REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 298A of 2003

Mwangangi & 9 others…….....….……...….APPLICANT

Versus

Commissioner of Lands & 9 others….....……RESPONDENT

RULING

This is an application brought by Chamber Summons dated and filed on the 21st July 2003 under Order 6 rule 13 (a), (b), (c) and (d) of the Civil Procedure Rules in which the 8th, 9th and 10th Defendants inclusive seek various orders, including striking out the Plaint as against them.

In addition to the four grounds stated therein, the application (save for prayer 1) is supported by the joint affidavit of the Applicants made on the 21st July 2003.Mr Maina for the applicants contended (inter alia) that the plaint dated the 26th Mach 2003 and filed on the 31st March 2003 is incurably defective as Plaintiffs have not complied with the mandatory provisions of Order 1 Rule 12 of the said Rules, relying on the Ruling of Rimita J dated the 30th July 2002 in Samperu Ole Kudad Loilipoti & (18) Others –v- llartimaru Group Ranch & Another (Nairobi HCCC No 1098 of 2001).Further, learned Counsel submitted that the plaint does not disclose any cause of action against the Applicants inasmuch as the allegations of fraud particularised therein are directed at the 1st and 2nd Defendants only. Furher, the titles to the Applicants' two properties namely, LR Nos 209/11543and 209/11546 were issued pursuant to Letters of Allotment and cannot therefore, be challenged. Mr Maina referred me to the Ruling of the Cout of Appeal dated the 17th October 1997 in Dr Joseph N K Arap Ng'ok –vs- Justice Moijo Ole Keiwua and Four Others (Civil Application No Nai 60 of 1977 (27/97 UR) in which that Court, referring to Section 23(1) of the Registration of Titles Act (Chapter 281 of the Laws of Kenya) reiterated in circumstances not dissimilar to those of the Application in the present case that the said Section "gives an absolute and indefeasible title to the owner of the property. The title of such or owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party….."

On these and other submissions advanced by Counsel for the Applicants, this court was urged to allow the application and also to enter Judgment against the Plaintiff on the Counterclaim.

The Application is opposed on the matters deponed to in the Replying Affidavit of the 1st Plaintiff made on the 11th August 2003. Mr Musyoki for the Plaintiffs / Respondents submitted that in addition thereto, there is also the Rely to Defence and Defence to Counterclaim dated the16th June 2003 and filed on the 18th June 2003 to support his argument that the Plaint should not be struck out. Citing the Ruling Mbaluto, J dated the 6th April 2001 in Masefield Trading (K) Ltd –v- Rushmore Company Limited and Francis M Kibui (Milimani Commercial Court Civil Case No 1794 of 2000), Mr Musyoki argued that the power to strike out under Order 7 Rule 1(3) is discretionary and ought to be exercised only sparingly. It was further submitted for the Plaintiffs that any evidence in support of the Application is inadmissible by virtue of the provisions of Order 6 rule 13(2) of the Said Rules. Finally, Mr Musyoki stated that paragraph 15 of the Plaint clearly establishes a cause of action against the Applicants and as the titles to their two properties may have been issued unlawfully, that issue can only be determined at the trial of the Plaintiffs' suit.

Mr Maina in a brief reply stated that the affidavit verifying the Plaint has not been supported by any of the other Plaintiffs. On the issue raised with regard to Order 6 Rule 13(2), he clarified that the affidavit

supports the Application save for prayer 1 and expressly stated herein.

In their Application, the 8th, 9th and 10 Defendants have stated that "The Plaint does not disclose a cause of action" against them and should therefore be struck out whereas Rule 13(1) (a) of Order 6 aforesaid provides that a pleading may be struck out, not on the ground that it discloses on cause of action, but on the ground that it discloses no reasonable cause of action. The application is therefore incompetent to that extent.

This notwithstanding, I have also considered the Application not only in conjunction with the submissions thereon by both learned Counsels and the judicial authorities to which they have respectively referred me to but also in light of the celebrated decision of the Court of Appeal in D T Dobie & Company (Kenya) Ltd –v- Joseph Mbaria Muchina and Another (Civil Appeal No 37 of 1978) (unreported) in which the test of exercising the discretionary power of striking out was enunciated in the following terms:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

HALSBURY'S LAWS OF ENGLAND,VOLUME 36 AT PARAGRAPH 73 makes the following statement of law:-

"In judging the sufficiency of a pleading for his purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the fact of it that the action is not maintainable or that an absolute defence exists, the court will not strike out. A pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out pleading should be exercised with extreme caution and only in obvious cases …..".

which I adopt with approval. The pith and marrow of it is that where on consideration of only the allegations in the plaint (as no evidence is admissible to support an application under Order 6 Rule 13(1) (a) the Court concludes that a cause of action with same chance of success is shown, then plaint discloses a reasonable cause of action.

While it is not the function of this Court to deal with the merits of the case at this stage, and I have no intention whatsoever of usurping the position of the trial Judge, I am nonetheless not persuaded nor satisfied that the plaint as it now stand is at present drafted, does show a reasonable or triable cause or triable issues against the 8th,9th and 10th Defendants jointly or severally. I cannot say whether a legitimate amendment could cure the defect as the Plaintiffs have made no attempt to amend their plaint any more than they have made any effort to comply with the provisions to sub-rule (2) of Rule 12 of Order 1 aforesaid. For these reasons, I would allow prayer 1 of Application.

With regard to prayers 2 and 3 of the Application, I am not prepared to strike out the Reply to Defence and Defence to Counterclaim nor enter summary judgment on the Counterclaim merely on the basis of the evidence contained in the affidavit of the 8th, 9th and 10th Defendants made on the 21st July 2003 and annexed to the Application particularly as no submissions thereon were made to me. Accordingly, I would dismiss both such prayers of the Application.

In the result, the Application of the 8th, 9th and 10th Defendants /Applicants as contained in the Chamber Summons dated the 21st July 2003 is allowed but only to the extend of prayer 1 thereof to the intent that the Plaint herein is struck out as against the 8th, 9th and 10th Defendants on the grounds that the Plaint discloses no reasonable cause of action against the said Defendants.

March 16, 2004

Kariuki, J