



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 252 of 2003

BEMIS LTD PLAINTIFF/RESPONDENT

VERSUS

THE ARCHDIOCESE OF NAIROBI

KENYA REGISTERED TRUSTEES.....DEFENDANT/APPLICANT

RULING

1. The Application, the Prayers and the Depositions The defendant's application by Chamber Summons dated and filed on 29th September, 2004 was brought under Orders IXA rule 10, XXXIX rules 1 and 2 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The substantive prayers were as follows:

(i) that, the interlocutory judgment entered against the defendant on 11th November, 2003 and all consequential orders be set aside;

(ii) that, the defendant be granted leave to file its defence out of time, and the draft defence and counterclaim annexed be deemed as filed after payment of additional filing fees;

(iii) that, pending the hearing and determination of the suit, the plaintiff, its servants and/or agents be restrained by way of temporary injunction from interfering with the status quo ordered by consent on 27th May, 2003.

As grounds in support of the application it is stated that on 24th March, 2003 the plaintiff served the defendant with an order issued on 21st March, 2003; a certificate of urgency dated 17th March, 2003; a Chamber Summons dated 17th March 2003 with its supporting affidavit and a plaint dated 17th March 2003. No summons to enter appearance was served. The defendant's advocates then filed an appearance, but did not file a defence on the basis that no summons had been served. There was even further delay in filing a defence because the parties had been negotiating on an out-of-court settlement. The defendant has a good defence, in its reckoning, as the Commissioner of Lands has expressed the view that the plaintiff's title over the suit land is fraudulent. The defendant has a counterclaim as against the plaintiff, over the suit property. And the defendant stated that this is not a proper case for interlocutory judgment to be entered – in view of the prayers sought by the plaintiff in its plaint.

Evidence in support of the application is set out in the affidavit of Rev. Father Pelin d'Souza dated 29th September, 2004. He states that he is a trustee of the defendant and is authorized in that capacity to make the depositions. He avers that he has received information from a Father Wanyoike, the Financial Controller at St. Mary's School, that Crescent Construction Ltd is already moving mounds of earth to the suit premises, L.R No. 209/8561 which premises belong to the defendant and which has been set aside for

the expansion of St. Mary's school once the instant case is concluded. Both the plaintiff and the defendant were holding title deeds which had the appearance of validity, for the self-same suit premises. During the pendency of a consent status quo order recorded before Mr. Justice Ransley on 27th May, 2003 the defendant through its agent, Pinnacle Projects Ltd, had opened negotiations with the plaintiff aimed at out-of-court settlement. A letter dated 9th March, 2004 carried the terms of the proposed settlement, and what remained outstanding was a planned meeting of the advocates for both parties. Subsequently there was a meeting of the advocates, together with the plaintiff's representative, Mr. Harbans Singh ; and it was agreed that Mr. Harbans Singh would make further consultations with the directors of the plaintiff. In the meantime His Grace the Archbishop Ndingi Mwana'a Nzeki took up the matter with the Commissioner of Lands, who expressed the opinion that the plaintiff's title could have been acquired fraudulently.

The deponent averred that, even as the investigations were in progress, he was informed by the defendant's advocates that the plaintiffs had filed an application on the basis of which, on 11th November, 2003 the Deputy Registrar entered interlocutory judgment against the defendant; and the basis of that judgment was "the defendant having been served with summons to enter appearance and having failed to file defence". The deponent deposed that the plaintiff had not served summons to enter appearance on the defendant. He deposed that in view of the state of service of documents upon the defendant, and of the fact that negotiations were still in progress, the defendant's advocates had not filed a defence.

On the plaintiff's side there is a replying affidavit sworn by Harbans Singh Amrit on 12th October, 2004. He averred that summons to enter appearance had been duly served on the defendant by Peter Mburu , the process server on 1st April, 2004. He deposed that the suit premises is not L.R No. 209/8561 as deponed by Rev. Fr. Pelin d'Souza, but rather, L.R No. 6863/80 , and the plaintiff's agents, Crescent Constructions Co. Ltd had been in possession thereof since the agreement for the sale of the same to the plaintiff by the defendant. The deponent avers that the first approach to the plaintiffs for an out-of-court settlement, took place only in January, 2004 – quite some time after the interlocutory judgment was entered on 11th March, 2003. The deponent states that the meeting which had taken place involving the respective advocates for the parties, on 10th March, 2004 was held on an entirely "without – prejudice" basis, and no agreement at all had been reached. The deponent averred that, as far back as 2nd September, 2003 the plaintiff's advocates had communicated with the defendant's advocates, drawing their attention to the fact that no statement of defence had been filed; but there was no reply from the defendant. The plaintiff also filed a statement of grounds of opposition, dated 7th October, 2004.

2. Consideration of the Submissions At the hearing which took place on 14th October, 2004 counsel for the defendant made a prayer for the preservation of the status quo pending full hearing; for the setting aside of the interlocutory judgment; for leave to file defence and counterclaim out of time; for restraints against the plaintiff pending hearing of the suit.

Counsel restated the somewhat strange averment that, while the pleadings had been served upon the defendant, one specific document, the summons to enter appearance, had been missing. Why would this one vital document be missing? And why did the defendant proceed to enter appearance while knowing well that the summons to enter appearance was missing? Why did the defendant not apply for leave to cross-examine the process server? How does one explain the clearly-worded evidence coming from the side of the plaintiff, that one of the papers duly served upon the defendant was the summons to enter appearance? And on what account did the defendant fail to respond to the plaintiff's letter of 2nd September, 2003 which reminded the defendant that no statement of defence had been filed? On a careful assessment of these legitimate questions, one sees more reason on the side of the plaintiff than on the side of the defendant. I have to draw the conclusion that non-service of the summons to enter appearance, if such was true, was not the reason for the defendant not filing and serving a statement of defence. (The remaining reason proffered was that there were negotiations in progress; the merits of this claim will be considered further on.) Since the defendant had in any case, whether it be of its wholly independent volition, filed a memorandum of appearance, it should, as a natural follow-up, have gone on to file and serve also the statement of defence. The defendant did not do so; and so its reasoning in this regard lacks cogency and must be held to fail.

Learned counsel, Mr. Nyiha, stated that the parties have been negotiating towards a settlement, and that the order made by Mr. Justice Ransley on 27th May, 2003 had been intended to achieve that purpose. I must say, however, that I have looked at that order, and the claim is not quite so plain on its face. It merely states: “By Court . Status quo between the parties to be maintained. Hearing after 100 days form close of pleadings”. Counsel noted that the said order had already lapsed; and from this I must draw the conclusion that if there have been any settlement initiatives between the parties, they have been abandoned.

Mr. Nyiha contended that the defendant has ‘very serious triable issues’; but he did not elaborate this point other than by restating an incident which the plaintiff/respondent has sharply challenged – and I think, quite justifiably – in the depositions. Learned counsel said:

“The Commissioner of Lands has written stating that the title transfer [in favour of the respondent] appears to be fraudulent and even criminal.”

Would such a statement in an informal letter emanating from a senior officer in the Lands Office be a proper foundation for a legal claim? Mr. Harbans Singh Amrit in his replying affidavit of 12th October, 2004 deposes (para.15):

“I am informed by [the respondent’s counsel on record] whom I verily believe that the Commissioner of Lands had no business [giving] any opinions as she is not a Court of law unto herself to come to any conclusions without taking into consideration the views of the plaintiff who was never given any audience.....”

The applicant also appears to consider that the strength of its proposed pleadings is enhanced by the fact that these come along with a counterclaim ; and this is presented as argument in favour of setting aside the interlocutory judgment and according the applicant locus poenitentiae to file and serve defences in preparation for full trial. From the depositions, Mr. Nyiha brought out the important point that the dispute between the parties is arising because although the plaintiff is the holder of title documents for L.R No. 6863/80 while the defendant is the holder of title documents for L.R No. 209/8561, these two different titles numbers actually refer to one and the same parcel of land, in the Lavington area where St. Mary’s School is located. Since this important point is not disputed, it should have been abundantly clear that there were only three possible explanations of the origin of the dispute: either (i) one of the parties has been wrongfully involved in the fraudulent creation of a document of title; or (ii) both parties have been involved in such a fraudulent enterprise; or (iii) the Lands Office has made a fundamental error by giving two different titles for the same parcel of land.

Whichever one of the three cases represents the truth, the conflict goes beyond private dispute settlement through negotiation or civil litigation. The dispute can only be resolved through the control and direction of the Commissioner of Lands, with the participation of the Director of Surveys. It must be determined whether L.R No. 6863/80 and L.R. 209/8561 correctly exist in the Lands Office records; it must be determined whether the two, as alleged, refer to one and the same parcel of land; it must be determined whether any fraud was involved in the creation of one or the other or both of the two land reference numbers. Since these essential scenarios have not been followed up, it becomes apparent that the suit and the applications being made under its umbrella are essentially misguided . No just outcome will be arrived at in a suit between the two parties which does not enjoin the Commissioner of Lands. These are the principles that must ultimately determine my finding in this application; though it must be obvious by now that the interlocutory judgment entered by the Deputy Registrar on 11th November, 2003 cannot be sustained because it will compound the injustice inherent in the instant matter unless and until the Commissioner of Lands is enjoined in the suit. In the light of the foregoing analysis, I will not attach any weight to the prolonged contest between counsel on how the pleadings have been served upon the defendants; whether service was upon the defendants themselves or upon their advocates on record; whether or not summons to enter appearance was part of the bundle of documents served; whether service was regular or irregular; etc.

Mr. Nyiha has submitted, and in my view correctly, that the suit herein is too complex to be disposed of

by affidavit evidence. In his words:

“The contemplation before Mr. Justice Ransley was that the matter was going to full trial How can one party then proceed to obtain interlocutory judgment. It had become clear that affidavit evidence was not taking us very far. We needed witnesses from the Lands Office . Full trial was unavoidable.”

It is quite clear to me that the fundamental issues involved in this case render it impossible to dispose of it on technicalities of procedure, without doing the gravest harm to the cause of justice. The issues in dispute greatly transcend the immediate concerns and the technical resources of the present parties by themselves; and the wrongs which directly lead to the dispute may well have emanated from the failings of those holding public office. Therefore those others must be enjoined, and made to account for their part in the proper stewardship of the ordinary people’s constitutional rights to acquire and hold private property.

There is, hence, no need for me to consider at any length the defendant/applicant’s pleas founded on the alleged good defence available. Once I open up this matter to the joinder of an additional party, the defendant will be able to take all necessary courses of action in accordance with the law of procedure. It is also not necessary for me to consider the averment that the plaintiff’s documents of title raise questions by the suspicious number of blotches found thereon. This will be dealt with in the proper trial that I envisage, involving the Commissioner of Lands as a party.

Case law has been brought to my attention relating to the powers of this Court to set aside an ex parte judgment such as the one entered in the instant case by the Deputy Registrar on 11th November, 2003. In *Maina v Muriuki* [1984] KLR 407 the Honourable Mr. Justice O’Kubasu (as he then was) quoted with approval (pp. 409 – 410) from *Patel v. E.A Cargo Handling Services Ltd* [1974] E.A. 75 (at p. 76 – Sir William Duffus, P.):

“The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J put it ‘a triable issue’, that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

Similarly in *Maina v. Mugiria* [1983] KLR 78 the Court of Appeal thus held (pp. 79-80):

“the principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

(a) Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the Court is to do justice to the parties.

(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.....”

Although learned counsel for the respondent had extensive submissions on the mode of service of suit documents which the plaintiff had done, I need not consider these, as I have already held that, that is an immaterial element in the decision that must be arrived at in this matter.

Mr. Jowhal contended that the intended defence of the applicant could not possibly have any merits – and hence there was no need to depart from the procedural judgment already entered, and to seek merits in a full hearing. His reasoning was that the plaintiff had already held land parcel, L.R No. 6863/80 for the last 20 years, and this possession of two decades must be perceived as carrying but one message – lawful ownership! Counsel went ahead to review the acquisition process whereby the plaintiff ended up as the owner of the suit land, at the end of which he remarked: “The title cannot be questioned at this stage”. He

affirmed this point by calling the Court's attention to Section 23 of the Registration of Titles Act (Cap. 281) which stipulates that the certificate of title is to be taken by all Courts as conclusive evidence of absolute title, save for fraud or misrepresentation to which the title-holder is a party.

While such an argument, in legal terms, is correct so far as it goes, I do not think it is right for the respondent to attempt to rely on it, given the special circumstances of this case. The very same argument can also be used by the applicant, with reference to L.R No. 209/8561; and if each of the parties used such an argument, they would sooner rather than later, find that only the fittest will be able to occupy the suit land, since the two land reference numbers converge on but one single land parcel. I take it that learned counsel would not be calling upon the Court to unlock the gates to the arena of physical combat! And therefore I will restore the authority of the law by setting aside the interlocutory judgment and ordering the parties to begin on a clean state, with the Commissioner of Lands enjoined as a party.

It is to be noted that counsel for the plaintiff/respondent was ready to level charges of fraud against the defendant. First of all this was most improper, as counsel very well knows that fraud, when alleged in a transaction, cannot be disposed of by such lateral allegations; it must be proved. Such proof can only take place in a full hearing; and this further confirms me in my conviction that the interlocutory judgment must be set aside.

3. Final Analysis and Orders I have already considered authorities relating to the exercise of judicial discretion to set aside interlocutory judgments. And I have stated clearly that this is one instance in which such a discretion is to be exercised. It is clear to me that, whether the interlocutory judgment is upheld, or set aside and trial proceeds with the parties currently on record, the result cannot but be a grotesque spectacle of injustice. The reason has already been stated above: the parties now in contention lack information or control over the actions and processes which alone could confer valid title to the suit land. Those processes and the pertinent information are wholly in the hands of the Commissioner of Lands. It is impossible to have a just resolution to the issues in dispute without the Commissioner of Lands being a party, with the opportunity to direct appropriate investigations, to call necessary assistance, to produce witnesses and records showing how the double title documents came to be issued for but one parcel of land which is now at the centre of conflict.

I will, therefore, make the following orders:

- (a) that, the interlocutory judgment entered against the defendant on 11th November, 2003 and all consequential orders, be and are hereby set aside;
- (b) that, the plaintiff shall, within 30 days of the date hereof, amend its plaint to enjoin the Commissioner of Lands as a defendant, and make any consequential changes to the plaint; and shall file and serve the same together with summons to enter appearance;
- (c) that, the defendant upon being served as aforesaid shall file and serve its defence in compliance with the applicable rules of procedure;
- (d) that, as soon as the pleadings are complete, in accordance with the orders herein, the plaintiff shall ensure the listing of the suit herein for a mention date, and the same shall be given on the basis of priority;
- (e) that, pending the hearing and determination of this suit, the plaintiff, its servants and/or agents shall be restrained by way of a temporary injunction from interfering with the status quo;
- (f) that, the costs of this application shall be in the cause.

DATED and DELIVERED at NAIROBI this 21st day of January, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff/respondent : Mr. Jowhal, instructed by

M/s S.S. Jowhal & Co. Advocates

For the Defendant/Applicant : Mr. Nyiha, instructed by

M/s Nyiha Mukoma & Co. Advocates