



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL DIVISION
CIVIL SUIT NO. 172 OF 2004

KENYA PORTS AUTHORITYPLAINTIFF

Versus

1. WAYLAND LIMITED

2. COMMISSIONER OF LANDS

3. THE CHIEF LAND REGISTRARDEFENDANT

RULING

By a chamber summons dated the 2nd April 2002 the first defendant seeks under Order 13(1) (a), (b), (c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act the striking out of the plaint herein on the grounds:- 1. THAT the suit discloses no reasonable cause of action against the First Defendant, it is scandalous, frivolous, vexatious and/or otherwise an abuse of the court process. 2. THAT the suit is incurably defective by dint of the provisions of the Civil Procedure Rules and the Civil Procedure Act and the Limitations of Actions Act.

3. THAT the Plaintiff has never had title to the suit premises. 4. THAT Government of Kenya being the first registered owner of the suit premises and having leased the same to the First Defendant, its title is indefeasible whether or not fraud, which is denied, has been committed by virtue of Section 143 of the Registered Land Act and therefore the records can neither be called nor rectified. 5. THAT by virtue of Section 74(4) of the Kenya Ports Authority Act, the property if any, of East African Railway & Harbour Corporation did not automatically vest upon Kenya Ports Authority. 6. THAT by virtue of the Limitation of Action Act, no title of adverse possession as claimed by the Plaintiff can vest in Government land. 7. THAT the plaintiffs have not complied with Section 136(2) of the Government Lands Act Cap. 280 before commencement of the suit.

8. THAT in any event, the suit is not maintainable under Section 136(1) of the Government Lands Act as it has commenced long after expiry of one year from the date cause of action arose.”

The application is supported by the affidavit of one Abbasali Roshanali Merali, a director of the first defendant. Before I consider the averments in that affidavit and those contained in the Replying Affidavit I need to state briefly the averments in the plaint and the defences and what the claim herein is all about.

The plaintiff claims in the amended plaint that the piece land situated in Mombasa and known as Title No. Mombasa/Block XLVII/112 (the suit property) was at all material times registered in the name of the General Manager, East African Railways and Harbours Corporation for and on behalf of the East African

Harbours Corporation (the Corporation). With the disbandment of the Corporation the plaintiff became the successor in title of all the assets and undertakings of the Corporation and has been in continuous possession and use of the suit property until about 1997 when the 3rd defendant unlawfully cancelled the entries in the land register of the suit property and caused the Government of Kenya to be registered as the proprietor thereof and allocated it to the 1st defendant soon thereafter.

The plaintiff further states that the said allocation was not only unlawful but also fraudulent and seeks *inter alia* declarations that the cancellation of the General Manager, East African Railways and Harbours and the registration of the Government of Kenya in the register of the suit property is null and void and that the second defendant had no powers to allocate the suit property to the first defendant and an order rectifying the register to reflect the plaintiff as the registered owner of the property. In the body of the plaint the plaintiff claims in the alternative to have acquired title to the sit property by adverse possession and I understand its prayer for rectification of title to embrace this alternative claim. In their defences the defendants deny that the suit property was ever registered in the name of the General Manager, East African Railways and Harbours Corporation or that the plaintiff became its owner as the successor in title of the Corporation and state that the suit property was an unalienated government land which was properly and lawfully allocated to the first defendant with the second and third defendants adding that this suit is by dint of section 136 of the Government Lands Act incompetent and that even if it was not this court would contravene the provisions of section 16 (1) (i), (iii) and (2) of the Government Proceedings Act if it granted the injunction sought by the plaintiff.

Basing himself on the averments in the said affidavit of Abbasali Roshanali Merali in support of the application the gravamen of Gikandi, counsel for the first defendant's argument was that this suit is by dint of section 136 of the Government Lands Act incompetent; that the claim for title under adverse possession is not only a contradiction of the plaintiff's other claim but is also incompetent for having not been brought by originating summons and that the first defendant being the registered proprietor of the suit property under the first registration, its title is by dint of section 143(1) of the Registered Land Act indefeasible.

In support of these contentions he cited the cases of Muigai – Vs – Housing Finance Company (K) Ltd and others (2003) KLR618, Isaac Wanjohi – Vs – A. K. Mbwiria and Another Nairobi HCCCNo. 383 of 1999, John Ndungu Kangethe – Vs – Patrick Murima Gitau and Others Civil Appeal No. 143 of 1998 (C.A) and Obiero – Vs – Opiyo and others (1972) E.A. 227. Mr. Maroro for the second and third defendants associated himself with the submissions of Mr. Gikandi and also asked for the striking out of the suit.

In response Mr. Mabeya, counsel for the plaintiff, submitted that section 136 of the Government Lands Act has no application in this matter as there is nothing claimed in this suit to have been done under that Act. As regards first registration he submitted that the registration of the suit property in the name of the first defendant is not a first registration. The property was first registered in the name of the General Manager, East African Railways and Harbours Corporation. He said there is nothing contradictory about the claim under adverse possession as it is in the alternative. The plaint, he said, raises many triable issues and urged me to dismiss the application. The power to strike out any pleading is not mandatory but permissive. As to when it can be exercised is not in doubt. It is well settled that the plaint should not be struck out and the plaintiff driven from the judgement seat unless the case is totally unarguable and no life can be breathed to it even with an amendment. It must be one which is clearly hopeless and has no chances of success at all. Our law reports are replete with authorities to this effect. Is the plaintiff's case unarguable or does it raise triable issues? The first defendant's argument on the competency of the suit is based on section 136(1) of the Government Lands Act which requires

“All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards”. (emphasis supplied). What in this case was done under the Government Lands Acts? Mr. Gikandi says that even though the lease of the suit property is registered under the Registered Land Act, it is nonetheless subject to the Government Lands Act. Whether or not that falls within the rubric of “anything done under this Act” to me appears a moot point.

The issue of first registration is not as clear cut as the first defendant would like us to believe. Besides the plaintiff's contention that the suit property was initially registered under whatever Act in the name of the General Manager, East African Railways and Harbours Corporation which I cannot dismiss without hearing the plaintiff, I on my part entertain doubt if a first registration under the Registered Land Act, which is not as a result of the adjudication process under the Land Adjudication Act can be said to be a first registration which by virtue of section 143(1) is unchallengeable.

I agree with Mr. Gikandi that on the authority of the court of Appeal decision in John Ndungu Kangethe – Vs – Patrick Murima Gitau, Civil Appeal No. 143 of 1998 a claim for title under adverse possession cannot succeed if it is not brought under originating summons. However, the plaintiff's claim herein is also based on other causes of action and adverse possession is only in the alternative. The authority is therefore distinguishable. For these reasons, the plaintiff's claim herein cannot be said to be unarguable and totally hopeless to warrant the striking out of the plaint. I find that it discloses a cause of action and raises triable issues. Consequently, this application is dismissed with costs.

DATED and delivered this 28th day of July 2005.

D. K. MARAGA

JUDGE