



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 437 OF 2002

ISSA MASUDI MWABUMBA.....PLAINTIFF

=V E R S U S=

- 1.ALICE KAVENYA1ST DEFENDANT**
2.HASSAN HAMISI SAUTI.....2ND DEFENDANT
3.THE ATTORNEY-GENERAL.....3RD DEFENDANT
4.DIANI PROMOTION SERVICES LTD.....4TH DEFENDANT
5.LOITA DEVELOPMENT LTD.....5TH DEFENDANT

R U L I N G

The Plaintiff approached the court by Notice of Motion dated 24/1/2003 seeking orders to enter judgment against the 3rd Defendant the Attorney-General for making an admission in pleadings that :-

“Title Deeds in respect of Plot No. Kwale/Galu/Kinodo/644 and 646 were obtained by fraud and should be cancelled”

and that:-

“The District Land Registrar, Kwale, be directed to cancel the names of Diani Promotion Services Ltd., Defendant No.4 and Loita Development Ltd., Defendant No.5, who were illegally registered against the Titles 644 and 646 and enter the name of ISSA MASUDI MWABUMBA and issue Title Deeds in his capacity as the legal representative of the Estate of Juma Helefu Mwamtsumi (Deceased).”

The application is supported by affidavit of Applicant which shows that by a letter dated 14/5/01 the Chief Land Registrar in the Ministry of Lands did admit that “the Plaintiff is the rightful owner” and that the Title Deeds were fraudulently obtained should be cancelled and the Plaintiff’s name should be entered as owner. The letter is exhibited.

The Applicant argues that the consequence thereof is that the registration and Title Deeds held by 4th and 5th Defendants are null and void. In his Plaintiff paragraph 9 and 10 the Applicant has pleaded particulars of fraud and misrepresentation against all the parties. According to record judgment was entered against the 2nd and 4th Defendant on 9/1/2003.

The 5th Defendant filed a Statement of Defence on 5/2/2003. 1st Defendant entered on 7/2/2003 and filed defence on 11/2/2003. On 23/12/2002 5th Defendant filed a Statement of Defence. The filing of the

Defence has been subject of investigation by Deputy Registrar in this matter.

In the meantime, the Applicant had filed this Notice of Motion on 24/1/03. 5th Defendant has filed grounds of opposition.

I have perused the record carefully. It is to be noted that the Plaintiff seeks summary judgment on admissions contained in his Exhibit WW1. This letter is said by the 3rd Defendant that it was forged. The Applicant in his Plaint paragraphs 9 and 10 alleges fraud and misrepresentation. It is a requirement of law that the party alleging fraud must plead such allegations and prove the same. Proof is by calling evidence at a trial which evidence is to be tested by cross-examination. I have noted that the officer in Lands Office who is alleged to have signed the exhibit of admission has not made any affidavit. Instead it is made by his senior officer. It is to be noted also that the Applicant claims title from his grand-father Mr. Juma Helefu Mwangtsumi but the grant of representation is not exhibited. For the Applicant it is said that he is supported by 1st Defendant Alice Kavenya who nevertheless has filed a defence. However, the application is vigorously opposed by the 3rd, 4th and 5th Defendants saying that the application is frivolous, does not show a grant of Letters of Administration, orders cannot issue under Order 12 rule 6, Order 9A rule (3) as it is not a liquidated demand, Order 12(6) where admission of facts has been made either in pleadings or otherwise. In this case the admission is denied by the party against whom it was alleged. Also that Defendant No.5 is the registered owner of the plot and that pleadings raise triable issues.

After considering all this opposition I have to point out that the duty of courts is to comply with the rule of law which demands that both sides to a suit be heard except in certain situations. The present case is not covered under Order 35 Civil Procedure Code which permits in proper cases for judgment to be entered on an application. Order 12 rule 6 Civil Procedure Code which is relied upon by the Applicant/Plaintiff, speaks of the situation where a party has made admission either in pleadings or otherwise. The letter relied upon as evidence of admission of fraud is disputed. Indeed it is said to be a forgery. In my view this is not a proper case for summary judgment (meaning judgment without hearing the other party).

The parties have cited authorities herein. However, it is to be noted that each case is decided on its own merits. I find there are triable issues and the suit should proceed to trial.

The application is dismissed with no order as to costs.

Dated this 2nd day of July, 2004.

JOYCE KHAMINWA

J U D G E

2/7/04

Mrs. Khaminwa, J.

Chege – Court Clerk

Plaintiff – Mr. Masudi – present

Mr. Mutungi – State Counsel

Ruling read in their presence.

JOYCE KHAMINWA, J.

Applicant Masudi – I apply for a copy of the Ruling.

COURT:- Let the same be supplied upon payment of charges.

JOYCE KHAMINWA, J.