Court, at Bungoma.

In any event, the plaintiff is said to have purchased the property, which was the subject matter of the suit herein, at a public auction that was unlawful. The defendant's case was that whereas the auction was conducted on 17/11/2003, the court had already issued an injunction on 14/8/01, putting a stop to the intended sale. It is also the defendant's case that the court order had been served upon the auctioneers prior to the date when the auction was scheduled to be conducted.

Accordingly, the defendant believes that any sale which may have been held was in flagrant breach of the orders made by the court, and could not therefore confer any rights on the plaintiff.

The defendant submitted that the plaintiff could not come to court to ask it to enforce that which the court had told him not to do. If that were to happen, the defendant contends that it would constitute a mockery of justice.

In answer to the application, the plaintiff submitted that he was the owner of the suit property, although the defendant was in occupation thereof.

The plaintiff explained that he had decided to bring this suit after he had verified that he had never been a party to the proceedings in the case that was pending before the High Court, at Bungoma.

The said case, at Bungoma is as follows;

NABAYI MULTI PURPOSE CO.OP. SOCIETY LIMITED V. AGRICULTURAL FINANCE CORPORATION, RONALD KELELE & MOSES KHAOYA WAFULA, BUNGOMA HCCC NO.128 OF 2001.

Upon receipt of the Plaintiff and an Injunction application, filed in that “**Bungoma Case**”, the plaintiff herein filed a Defence and a Counterclaim.

In his said Counterclaim, the plaintiff sought orders for the eviction of the defendant herein, on the grounds that he was the legal owner of the suit property. Indeed, the plaintiff herein sought recognition as the registered proprietor of the property, L.R NO. 8994/22.

It is in those circumstances that the defendant submits that the suit herein should be struck out, because as at the date when this suit was instituted, there was already another pending case, involving the same parties, and in respect of the same subject matter.

The defendant submitted that by bringing this suit, whilst there was already another suit between the parties, the plaintiff was abusing the process of the court. In effect, this case was, in the opinion of the defendant, liable to be struck out, pursuant to Order 6 rule 13 (1) (d) of the Civil Procedure Rules.

In answer to the application the plaintiff said that the defendant had, erroneously, made him believe that he was a party to the “Bungoma Case”. However, the truth of the matter was that the plaintiff herein had never been enjoined to that suit.

As at 30/6/2005, when this suit was instituted, the plaintiff says that he had already become aware that he was not a party to the Bungoma case. Therefore, he insists that by stating, on oath, that there was no other suit which was pending between the parties herein, he was stating the truth.

However, the defendant expressed the view that that statement constituted a falsehood because it was not until 10/7/2006 when the court expunged, from its records, the defence and Counterclaim which the plaintiff herein had filed in the Bungoma Case.

In my considered view, it is arguable whether or not, as at 30/6/2005, the plaintiff was a party to the Bungoma case. I say so because on the one hand, the case title appeared to indicate that he was the 3rd defendant; whilst on the other hand; the plaintiff may never have become a party to the Bungoma Case.

The issue needs to be determined substantively. In the course of giving due consideration to the said issue, the court will need to determine whether or not the plaintiff was ever a party to the Bungoma case.

In my considered view, the defendant should expect to be faced with the questions as to when and how the plaintiff herein became a party to the Bungoma case. In responding to those questions, the defendant would need to bear in mind the orders which were made by the Hon. N.R.O. Ombija J. on 10/7/2006. Those orders were in the following terms: -

“There being no pending or proper joining of the 2nd and 3rd defendants, papers filed against them (2nd and 3rd) or for them are null and void.”

According to “Black’s Law dictionary”, if something is null, it is deemed as,

“having no legal effect, without binding force.”

In my understanding of the orders made on 10/7/2006, therefore, the plaintiff did not cease to be a party to the Bungoma case from the date of the said orders. Instead, all the papers filed either against him or by him, had had no legal effect from the outset. Therefore, it would appear that by the time when this suit was instituted, the plaintiff was correct to have deponed, in his verifying affidavit, that there was no other case, whether pending or determined, between the parties herein, over the same subject matter.

In his capacity as the registered owner of the suit property, as shown on the Grant, the plaintiff appears to have an arguable case.

That the defendant believes that the plaintiff acquired the title irregularly or unlawfully, would not be reason enough to warrant the striking out of the Plaintiff.

I hold that the defendant has failed to demonstrate that the plaintiff's case is either an abuse of the process of the court, or that it is otherwise so hopeless that it should be struck out.

Accordingly, the application dated 11/4/2006 is dismissed with costs.

Dated and Delivered at Kitale this 30th day of October, 2007.

FRED A. OCHIENG

JUDGE