



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 899 of 2003

NATIONAL SOCIAL SECURITY FUND

BOARD AND TRUSTEES.....PLAINTIFF/RESPONDENT

VERSUS

ELIJAH ONGERI

ALIO MATOGO

FRANCIS OSORO

ZACHARIA MARITA ADEI

KEN BARAZA

JOHN OYIER

ALIANA MOHAMED (Sued on their behalf and on behalf of

all persons illegally occupying L.R.No.209/12340 and

L.R. No. 209/12341 DEFENDANTS

RULING

1. The Plaintiff/Applicant seeks that the Defence filed by the 3rd and 4th Defendants in this suit be struck out and judgment entered for the Plaintiff as prayed in the Plaintiff.
2. The Applicant under Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules is predicated upon grounds that the Defence is a general demur and discloses no issue of fact or law which can afford a prima facie or competent defence to the Plaintiff's claim. The sole legal issue argued before me in support of this contention is that the Defendants have neither a contractual or statutory proprietary interest in the suit land. As trespassers therefore, they have no color of right that can form the basis for their continued illegal occupation of the Plaintiff's land.
3. I am alive to the statement by Justice Madan L.A. (as he then was) in *D.T. Dobie & Co. (K) Ltd. vs. Muchina & Another (1978) LLR a CAK* where he said: -

"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; The court ought to act very cautiously and carefully consider all facts of the case without embarking upon a trial thereof, before dismissing a case for disclosing no reasonable cause of action or being otherwise an abuse of the person of the court."

4. I am also aware that in Kundanlal Restaurant vs. Devshi &

Co. {1992} EACA the court at page 80 thereof held as follows: -

"It is desirable and important that the time of conditions and of courts should not be wasted by the investigations of bogus defence. There is one important matter but it is a matter of adjectival law only embodied in the Rules of court and cannot be allowed to prevail the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the Defendant was to show is that there is a definite triable issue of Law".

5. The caution that I shall exercise in this matter is along the lines that were expressed in Nitin Properties Ltd. vs. Jugojir Singh Kala and Kaldeep Kaus Kalai Civil Appl. No. 132 of 1998 when the Court of Appeal stated that: -

"Striking out is a drastic remedy and it has been held time and time again that striking out procedure can be invoked only in plain and obvious cases and that such Jurisdiction must be exercised with extreme caution."

6. And so with this background and having warned myself of the dangers of hastily striking out a pleading I shall now look to the merits or demerits of the parties' contentions as laid before me.

7. The Defendants say that they have a triable issue, which is that whereas the Plaintiff has title to the suit land, they (the 3rd and 4th Defendants and all those sued with them) have a possessory right to the suit premises which I gather is supposed to override the Plaintiff's title.

8. I have looked at the Defence dated 10th November 2003 by 3rd and 4th Defendants. It has a number of general denials of specific paragraphs of the Plaint. In my view only paragraphs 4 and 5 have substantive denials or defences and they read as follows: -

Paragraph 4 -

"Paragraphs 3, 4 and 5 of the Plaint are denied in toto. The 3rd and 4th named Defendants state that they entered and settled at the suit premises on or about 1974 and 1977 respectively and have since constructed their houses at the said premises and continue to live there as their place or residence and abode. The 3rd and 4th named Defendants in particular deny that they entered the suit premises in the year 2003 as stated in paragraph 5 of the Plaint."

Paragraph 5 -

"The 3rd and 4th named Defendants state that the Plaintiff was not in possession of the suit premises at the time they entered and settled thereon and further state that the Plaintiff has never in fact taken possession of the suit premises at any time or at all".

9. The issues raised here are that the Defendants entered the suit land in 1974 and 1977 respectively and live there and have possession while the Plaintiff has never taken possession.

10. The Plaint dated 26th August 2003 and filed the next day prays for declaration that: -

i) The Defendants' occupation of the Plaintiff's land is an act of trespass; thus the Plaintiff has a right to

recover possession of the same.

ii) An order directing the Defendants to give up their illegal occupation of land immediately and leave the subject land; in default of which the plaintiff be at liberty to evict them using all lawful force as might be necessary.

11. The basis as I said earlier for seeking these orders is that the Plaintiff is the registered proprietor of the land parcels known as L.R. No. 12340 and L. R. No. 209/12341 now occupied by the 3rd and 4th Defendants. I am asked by counsel for the Plaintiff to look at Section 23 of the Registration of Titles Act, Cap 281 and find that the Plaintiff's title is indefeasible and cannot be challenged, least of all by trespassers such as the 3rd and 4th Defendants and their confederates.

12. Section 23 of the Act provides as follows: -

"The certificate of title issued upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subjected to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

13. I shall juxtapose this submission with the one by the Defendant's counsel that his clients have a possessory right over the suit land.

14. A possessory interest has been defined in the Oxford Dictionary Law 2002 edition to mean *"ownership of land that can only be proved by evidence of the requisite period of adverse possession or possession coupled with a defective documentary title. A proprietor of registered land having only possessory title is not protected against any adverse estate, interest or right, or right subsisting or capable of arising up to the time when the title was first registered."*

15. In the instant the 3rd and 4th Defendants seem to be leaning, without much saying so towards a defence that they are owners of the suit land by possession. The land in question was first registered on 12th January 1995 and the proprietor was M/S Sharjah Trading Company Limited whose title was then transferred to the Plaintiff on 26th May 1995.

16. No fraud or misrepresentation on either Mr. Sharjah Trading Co. Ltd. is alleged in the Defence as envisaged by Section 23 aforesaid. It follows therefore, that the weak possessory right, which in any event has not been pleaded, is far subordinate if at all to the Plaintiff's title which is indefeasible and *"cannot be challenged"*.

17. The upshot of all these things is that there is really no defence to the suit. The same cannot be cured by amendment *since ab initio* the Defendant's have no identifiable interest in law as regards the suit property.

18. Often times this court is faced with the problem of laymen claiming ownership through political rather than legal means. It is not enough to say as the Defendants are saying here that the Provincial Administration, the Member of Parliament, or even the *"Government of Kenya"* has *"always been aware of and recognized the hundreds of persons who have settled at the suit premises"*. (Paragraph 12 of the Affidavit of Zacharia Manta Adei sworn on 10.12.2003). Neither is it enough to say as Francis Osorio says that the *"Plaintiff has never taken or obtained vacant possession of the suit premises"* and *"cannot seek to evict the occupants of the alleged trespass"* (Replying Affidavit sworn on 18th February 2004). The *"awareness"*, *"recognition"* and *"occupation"* must be backed by law and not such niceties as are the preserve of politicians and not the law. In the instant case, the Defendants are on very shaky grounds, as even with all sympathy that this court can master, they have no defence to the suit.

19. In the circumstances, I shall grant the prayers sought by the Plaintiff/Applicant in its application

dated 9th February 2004 with costs.

20. I must say something about my orders of 5th February 2004 because I heard from counsel for the Defendants what I considered a misrepresentation of that order. I would on my own motion clarify the impact of that order, which is this; that I only set aside judgment as against the 3rd and 4th Defendants. The other Defendants both named and unnamed have not come to seek such setting aside and judgment against them still stands, unless this court makes other or further orders with regard thereto.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of March 2004.

I. LENAOLA

Ag. JUDGE

16.3.2004

Ruling read in the presence of: Mr. Nguru for the Respondent, Mr. Kajwang for the Applicant

I. LENAOLA

Ag. JUDGE

16.3.2004