

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 34 of 2004

PETER SMITH NDILE PLAINTIFF

VERSUS

OBADIAH KAMANDE MWANGI 1ST DEFENDANT

MUNICIPAL COUNCIL OF KITUI 2ND DEFENDANT

RULING

The plaintiff Peter Smith Ndile filed a suit against the two defendants, Obadia Kamande Mwangi and Municipal Council of Kitui seeking orders of a declaration that the plaintiff is the lawful owner of the suit premises known as plot C Kitui Municipality; a permanent injunction to restrain the 2nd defendant from re-allocating the suit premises to 1st defendant or any other person; a permanent injunction restraining the 1st defendant from trespassing on the said premises and an order of eviction of the 1st defendant from the said premises.

Both defendants filed defences to the suit. The 1st defendant denied trespassing on the land and denied that the plaintiff does not have a cause of action against the 1st defendant and that the plaintiff has no locus standi to bring the action. The 2nd defendant filed a defence through Kinyua Musyoki advocate in which the 2nd defendant does admit the records held by them show the owner of the plot to be one Consolata Wamucii who entered into an agreement of sale with the plaintiff and 2nd defendant gave notice to the Commissioner of Lands on 28.6.1999 requesting a change of ownership. The 2nd defendant however denies allegations of fraud levelled against the 2nd defendant by the plaintiff.

On 28.6.2004 the 1st defendant through his advocate Mr. Muithya filed a chamber summons seeking orders that the plaint filed herein be struck out on grounds that it does not disclose a reasonable cause of action, is bad in law and is improperly before the court. The grounds upon which the application is brought are that the plaintiff does not have the locus standi to bring the present proceedings; that the title of the subject plot has not passed to the plaintiff and plaintiff has no proprietary interests to protect in his own name and lastly that the person who should have brought the suit is the alleged seller one Consolata Wamucii. The counsel submitted that the land in issue is still allotted to one Consolata Wamucii of Box 1 Kitui and that the allotment was vide letter TP 39/VIII dated 26.11.1996 and that the plaintiff/respondent bought it from the said allottee in 1997 but to date there has been no change into the plaintiffs names. His contention is that a mere agreement of sale does not pass title and that all documents annexed to the replying affidavit of the plaintiff/respondent do support the applicants case. That the last document dated 28.6.1999 from the 2nd defendant to the Commissioner of Lands to change the names of the allottee from Consolata Wamucii to Peter Smith Ndile does not show that the said change was ever effected. That this was pleaded in the defence but the plaintiffs never bothered to file a reply to the defence or apply to join the said Consolata as a party to the suit. As regards the grounds filed by the 2nd defendant it was the applicants view that if there are any issues between the 2nd defendant and plaintiff, the plaint can be

struck off as against the 1st defendant and the case proceeds to hearing as between the plaintiff and the 2nd defendant.

In opposing the application Mr. Makau advocate for the plaintiff relied on the replying affidavit dated 9.3.2005 and the grounds of opposition filed by the 2nd defendant. His submission is that there are triable issues raised in the pleadings and parties should be allowed to tender their evidence and that the plaintiff sets out how the land was purchased by the plaintiff and the Commissioner of Lands was asked to effect the transfer. That as to whether or not transfer has been effected is a triable issue. Counsel also argued that under Order 1 Rule 9 no suit can be defeated by reason of nonjoinder or misjoinder of the parties and the application is therefore premature. Mr. Makau also argues that this being a court of equity, it should hear the plaintiff based on the documents filed in support of his claim over the land and the matter be allowed to proceed to full trial.

Though the 2nd respondent had filed grounds of opposition, by the time the court heard the application, counsel had not arrived and the court proceeded to hear the application in his absence. All the same the grounds were addressed by both Mr. Muithya and Mr. Makau.

I do agree with the 1st defendant's contention that so far, the documents annexed to the replying affidavit do not show that the plaintiff is the owner of the land in question. The sale agreement does not pass title to the plaintiff nor does the letter to the Commissioner of Lands requesting that the land be transferred to the names of the plaintiff. The plaintiff's counsel totally avoided mention of why they have not joined Consolata Wamucii to the proceedings since the annexed documents are still in her names and they had ample time to do so.

Mr. Makau invoked Order 1 Rule 9 Civil Procedure Rules which provides that no suit shall be defeated by mere misjoinder or non joinder of parties and that the court may deal with the matter in controversy so far as the rights and interests of the parties are concerned. The question is whether failure to join the seller of the plot one Consolata Wamucii is fatal to the plaintiffs case so that the orders of striking out can be issued at this stage.

It is evident from the pleadings that the pleadings raise several triable issues. There is the issue of whether the 1st and 2nd defendant have been involved in fraud; whether transfer of the plot from Consolata to plaintiff has been effected and whether the plaintiff had the capacity or locus to bring this suit. This court does appreciate that it is the plaintiff who filed this case and there should be evidence to support his claim as to his standing in the matter. However, from the pleadings and the application for injunction earlier considered, there are allegations that the 1st defendant has an interest in the matter and had actually taken possession of this said plot and was developing it. So far the 1st defendant has not bothered to show what his interest is in the land and how he comes to be in possession. The standard of proof in civil cases is not beyond any doubt but on a balance of probability. The plaintiff will only be required to prove his case based on that standard. If the court were to strike out the plaint at this stage it will mean that the 1st defendant continues with possession and construction but the court will not have resolved the issue as to who the plot belong to. In the event that the plaintiff later shows proof of ownership of that plot the court will have done an injustice by striking out of the plaint which may not be remedied.

From the foregoing this being a land matter which needs careful consideration, this court is of the view that the court should not take this drastic measure of striking out the plaint before hearing the parties orally where all issues raised can be ventilated and where the plaintiff can then prove ownership or otherwise. The application is therefore refused, it is dismissed with costs.

Dated at Machakos this 20th day of April 2005.

Read and delivered in the presence of

R. V. WENDOH

JUDGE