



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA OF KISII

Civil Case 268 of 1996

MAMBOLEO KERANDI PLAINTIFF

VERSUS

1. ROBINA NYAMANGA

2. ZAKARIA MOMANYI

3. THOMAS MONGARE DEFENDANTS

RULING:

The plaintiff/applicant prays to court to strike out the 2nd and 3rd defendants/respondents defence dated 4th July 2002. The 2nd prayer is not clear but he seemed to be praying for lifting of the courts orders made on 26.8.98.

The first defendant is the mother of 2nd and 3rd defendants. The plaintiff sued them alleging to have bought one acre of land from land No. NORTH MUGIRANGO/KIABONYORU/64, which was then registered in the name of 1st defendant. It was later charged to N. MUGIRANGO/MOKOMONI/1324. The purchase was in 1985. Apparently the 1st defendant filed on 8th May 1997 a statement admitting the plaintiffs claim. It is not clear whether the 2nd and 3rd defendants were served with summons. After that the plaintiff and 1st defendant filed a letter in court and a consent judgment was recorded on 26/8/98. A portion of 800 x 400ft was to be excised from the 1st defendant's land No.1324. Later the plaintiff applied to court to amend the parcel Number to read 1259 and not 1354. The court granted the order. All this time the 2nd and 3rd defendants were not featuring on the scene. However they later made an application in court to have the court order stayed and to be allowed to file their defence.

On 26th June 2002 the court allowed the application and ordered the stay of the court judgment and allowed the 2nd and 3rd defendants to defend the suit. They eventually filed their joint defence on 8th July 2002. It is this defence the plaintiff want struck out.

It was submitted that the defence does not disclose any triable issue. It is a mere denial and the two defendants have not shown the proprietary rights to the land.

Application was opposed. It was submitted that plaintiff did not serve the 2 defendants with summons. They only learnt about the matter when the surveyor went to the land. They came to court and were allowed to defend the suit.

Further Mr. Ondika submitted that there were triable issues as the land by the time it was transferred

was in the name of the 2nd defendant.

I have considered the application. Indeed the defence is a denial but looking at the circumstances surrounding the case I feel that this is not a proper case for summary dismissal. It seems that the plaintiff wanted to deal with the 1st plaintiff only and that is why he did not serve the two defendants.

Initially he was claiming a portion of land from parcel No.1324. However after obtaining judgment he turned round and stated that he wanted a portion from No.1259. By then parcel No.1259 was in the name of the 2nd defendant having been transferred from the 1st defendant. It seems that the 2nd defendant was not involved in the amendments made. These are issues, which can only be addressed at a full hearing.

The plaintiff has a judgment against the 1st defendant. That judgment however affects the rights of 2nd defendant, as he was by then the registered owner. The plaintiff alleges that this was through fraud but again this will be addressed at the full hearing.

The judgment against the 1st defendant was stayed but not set aside. The situation has to remain like that until the issues between plaintiff and 2nd and 3rd defendants are sorted out.

In the circumstances the application is dismissed with costs.

Dated at Kisii this 21st October 2004.

KABURU BAUNI

JUDGE

21/10/04

Mr. Nyakongo for plaintiff

Mr. Minda for Mr. Ondika for respondent