



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA ELDORET

CIVIL DIVISION

CIVIL CASE 10 OF 2003

LILIAN WAITHERA GACHUHIPLAINTIFF/APPLICANT

-VERSUS-

DAVID SHIKUKU MZEEDEFENDANT/RESPONDENT

RULING

Before me is an application by way of Chamber Summons brought under Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules. It is dated 10th June 2003. It seeks for orders that –

- (a) The defendant’s defence dated 8th March 2003 be and is hereby struck out and judgement entered for the plaintiff against the defendant as prayed.
- (b) Costs of the suit and this application be awarded to the plaintiff/applicant.

The application has grounds on the face of the Chamber Summons and is supported by the affidavit sworn by Lilian Waithera Gachuhi on 10th June 2003. The application is opposed and a replying affidavit sworn by the respondent David Shikuku Mzee on 17th September 2003 was filed.

Though Messrs. Amayamu and Company Advocates for the respondent were served with the hearing notice for the application, they did not attend court for the hearing of the application.

At the hearing of the application, Mr. Shivaji for the applicant submitted that the applicant was seeking for the defendant’s defence to be struck out and judgement to be entered for the plaintiff as requested in the plaint. The applicant was also seeking for costs.

He submitted that the plaintiff/applicant was the registered proprietor of a parcel of land – Eldoret Municipality/Block 11/610. She was issued with a title which was annexed to the supporting affidavit as “LWG1”. The proprietorship section showed that the applicant was the first registered owner. The respondent acknowledged this fact in paragraph 6 of the replying affidavit. The respondent did not have an answer to the applicant’s claim in the suit. He was merely relying on a letter of allotment, which had not been annexed. He sought to rely on the case of Michael Githinji Kimotho –vs- Nicholas Muratha Mugo Nairobi Civil Appeal No.53 of 1995 (unreported) – that a defendant cannot resist a claim of ownership on the basis of a letter of allotment when his adversary is the registered proprietor. He also sought to rely on the case of Wreck Motor Enterprises –vs- Commissioner of Lands and 2 Others Nairobi Civil Appeal No.71 of 1997 (unreported), in which it was held that, once land is registered, it was alienated, and a party cannot

rely on a letter of allotment.

He further submitted that the correspondences from the respondent's counsel indicated that the respondent's counsel seemed to accept the plaintiff's ownership of the land.

I have considered the application and submissions of counsel for the applicant. I have no doubt that, legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of land. I am fully in agreement with the arguments put by counsel for the applicant citing the cases of Michael Githinji Kamotho –vs- Nicholas Mugo Nairobi Civil Appeal No.53 of 1995; and Wreck Motor Enterprises –vs- Commissioner of Lands and 2 Others Nairobi Civil Appeal No.71 of 1997.

From the title document exhibited, Lilian Waithera Gachuhi is the lessee of Eldoret Municipal Council. The registration section of the property section shows that the lessor is Eldoret Municipal Council. The applicant was registered as the lessee on 12th August 1997 for a period of 99 years from 1st November 1983. Counsel for the applicant has submitted that the applicant was the first registered owner of the subject land Eldoret Municipality Block 11/610. With due respect, I disagree with him. In my view, Eldoret Municipal Council was registered as the owner. It only leased the land to the applicant Lilian Waithera Gachuhi. This is not a first registration of the applicant under section 143 of the Registered Land Act (Cap.300).

In considering this application I have perused the plaint, the defence and the application plus the supporting affidavit, as well as the replying affidavit. I have also perused annexed correspondence between advocates for the parties. It is apparent to me that there is an issue on the actual identity of the subject land. The sale agreement in which the respondent claims he bought land from Debla Masinza refers to title No. B11/609 Eldoret not 610 Eldoret. The respondent appears to know the distinction between the two plots as deponed in paragraph 11 of his replying affidavit. I can only strike out the defence if it discloses no triable issues or is an admission of the plaintiff's claim. In our present case the identity of the land in question is a triable issue.

Having considered the matter as a whole, I am of the view that this is not a case which should be determined by way of summary procedure by striking out the defence. It is a matter, which should go to trial through tendering of evidence by all parties, so that the case can be determined on the merits of the evidence to be so tendered in court.

For the above reasons, I am constrained to dismiss the application. I order that costs will be in the cause.

Dated and delivered at Eldoret this 13th day of July 2005.