



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 50 OF 2004

BONIFACE NZOMO KALANI

MWENDO NDISIA (alias MALE NDISYA)
PLAINTIFFS

PETER KOMU KIMULI

VERSUS

MUNYWOKI MUSUVA NGAO
DEFENDANT

RULING

The application before the court is dated 30.11.2004. It was argued in the absence of the respondent who did not, together with his advocate, attend court on 14.12.2005 when applicant prosecuted the application although service was effected.

The application sought that the applicant's originating summons dated 30.4.2004 be struck out for (a) being fatally defective (b) disclosing no reasonable cause of action and (c) being scandalous, vexatious and an abuse of the court process.

The applicant argued that the applicant is the registered owner of the parcel of land called Muthetheni/Kalamba/586. That the said piece of land was purportedly sold to the respondents who are the original claimants of the said piece of land in his absence and without his consent and knowledge. His brother admittedly received the purchase money all amounting to Ksh. 45,000/- which he later tried to give to the applicant but the applicant refused to take. That when the applicant's brother tried to return the money, the plaintiffs/Respondents refused to accept it back claiming that they had conclusively bought the pieces of land. That apparently the process took about nine years. The applicant/defendant also argued that the respondents/plaintiffs were never allowed to occupy the land and that any time they managed to make an entry, they were repulsed by the applicant. He also argued that on 25.3.2004 he realised that the defendants had filed a caution against the piece of land which he removed after the Registrar of Lands heard a case between the parties and found that the applicant was the rightly registered owner.

The applicant also argued that the Originating Summons are defective for failure to comply with the provisions of Section 35(1) and Section 34 of the Advocates Act which provide that every affidavit, such as the one supporting the Originating Summons, must show the name of the drawer. That the affidavit in question does not show the drawer.

The applicant also argued that since the Plaintiff/Respondent has never had a continuous adverse

possession, he cannot therefore be entitled to demand ownership of land under dispute. He also argued that the respondents are claiming and admitting that they are bona fide purchasers for value who therefore cannot at the same time claim adverse possession.

And finally, the applicant argued that in any case the sale transaction was never blessed with the local Land Control Board consent in accordance with the provisions of the Land Control Act Section 6(1).

Although the applicants did not appear before the court to defend this application, I noted that they had filed a replying affidavit which in the court's discretion, I carefully perused and decided to take into account as I consider the application. They admit that the applicant is the registered owner. They admit also that the Land Registrar decided that the cautions filed against the piece of land were wrongly filed and removed the same. They do not agree that the sale was done with the applicant's brother but insist that the agreement of sale was entered into by the applicant himself. They also argued that they had occupied the land for not less than 14 years, and had therefore earned adverse legal rights which entitle them to claim for adverse possession. They admit however, that they never obtained the necessary land control consent. They also denied that anyone tried to refund the purchase price although even if it were so, it would be too inadequate due to inflation.

I have considered all the above facts and arguments. What the applicant is seeking is to bring the plaintiff/Respondent's suit to an end at this preliminary stage. This means that the plaintiff/respondent's right to get an opportunity to present their case in full, will be taken away before they are fully heard. In my view the applicant must show very good reasons upon which to persuade this court to do so.

Mr. Sila raised first the ground that the applicant did not sell the piece of land himself. That it was sold by his brother who indeed swore an affidavit to that effect. However the plaintiffs filed their replying affidavit asserting the contrary and claiming that the applicant himself signed the sale agreement. In my view a matter so contested should be allowed to go to trial where each party will be properly subjected to cross-examination to test their verity. The same applies to the issue of whether or not the plaintiffs/Respondents took continuous adverse occupation of the piece of land the subject of dispute for over 12 years. This issue also stands on the face of the clear registration of the piece of land in the ownership of the applicant. Suppose the plaintiffs/respondents were to sufficiently prove that they held adverse possession for over 12 years, such clear registration as mentioned above might no longer remain so clear any more.

Having taken into account the above mentioned points I have come to the conclusion that it will be in the interest of justice that the plaintiffs/respondents be given a fair chance to prove their case if a case they have, in a full hearing and that therefore this is not a suitable case for striking out. The applicant also failed to guide this court on the relevant principles upon which this court can strike out a suit at the preliminary stage. Accordingly the application to strike out the Originating Summons is hereby dismissed with costs to the plaintiffs/respondents. The plaintiffs should fix the suit for a hearing without delay. Orders accordingly.

Dated and delivered at Machakos this 3rd day of March 2006.

D. A. ONYANCHA

JUDGE