REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 32 of 2000

JUSTIN MUTEGI RINKANYA…….....…APPLICANT/PLAINTIFF

VERSUS

JOSEPHINE KATHURE MWAMBIA……DEFENDANT/RESPONDENT

RULING

1. The Amended Plaint dated 4.10.2000 was filed by Justin Mutegi Phares Rinkanya the Plaintiff herein and in it, he avers inter-alia that;

i) he is the registered proprietor of land parcel No.East/Magutuni/1934 and his registration was the first one in respect of that parcel of land.

ii) the Defendant, Josphine Kathure Mwambia was residing on the parcel prior to the Plaintiff's registration and has refused to vacate the land or at least a portion of it.

iii) that the Plaintiff now seeks that the Defendant be evicted.

The Defendant filed a Defence on a date that is unclear from the record but it is dated 29.9.2000. In it she avers that she has "lived on the parcel of land she occupies from early 1960s" and that the land belongs to her deceased husband. Further, that she occupies land parcel number East Magutuni/465 and that the "Plaintiff has fraudulently and secretaly (sic) caused part of parcel number East/Magutuni/1934 to be placed on her late husband's parcel of land".

2. The Plaintiff on 15.7.2003 filed a Chamber Summons Application under Order VI Rules 13 (1) (a) (b) and (c) of the Civil Procedure Rules seeking that the Defence aforesaid be struck out and Judgment be entered for the Plaintiff as prayed.

3. In submissions and in line with the grounds set out in support of the Application as well as the Supporting Affidavit of the Plaintiff, Mr. P.N. Mugo argues that firstly, that the Plaintiff having been registered as the first owner of title number East/Magutuni/1934 holds that title to the exclusion of all other persons including the Defendant. Secondly, the Defendant alleges fraud but does not give particulars thereof as required by the Civil Procedure Rules. Thirdly, even if the allegations of fraud were found to be true, it would not be a basis for impeaching the Plaintiff's title in view of the provisions of S.134 of the Registered Land Act, Cap. 300. Fourthly, the allegation that the land parcels aforesaid could

be overlapping flies in the face of the truth because the two are very far from each other. Lastly, that there is nothing to try in the suit and the Defence raises no issue for trial and should be struck off.

4. In response, the Defendant's Counsel filed a Replying Affidavit sworn on 17.11.2004. The deponent, Julius Mbaabu M'Inoti deposes that the Defence raises triable issues and that the suit ought to be heard on merits. Further, that the Application "seeks to pre-empty (sic) the dismissal of the suit in view of our paragraph 5 of the defence as there is no averment to non-existence of any other suit pending in the Plaint" (Sic). I have disregarded a purported "Replying Affidavit" by the Plaintiff as I don't see that leave was granted to file it.

5. Miss Ndorongo who argued the Application on behalf of Mr.M"Inoti for the Defendant raised three other matters;

(a) that a Surveyor has been to the two parcels of land and has been asked to separate them on the ground

(b) that the Application is defective as it is a Notice of Motion while Order VI rule 16 expects that it ought to be a Chamber Summons.

(c) That the subject of the dispute, being land, the matter ought to be determined on all merits and not at the interlocutory stage.

6. For my part, I should first of all deal with the more mundane matters

raised; the first being the contention by Miss Ndorongo that the Application is defective. I have seen the copy of the Application before me. It is a Chamber Summons and properly so under Order VI Rule 16. The other is the submission regarding a certain surveyor doing a separation of the two parcels of land in issue here. Again that submission is neither in the Defence nor in the Replying Affidavit on behalf of the Defendant. It cannot for these reasons be a submission in aid of the Defendant's case.

7. Another matter that I should dispose of but which is more grave than the ones cited is the fact that Counsel for the Defendant, Julius Mbaabu M'Inoti in swearing the Replying Affidavit on behalf of his client has descended to the fray. He has left his hallowed place at the Bar and gone to the dock! Our Courts have on more than one occasion said that Advocates have no businesses doing so and deponing to matters of evidence on behalf of their clients. Mr. I'inoti cannot surely know, as he claims, of his own knowledge, that "the respondent has been in occupation of the suit land since adjudiction process 1960s todate (sic)".

8. Having so stated, I have looked at the substance of this suit and I am certain that the nature of it is such that I am not at this stage able to say that there is nothing to try. I agree with Miss Ndorongo therefore that the issue of land is a very emotive one and matters involving land should not be tried and disposed of by way of Affidavits such as the ones I have described above. The fact that the Plaintiff concedes that prior to his registration, the Defendant was in occupation of the land is a matter for investigation at the hearing. The fact that the Defendant claims that the process of adjudiction was flawed is a matter for this Court to inquire into at the hearing well noting the worth of a first registration under the Registered Land Act. It is really at a full trial of the matter that all these questions can be determined one way or the other.

9. It has been said time and time again that only in the clearest of cases can a pleading be struck off. It must in fact be so hopeless that it cannot be cured by any known procedure to our law. I do not think that the Defence herein is so hopeless that I should at this stage consign it to the dust-bin of litigation by the fatal blow of striking out under Order VI Rule 13.

10. I am in conclusion reminded of the words of Madan, J.A. in D.T. Dobie & Co (K) Ltd –vs-Muchira [1982] KLR 1 at page 9 where he said;

“The Court ought to act very cautiously and carefully and consider all facts of the case without embaking 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 normal way.”

11. These statements aptly illustrate the caution I am exercising in reaching the end of this matter and in the exercise of discretion at this interlocutory stage.

12. I shall without further ado dismiss the Application dated 15.7.2003 but because of the criticism I have leveled at the Defendant’s response, I do not consider that she is entitled to the costs thereof.

Orders accordingly.

Read in open court this 26th day of January 2005

I. LENAOLA

JUDGE

In the presence of;

No party present

I. LENAOLA

JUDGE