



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 535 OF 2000

CROSS CURRENT INDIGENOUS

NETWORK LTD.....PLAINTIFF/RESPONDENT

VERSUS

COMMISSIONER OF LANDS.....1ST DEFENDANT

AFRICAN INLAND CHURCH (KENYA).....2ND DEFENDANT

RULING

The second Defendant's application by Notice of Motion, dated and filed on 20th April, 2000 was brought under Order XXXV, rule 1(1)(b) and (2) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The prayers in this application were as follows:

- (a) that the Plaintiff, its agents and/or servants do within seven days of the date of service of this order, unconditionally reinstate and restore full possession of L.R. No. 209/11635 to the second Defendant;
- (b) that, in default of compliance with the Court's order, an eviction order do forthwith issue;
- (c) that the costs of this application be borne by the Plaintiff in any event.

The grounds in support of the application were stated as follows:

- (i) that, the Plaintiff is a trespasser on the suit premises;
- (ii) that, the second Defendant is entitled to vacant possession of the suit premises;
- (iii) that, the Plaintiff's suit is a sham incapable of raising any triable issues;
- (iv) that, the second Defendant continues to suffer loss and damage due to the trespass by the Plaintiff;
- (v) that, the grant of this application will operate to meet the ends of justice.

Although the Notice of Motion application of 20th April, 2000 claims to be further supported by "the annexed affidavit of REVEREND DANIEL MBAI", what is on file (and indeed without the character of annexure) is a "Replying Affidavit" by REVEREND DANIEL MBAI, dated and filed on 20th April, 2000. In order not to defeat the intent of the second Defendant's application, I will regard the purported

“Replying Affidavit”, considering its dating and the possibility of excusable error, as the essential supporting affidavit for the application. And what does it contain?

The deponent says he is the secretary of the Board of Trustees of the second Defendant, and is aware that land parcel L.R. No. 209/11635 is the property of the second Defendant, who is the registered proprietor, and to whom a grant for the same was issued on 18th February, 1998. He deposes that a Bible Centre had been developed on the suit premises through the funding of Cross Currents International Ministries, U.S.A. in conjunction with Cross Currents International Ministries in Canada and the U.K. He avers that on 28th August, 1997 Cross Currents International Ministries (CCIM) advised Trans- Word Radio, Kenya that the assets funded by CCIM then and now lying at the second Defendant’s land and which were in the Plaintiff’s custody, be donated to Trans-Word Radio, Kenya (TWR). The deponent further avers that after several consultations, TWR requested, and the second Defendant agreed, to be a caretaker of the said property donated by CCIM to TWR. It was deposed that the Plaintiff, acting through Pastor Boaz Omondi and Mr. Timothy Mpaayei have trespassed on the second Defendant’s property and used the said facilities for their own benefit, as neither the Plaintiff nor Pastor Omondi or Mr. Mpaayei has any legitimate claim to either the land or the project funded by CCIM; but the Plaintiff acting through the named individuals, has prevented the second Defendant from the use of its property. The deponent said that the second Defendant and TWR have on several occasions requested the Plaintiff to vacate the premises, but the Plaintiff has failed to do so. On 27th April, 2000 the Plaintiff/Respondent filed grounds of opposition which I must assume are in respect of the instant application. This carries the following grounds:

- (i) that, the second Defendant is not a legitimate owner of the suit plot and is not entitled to possession;
- (ii) that, the second Defendant has for a long time acquiesced in the Plaintiff’s occupation of the suit property and is now estopped from challenging the same;
- (iii) that, the Plaintiff and the Defence and Counterclaim, read in their totality, raise triable issues which should go to trial on the merits; (iv) that, the application is defective under order L rule 15(2) of the Civil Procedure Rules and for lack of a supporting affidavit; kenyalawreports.or.ke
- (v) that, the second Defendant has never given notice of or asserted its ownership of the suit property against the Plaintiff or anybody else;
- (vi) that the Plaintiff has been in occupation of the property and has developed it and initiated business thereon, well before the Defendant purported to acquire title to the same.

On 28th April, 2000 **Boaz Okull Omondi** swore and filed an affidavit responding to the averments aforesaid of Rev. Daniel Mbai in his purported “replying affidavit.” The deponent makes a largely inappropriate affidavit which argues at length, and substantially departs from a testifying role to counsel’s role of making submissions before the Court. For what remains evidentiary in the said affidavit, Boaz Okull Omondi avers that “the Applicant” (which probably means the Plaintiff/Respondent) was incorporated as a private limited company on 3rd December, 1991 and registered as an NGO on or about 25th September, 1997; and at a meeting held in Nairobi on 5th May, 1992 he had been appointed a director of the company, with several shares therein. He avers that “we completed building on the suit property and commenced our operations by 1994, long before the second Respondent purported to acquire its title.” This application first came up for hearing on 12th May, 2004 when Mr. Katwa and Mr. Kemboi represented the second Defendant/Applicant; Mr. Wasuna represented the Plaintiff; and the Attorney-General’s chambers was on record as representing the first Defendant.

Mr. Katwa stated the purpose of the application as being, that the Plaintiff/Respondent should give possession of the suit premises, L.R. No. 209/11635 to the registered title holder, namely the second Defendant. Learned counsel submitted that since the title was in the name of the second Defendant, the registered owner was entitled to enjoy the fruits of that title. He relied on the provision of Section 23 of the Registration of Titles Act (Cap. 281), which guarantees a duly registered party all the benefits accruing from the registration process – and this position can only be vitiated where there is proof of fra

ud or misrepresentation to which the title holder is party. Counsel noted that the Plaintiff had, by application of 14th December, 2000, sought orders of injunction against the second Defendant; but the Commissioner of Assize (as he then was) Visram had held that none of the alleged grounds of fraud could succeed. The effect of his ruling was that it was not possible to obtain orders of injunction against the true owner. The second Defendant had neither been implicated in any act of fraud, nor had the second Defendant been in charge of the registration process. Mr. Katwa submitted that the instant application had, besides, improperly introduced fraud claims which were not in the Plaintiff itself. Counsel relied on the Court of Appeal decision in *Wreck Motor Enterprises v. Commissioner of Lands & Another*, Civil Appeal No. 71 of 1997. The relevant passage in the judgement of the Court reads as follows (p.6):

“In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the Applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document... see *Dr. Joseph N.K. Arap Ng’ok v. Justice Moiwo Ole Keiwua & 4 Others*, Civil Application No. NAI 60 of 1997...”

Counsel referred to another decision of the Court of Appeal, *Dr. Joseph N.K. Arap Ng’ok v. Justice Moiwo Ole Keiwua & 4 Others*, Civil Application No. NAI 60 of 1997. Two passages in this decision are relevant:

(i) “Mr. Otieno Kajwang who appeared for the Applicant argued that the approval by H.E. the President amounted to his client obtaining title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of [a] letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.” (p.2).

(ii) “Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.” (p.3).

Counsel underlined the re-stated principle of the sanctity of property title by citing yet another Court of Appeal decision, *Michael Githinji Kimotho v. Nicholas Muratha Mugo*, Civil Appeal No. 53 of 1995. The learned Judges of Appeal there stated the law in these terms:

“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent’s claim. Though the appellant had for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent’s claim where the latter is registered as owner of the land. Similarly if he, the appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument’s sake the suit land had been erroneously allocated to the respondent, the appellant as a squatter in the suit land had no locus standi and the so-called erroneous allocation could not be an answer to the respondent’s claim for his eviction. His position as a trespasser could not have given him any protection against the respondent’s claim for possession as the registered owner of the suit land” (pp.3 –4).

The above trilogy of authoritative Court of Appeal decisions is crystal-clear as to the status of claims by a registered land-owner running against claims by the physical occupant of a suit land. Unless (i) the physical occupant meets the conditions of an adverse possession claim, and he has moved the Court through prescribed procedure for having his claim upheld, and his claim has been upheld; or (ii) the physical claimant proves to the satisfaction of the Court that the registered title-holder attained his proprietorship status by fraud or he was party to a misrepresentation which brought him thither, then the registered land-owner wins the argument hands down; and the physical occupant must yield, quit, or be evicted. It seems to me that this is the current state of the law; and so it forms the doctrinal substratum whereupon any lesser equitable pleas may, in a proper case, be made before the Court. I am thus in agreement with learned counsel for the second Defendant/Applicant, that it will not lie, in legal terms, in the Plaintiff/Respondent's mouth to plead, as he does, that "we completed building on the suit property and commenced our operations by 1994, long before the second [Defendant] purported to acquire its title." The Plaintiff would merely be declaiming its want of care in initiating physical developments upon land not its property. Any such want of caution, if it leads to loss to the Plaintiff, and the Plaintiff believes that in conscience the second Defendant ought to share in the burden ensuing, can only be taken up as an equitable claim sounding in reasonable compensations but certainly not affecting the settled legal question as to the vesting of property rights. Only therein will lie any such recompense as the Plaintiff might plausibly claim. Mr. Wasuna for the Plaintiff/Respondent contended that the second Defendant's title was no title at all, since no allotment of the land had been made to the second Defendant; and that the second Defendant had all along been aware of the Plaintiff's unregistered interest in the suit premises.

Now the effect of this contention is to broach a claim based on fraud. If this is an important point to the Plaintiff, then its implication for this matter is that it has to be taken at full-trial stage; for it is not possible to demonstrate a case of fraud by partial bites. Fraud must be fully proved through evidence taken in normal trial conditions. At this interlocutory stage the Court can only give interim directions based on prima facie positions. I am not able at this stage to make the prima facie inference that the second Defendant has been involved in any act of fraud, causing loss to the Plaintiff/Respondent.

Learned counsel, Mr. Wasuna submitted that, in the determination of fundamental questions of rights during full trial, the question will arise: "how did the Plaintiff gain possession of the suit premises?" This question, counsel submitted, can only be answered after the full trial. For this reason, he further submitted, it would be inappropriate to order the Plaintiff to make over possession to the second Defendant at this stage. Counsel noted from the affidavit evidence that the second Defendant had never been in occupation of the suit premises; and on this account the second Defendant cannot claim any loss or damage if the status quo was preserved.

Mr. Wasuna's argument amounted to a plea that summary judgement be avoided, because were it to be given, the Plaintiff stood to suffer substantial harm, whereas its not kenyalawreports.or.ke

being given would not much prejudice the second Defendant – that is, essentially a balance-of-convenience argument. In aid of this submission learned counsel cited the Court of Appeal decision in *Shah v. Padamshi* [1984] KLR 531. In the words of Madan, J.A. (p. 535):

"Except in the clearest of cases, which this one was not, it is inadvisable for the Court to prefer one affidavit to another in order to grant summary judgement. Summary judgement is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Court strongly feels that the defendant is unlikely to succeed at the trial. The Court must not attempt to anticipate that the defendant will not succeed at the trial. This appeal must be allowed with costs. The decree of the High Court is set aside, and the appellant given unconditional leave to defend before another judge."

Counsel also cited another Court of Appeal decision, *Giciem Construction Company v. Amalgamated Trades & Services* [1983] KLR 156. The following passage in the judgement of Chesoni, Ag J.A. (p. 164) may be quoted: "As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he

ought to have leave to defend. Leave to defend must be given unless it is clear that he has no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgement. In this case the defendant showed that he had reasonable grounds for setting up a defence...

” Counsel underlined his plea that there be entered no summary judgement, because the depositions made for the Plaintiff had shown clear triable matters – even if some of them did not form part of the main pleadings. He did indeed submit that such matters in affidavits, under Order XXXV, rule 6 ought to be taken into account in considering circumstances in which summary judgement might be entered. In support of this argument he cited the Court of Appeal decision in Sunderji v. Clyde House Company Limited [1984] KLR 499. The principles emerging from that decision are set out in the head-note (p.499): “1. An application for summary judgement under Order XXXV of the Civil Procedure Rules should not be allowed where pleadings and affidavits disclose bona fide triable issues of fact and law. “2. Where an issue is raised which requires reference to applicable case law in order to reach a decision, such an issue should be tried with full argument on the law and should not be dealt with summarily.”

Counsel stated that there were particulars of fraud indicated in the depositions; but they should not be dealt with in an interlocutory application. There is much more in support of this submission; for Mr. Katwa for the second Defendant also made certain remarks touching on the fraud issue which consequently, by common consent, is an important one for determination. Mr. Katwa thus remarked: “The second Defendant believes fraud was perpetrated against them; the second Defendant was allocated the land, it then perfected its title; successfully getting the land is not an act of fraud.” Mr. Katwa made reference to the ruling given in this matter by Visram, J on 11th December, 2000 (p.7):

“In its amended Plaintiff, the Plaintiff alleges that the certificate of title was issued to the second Defendant un lawfully and fraudulently. The Plaintiff’s case is that it was the original allottee of the suit land and that the allotment has not been revoked. The Plaintiff has in its amended Plaintiff outlined nine particulars of fraud. I am not allowed to deal with those particulars unless I fall prey to usurping the trial judge’s role. However, one thing is certain: none of those particulars implicates the second Defendant in the fraud.”

Mr. Katwa submitted that if there was any liability in the above-described circumstances, only the Commissioner of Lands would stand accused and not the second Defendant. In these circumstances, in Mr. Katwa’s submission, summary judgement falls due, in favour of the second Defendant. Counsel submitted that the second Defendant’s title was beyond reproach, and there was no need at all to go on to full hearing. He urged that any injury the Plaintiff could claim, was limited to the possibility of an award of damages. From the foregoing review of the pleadings, the depositions, the submissions and the case authorities, the state of the law has become quite clear. From a number of interlocutory rulings made to-date, it may be considered on a prima facie basis that the second Defendant’s claims to the suit land do not appear to be in any manner irregular, even though the Plaintiff has charges of fraud which can only be tested during full trial. Naturally therefore, the Plaintiff has a fundamental interest in an opportunity to have the fraud charge tried out – which can only be at the trial of the suit. Since fraud cannot be tested and resolved at interlocutory hearings, a strong case exists to allow this matter to proceed to full trial. It is not contested that the Plaintiff is in occupation of the suit premises, and that the second Defendant, though being the proprietor, has not been in occupation. It must always be taken that a party in occupation of suit premises stands to suffer the most dramatic loss if forced out, whereas the party not in occupation is able to survive outside the suit premises for a little more time. Hence, generally, the balance of convenience would favour the one in possession, of course, depending on what he is doing there.

Landmark Court of Appeal decisions state unambiguously that summary judgement is not to be lightly entertained, as it is potentially privative, in relation to the vindication of legal rights by litigants. In effect, I think, there is a judicial policy or practice which dictates the greatest care and concern, before a judge should ever allow an application for summary judgement. This is abundantly clear from Shah v. Padamshi [1984] KLR 531; Giciem Construction Company v. Amalgamated Trades and Services [1983] KLR 556; and Sunderji v. Clyde House Company Limited [1984] KLR 499.

Thus, while acknowledging the prima facie bona fides in the second Defendant's case at this interlocutory stage, I am not in agreement with counsel that it is appropriate to enter summary judgement, just on the basis of the depositions on file. It is, in my view, desirable to allow the Plaintiff a day in Court to test the validity of its claims.

I will, therefore, make the following orders:

1. The second Defendant's prayer that the Plaintiff, its agents and/or servants do within seven days of service of this order unconditionally reinstate and restore full possession of L.R. No. 209/11635, Nairobi to the second Defendant, is refused. 2. The second Defendant's prayer that the Plaintiff be evicted, is refused

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3. The Plaintiff shall move with expedition, and in any event within 30 days from the date hereof, to have a date fixed for the hearing of the suit, failing which the second Defendant will be at liberty to make a suitable application, or to secure a date for the hearing of the Plaintiff's suit. ***In pursu ance of this Order, the Registry shall allocate a hearing date on the basis of priority .***

4. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 2nd Defendant/Applicant: Mr. Katwa, instructed by M/s Ochieng, Onyango, Kibet & Ohaga Advocates

For the Plaintiff/Respondent: Mr. Wasuna, instructed by M/s. Wasuna & Co. Advocates.

1st Defendant absent and unrepresented.