REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 30 of 2006

KIUNDU KIMANI…….……..…PLAINTIFF

Versus

STEPHEN THUMI KIMANI…….……DEFENDANT

RULING

Plaintiff has brought Chamber Summons dated 12th April 2007 seeking that the defence filed herein be struck out for being frivolous, vexatious or for delay in the fair trial of this suit. The application is brought under *Order VI Rule 13 (1) (b) and (c)*. The Plaintiff and the Defendant are brothers. The Plaintiff by his plaint claims that he is the registered owner of parcel No. LOC. 19/NYAKIANGA/1430. The Plaintiff further pleaded in his plaint that the Defendant has interfered with his use of that land by objecting to the Plaintiff's application for Land Board consent to transfer that property to another person. As a consequence of that objection the Plaintiff claims he suffered loss and damage. The Plaintiff by his plaint prays for an injunction against the Defendant to stop him interfering with that land and he additionally seeks an award of damages.

In support of the application of striking out the defence the Plaintiff in his affidavit stated that he is the registered owner of that property. That there had been tribunal cases between the Defendant and his wife involving the subject property where the Defendant claimed ownership of that property. That that claim was dismissed.

In his defence the Defendant stated that the Plaintiff holds the land in trust for both of them. That the property originally belonged to their father and subsequently the Plaintiff caused that property to be registered in his name. He further stated that there is a tribunal matter that is still pending between them. Finally in his defence the Defendant denied having interfered with the Plaintiff's quiet possession of that property.

The Plaintiff by his present application is seeking the Court to use its summary process of striking out the defence. In considering this summary process the courts have had the following to say: In the case of **DYSON V ATTORNEY GENERAL [1911] 1 K.B 401** the court had the following to say:

"***To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."***

In the case of **HUBBUCK & SONS LTD. V WILKINSON, HEYWOOD & CLARK." [1899] 1 Q.B. 86** the court expressed itself as follows:

"***The……summary procedure [i.e. under Rule 19] is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks."***

In our local case of **DT DOBIE & COMPANY (KENYA) LTD. V MUCHINA [1982] KLR 1,** Madan J. A. stated:

"***the Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a 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."***

With the caution stated in the above case which I have relied upon, I find that the Defendant's defence cannot be said to be frivolous, vexatious nor can it be said to be an abuse of the process of the Court. The Plaintiff claimed that the Defendant interfered by objecting to his application of Land Board consent. The Defendant in his defence denied that. The Defendant cannot be sent away from the seat of judgment for denying interfering with that application for consent. It is the Plaintiff's claim that there is interference and in the face of the Defendant's denial the Plaintiff has to prove his case. The Defendant's defence cannot be said to be vexatious, scandalous or frivolous nor is it an abuse of the court process. I find the Plaintiff's application by Chamber Summons dated 17th April 2007 is misconceived and the same is dismissed with costs to the Defendant.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 14th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE