

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 113 of 2005

THOMAS ONSERIO ONGUBO.....PLAINTIFF

VERSUS

LABAN MASINJILA.....DEFENDANT

RULING

The plaintiff, Thomas Onserio Ongubo filed suit against the defendant seeking to have the defendant evicted from a parcel of land known as **NAKURU MUNICIPALITY/BLOCK 4/177** (*hereinafter referred to as the suit land*) which he claims to be the registered owner. When the defendant was served, he entered appearance and filed a defence. In his defence he stated that he was a beneficial owner of the suit land having resided in a house erected on the suit land for a period of over 18 years as a civil servant. The defendant claimed that, as a civil servant, he was entitled to be given first priority when the said parcel of land was allocated. In essence the defendant was stating that the plaintiff had not lawfully obtained title to the said parcel of land.

On the 16th of August 2005, the plaintiff filed an application under the provisions of **Order VI Rules 13(1)(b)(c) and (d) and 16 of the Civil Procedure Rules** seeking to have the statement of defence filed by the defendant on the 26th of May 2005 struck out. The plaintiff further prayed for judgment to be entered in his favour as prayed in the plaint. The grounds in support of the application were that the plaintiff, as a registered owner was entitled to the suit land. The plaintiff stated that the defendant had no claim whatsoever over the said parcel of land and therefore his defence should be struck out as it was frivolous and vexatious and otherwise calculated to delay the fair determination of the plaintiff's claim.

The defendant filed a replying affidavit opposing the plaintiff's application. He deponed that he was beneficially entitled to the suit land having resided on the same for a period of over 18 years. He claims that as a person in occupation he was entitled to the suit land. He further deponed that the defence that he had filed raised triable issues which could not be said to be frivolous or vexatious. He further deponed that the process upon which the plaintiff used to acquire title to the said parcel of land was fraudulent. He urged this court to dismiss the application.

At the hearing of the application, I heard the submissions made by Mr Omae Learned Counsel for the plaintiff. He submitted that the plaintiff was the owner of the suit land having purchased the same for value from the previous owner. He submitted that the plaintiff was the registered owner of the suit land and had exhibited a copy of the title and an extract of the register maintained at the Lands office to prove his ownership. He further submitted that the defendant had no registerable interest on the suit land and further that the defence filed by the defendant did not disclose any triable issues. He argued that the basis of the defendant's defence was that he was aggrieved that he had not been allocated the suit land as the person in occupation. He submitted that the defendant's interest however was not recognized in law. He submitted that the defendant had raised no issue that would enable this court grant him leave to defend the suit. Since the defendant did not have any legal right over the suit land, the plaintiff urged this court to allow his application with costs.

Mr Akang'o, Learned Counsel for the defendant submitted that this court should be reluctant to act upon the plaintiff's application and exercise its draconian power to strike out the defence. He submitted that this power could only be exercised in the clearest of circumstances which, however, circumstances did

not exist in this case. He further submitted that the defendant's interest on the suit land was recognized by the law. In his view the defendant's interest was recognised under **Section 30(g) of the Registered Land Act** as an overriding interest. He submitted that the defendant had stayed on the suit premises for a very long time from the time he was posted to Nakuru as a judicial officer until his retirement. He further submitted that the defendant's right over the suit land need not be registered. He argued that the defendant had applied and was allocated the suit land. For the time being, it was submitted the defendant was paid rent to the government. Mr Akang'o further argued that the circumstances under which the plaintiff got registered as the owner of the suit land were suspicious. He urged this court to consider all the circumstances of this case and the fact that the plaintiff had not asserted his proprietary rights over the suit land since obtaining title in the year 2001 and rule in favour of the defendant. He submitted that the defence filed by the defendant raised triable issues which should be ventilated in a full trial. He urged this court to dismiss the application with costs.

I have read the pleadings filed by the parties to this application. I have also carefully considered the rival arguments made by the counsel for the plaintiff and the counsel for the defendant. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the prayers sought in his application. The other issue for determination is whether the defendant's defence raises triable issues that would enable this court grant him leave to defend the suit. Certain facts are not in dispute in this case. It is not disputed that the plaintiff is the registered owner of all that parcel of land known as **Nakuru Municipality/Block 4/177**. The plaintiff has annexed a certificate of lease issued to him by the Land registry signifying his ownership of the suit land. He has also annexed a certificate of official search and an extract of the register maintained at the land office Nakuru in respect of the said suit land. The defendant does not dispute that the plaintiff is so registered as the owner of the said parcel of land.

What he disputes is the circumstances under which the plaintiff got registered. Upon perusal of the defence filed by the defendant it is clear that the defendant is contesting the plaintiff's ownership of the suit land because he claims that he was entitled to the said parcel of land having applied for it when the same was being allocated by the government. The defendant claims his application to be allocated the suit land was considered favourably. The defendant did not however annex any document in his replying affidavit to support his claim that the suit land had been allocated to him by the Government. He submits that the plaintiff acquired the title to the suit land under suspicious circumstances. In his submissions before court the defendant admits that his claim over the suit land does not merit registration but is an overriding interest as envisaged by **Section 30 (g) of the Registered Land Act**.

I have carefully considered the facts of this case. As was held by Madan J.A. in the case of **D. T. Dobie & Co. (Kenya) Ltd. -vs- Muchina [1982] KLR 1** at page 9

“A court should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

In the instant case, the defendant is resisting the plaintiff's claim based on what he states was a promise given to him that he would be allocated the suit land. His further defence is that the plaintiff purchased the said parcel of land and got himself registered under dubious circumstances. Although the defendant has said that the plaintiff was fraudulently registered as the owner of the suit land, no such averment of fraud was made in his defence neither was the said alleged fraud particularized as required by the law. What I have before me is a claim by a registered owner whose title has not been challenged and who wants to secure possession from an illegal occupant of his land.

The defendant has not annexed any document that would make this court make a finding that his defence raises triable issues which ought to be ventilated in a full trial. The title held by the plaintiff has not been challenged by the defendant since the plaintiff obtained the same in the year 2001. In his defence, the

defendant has not raised a positive defence to establish that he is entitled to the suit land. The defendant cannot therefore resist the plaintiff's claim. The defence filed by the defendant does not raise any triable issues known in law. I agree with the plaintiff that the said defence is frivolous and vexatious and meant to delay the just determination of this case.

I therefore grant the plaintiff's application dated the 16th of August 2005 and strike out the defence filed by the defendant on the 25th of May 2005. I however decline to enter judgment in favour of the plaintiff as prayed in the second prayer of his application. The plaintiff did not make an application that summary judgment be entered in his favour against the defendant. The plaintiff has to prove his claim by way of formal proof. He shall have the costs of the application. He is at liberty to fix his case for formal proof.

DATED at NAKURU this 24th day of February 2006.

L. KIMARU

JUDGE