



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 605 OF 1998

NARIKAE OLE SAKUDA PLAINTIFF

VERSUS

SANTAINÉ OLE KIMOSO MUYAKI DEFENDANT

RULING

There are 2 Preliminary Points raised by Mr. Ngwiri Learned advocates for the Defendant in this matter. First that the plaint is not drafted properly in that Order 7 rule 5 of Civil Procedure Rules is not vindicated. Secondly that the case is instituted before obtaining authority by Registrar of Lands Act Cap 300 section 21 (4)

But Mr. Keringo Learned counsel for the Plaintiff says Preliminary point does not lie because this is a matter of evidence and showing letter from the Registrar of Lands to himself advising that the matter be taken to the Court so section 21 (4) of Cap 300 does not lie.

Order 7 rule 5 of the Civil Procedure Rules says that:-

“The plaint shall show that the defendant is or claims to be interested in the subject matter and that he is liable to be called upon to answer the Plaintiff’s demand”.

It is a cardinal principle of practice that pleadings should be concise and contain statements in a summary form of those material facts a party relies on for his claim. It must show that a cause of action exists. Each party is entitled to know the case against him or is intended against him binding him to a defence story. Where this is not clear particulars are ordered and may lead to the Defendant striking out his name from the case. Where claim is for land whoever is in possession actually and physically should be made a defendant, in eviction the tenant in possession must be sued. Trespass to land is described by

“An entry upon or any direct or immediate act of interference With possession of land Called breaking and entering .. it must be a physical act done directly on to the plaintiff’s land A continuing state state of things which was originally lawful as being permitted for a reasonable time but which has become unlawful by being permitted for a reasonable the but which has become unlawful by expiry of that time is a trespass

The owner of land may sue for trespass but in order to maintain an action on trespass the plaintiff must have present possessory title and actual possession as owner is presumptive proof of property and is better than any claimant who cannot show any better title or authority.

The claim is based on trespass in spite of the most strange denial or purported denial by... claiming that Defendant has entered into it without permission.

I think in terms of pleading the plaint is adequate and the cause of action exists on the face of the plaint hence the first objection must fail.

As for second objection based on section 21 (4) of Cap 300. That section reads:-

Section 21 (4)

“No court shall entertain any action or other proceedings, relating to a dispute as to the boundaries as to the bordering of a registered land unless the boundaries have been determined as provided in this sections”.

The claim before court is on Trespass and although it may be a defence to say that the land did not belong to the Plaintiff, the issue of boundary may only come in as an issue to determine whether the entry was outside the land in question. But that is not the issue here and if it was it would be whether ascertainable in evidence.

In Preliminary points where a matter falls outside a pure point of law it can only be resolved on evidence but such evidence must so be greed and must have been settled. This is what Sir Charles Newbold said in MUKISA BISCUITS MANUFACTURING LTD vs. WEST END DISTRIBUTORS LTD 1969 EA 696. When he said that:-

“a Preliminary objection is in that nature of what used to be a demurrer. It raises a pure point but which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised when any fact has to be ascertained or if what is sought is the exercise of a judicial discretion”.

Here it is my opinion that the matter involves reliance on evidence which is not as yet ascertained. Application cannot succeed but can be argued at the end of the case.

Application disallowed.

No order as to costs.

Delivered this 21st Day of March 2003.

A.I. HAYANGA

JUDGE

Read to Miss Wanyonyi holding brief for Mr. Ngwiri for Defendant.

No appearance for plaintiff.

A.I. HAYANGA

JUDGE