



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 7 OF 2004

MOHAMED SHEIKH ABUBAKAR PLAINTIFF

- Versus -

ZACHARIUS MWERI BAYA DEFENDANT

R U L I N G

This is an application for summary judgment brought under Order 35 Rules 1 and 2 of the Civil Procedure Rules. In his plaint and in the affidavit in support of the application, the plaintiff claims that in 1996 he applied for an industrial plot at Kilifi. His application was approved and by a letter of allotment dated the 8th November 1996 the Commissioner of Lands allocated him an unsurveyed industrial plot containing by measurement 0.4 of a hectare or thereabouts at Kilifi. The piece of land was subsequently surveyed and given Reference Number 5054/1463 and a Grant dated the 24th December 1999 and registered as Number C.R. 33256/1 was issued to the plaintiff showing that the plaintiff is the registered proprietor of that piece of land as lessee from the Government of Kenya for term of 99 years from the 1st day of November 1996. (the suit piece of land) The plaintiff for that states that sometimes in 1998 the defendant encroached onto a portion of that piece of land and started erecting structures thereon in spite of his protestations. Consequently the plaintiff filed Mombasa CMCC No. 1432 of 1998 seeking inter alia vacant possession and an injunction to restrain the defendant from continuing to trespass on that piece of land. While that suit was pending before court the plaintiff says he learnt that the defendant had sought to be allocated the portion he occupied (the portion). He wrote to the Commissioner of Lands objecting to the excision of the piece of land for allocation to the defendant. He has annexed to his affidavit a letter written by the Director Physical Planning advising the Commissioner of Lands that the piece of land was the subject of a pending case and that the District Physical Planning Officer Kilifi had advised against preparing any plans as doing so could amount to contempt of court. The plaintiff says that with that letter he thought the matter would be held in abeyance until the said case was determined. However during the hearing of the case the plaintiff was surprised to learn that the defendant had been allocated the portion.

On hearing that the defendant had been allocated the portion the plaintiff applied in Mombasa HCMisc. Civil Application No. 293 of 2001 and got that allocation to the defendant quashed. On the 20th March 2002 according to him the case before the Chief Magistrate's Court – CMCC No. 1432 of 1998 was heard and judgment delivered on 7th May 2002 in which the Senior Principal Magistrate held that the defendant be allocated the portion and the plaintiff the rest of it.

The application is strongly opposed by the defendant. He states in both his defence and the replying affidavit that he first bought the portion in September 1996 from one Jackson Nzaro who had been occupying it since 1924 and that he later applied and on the 21st June 2001 the Commissioner of Lands allocated the portion to him. Moreover, the defendant further states, at the time of allocation of the suit piece of land to the plaintiff, he (the defendant) was in actual occupation of a portion thereof and the Senior Principal Magistrate having decreed that portion to him, the matter was res judicata. He denied

knowledge of the said Mombasa HCMisc. Civil Application No. 293 of 2001 quashing the allocation of the portion to him. He further contended that the plaintiff fraudulently obtained the allocation of the suit piece of land to himself.

Counsel for the parties submitted along their respective clients' averments as summarized above with counsel for the plaintiff concluding that the allocation of the portion to the defendant having been quashed by the High Court and the Commissioner of Lands having subsequently cancelled that allocation there is nothing left in this matter to be taken to hearing. Counsel for the defendant on the other hand submitted that the defence raises serious trial issues which cannot be determined by summary procedure.

Before I analyse the facts in this case I would like to state the law on the matter as I understand it.

In an application for summary judgment if the plaintiff's claim is undoubtedly clear and the defence is a mere sham or is a spurious one, then the order will be granted. If on the other hand the defendant has an arguable defence, never mind the likelihood of its success, or if it discloses a trial issue, then he must have leave to defend. Support for this view and the general principles applicable to applications for summary judgment under Order 35 Rules 1 and 2 was succinctly brought out by the observations by the late Justice Madan in **Continental Butcher Ltd. Vs Samson Musila Nthiwa Civil Appeal No. 35 of 1997** where he said:-

“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enforcement of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by Order 35 subject to there being no bona fide triable issue which would entitle a defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham. This would be in accord with the well known words of Jessel, M.R. and Lord Chancellor (Halsbury) spoken respectively in *Anglo- Italian Bank Vs Wells* 38 L.T. at page 210 and *Jacobs Vs Booths Distillery Company* 85 L.T. at page 262 as follows:-

‘Jessel M.R.’ ‘ where the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff’ Lord Halsbury – ‘People do not seem to understand that the effect of O.XXV (the equivalent of O.XXXV) is that upon the allegation of one side or other a man is not to be permitted to defend himself in a court that his rights are not to be litigated at all.’

The same principles had been echoed by Newbold P of the former Court of Appeal for Eastern Africa in **Zola & Another Vs Ralli Brothers Ltd. & Another [1969] E.A. 691 at page 694** where he stated:-

“Order 35 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant”

The same principle applies to a claim for land as in this case. The summary jurisdiction however has to be exercised with care. Although it would seem to be against the principles of natural justice to deprive a man his right to defend, however, where a court in, a plain and obvious case, is satisfied without any doubt in the matter that a plaintiff is entitled to judgment and that the defendant is seeking leave to defend merely for purposes of delay it must grant judgment.

As already stated, the defendant on learning that the piece of land had been allocated to the plaintiff sought to be allocated the portion. The Commissioner of Lands purported to do that but that decision was quashed by this court (Lady Justice Khaminwa) in HC.Misc. Civil Application No. 293 of 2001. Subsequently in his letter dated the 14th February 2003 receipt of which the defendant has not denied the Commissioner of Lands addressed the defendant as follows:-

“Reference is hereby made to the letter of allotment Ref. No. TP58/1/IX/72 of 21st June 2001 offering you the above plot. This is to inform you that the offer of the above plot is hereby withdrawn and the allocation cancelled. This is in pursuance of court order by High Court at Mombasa No. HC.Misc. Civil Appeal [application] case No. 293 of 2001 quashing the above application.

You will be refunded all fees paid immediately you surrender the original letter of allotment and official receipt issued to you”.

So as matters stand now the plaintiff has title to the suit piece land and the defendant has none. The defendant’s claim to the land is based on the said letter of allotment which has been cancelled since the 14th February 2003. The judgment of the Senior Principal Magistrate in CMCC No. 1432 of 1998 was also based on that letter of allotment.

I have perused the defence and in particular paragraph 15 thereof in which it is alleged that the plaintiff fraudulently obtained title to the piece of land without the consent of the defendant who is the rightful owner of the portion. I am satisfied that it does not raise any triable issue. The defendant is not the rightful owner of the portion. His purported purchase of that portion from one Jackson Nzaro does not avail him as Nzaro was not the owner of the land he purported to sell to him.

For these reasons I am satisfied that the defence herein is a sham and does not raise any triable issue. It is intended to delay the quick disposal of this case. Consequently I allow this application and enter judgment for the plaintiff for vacant possession and costs. The plaintiff has not made out the claim for mesne profits and the same is dismissed. I order that the defendant shall give to the plaintiff vacant possession of the suit portion of land within 60 days of the date hereof.

DATED this 23rd day of July 2004.

D.K. Maraga

Ag. JUDGE