



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 44 OF 2002

MUTUA NDETEI ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

DUNCAN MUTINDA KITHEMBE ::::::::::::::::::: DEFENDANT

R U L I N G

By a plaint dated 27.3.2002 and filed in court on 10.4.2002 the plaintiff Mutua Ndetei has brought this suit against the defendant Duncan Mutinda Kithembe seeking orders of declaration that the plaintiff is the owner of land known as MASII/EMBUI/50 situate in Embui location; an order of eviction of the defendant from the land; a permanent injunction restraining the defendant by his servants or agents from interfering or trespassing on the said land and costs.

The defendant filed a defence on 3.5.2002 in which the defendant claims to have bought the land from the plaintiff and he has a beneficial interest in the said land. What has come up for hearing is the application dated 14.8.2003 asking for summary judgement to be entered for the plaintiff against the defendant as prayed in the plaints and costs of the application and suit. The grounds upon which the application is brought are that the defence filed raises no triable issues and it is proper that this case be determined summarily.

It is the plaintiff's case that he never sold the land to the defendant/respondent in 1994 and that the sale agreement annexed to the replying affidavit of respondent dated 16.4.2002 does not bear his signature and that even if there was such an agreement it would be invalid by reasons of limitation.

The defendant/respondent filed grounds of objection to the effect that the defence raises triable issues in that the parties entered into a sale agreement which is yet to be concluded and the application is thus frivolous, vexatious and hence an abuse of court process.

It is not in dispute that the plaintiff/applicant is the registered owner of the parcel of land in question. A copy of the title deed is one of the documents on the plaintiff's list of documents. The defendant/respondent does not deny it.

Whereas the applicant claims to have allowed the respondent to settle on the said land for a while as he was married to the daughter, the respondent claims otherwise, that there was a sale agreement. The question is whether the sale agreement is valid and even if not, whether the respondent has acquired a beneficial interest on the land. The plaintiff at paragraph 6 of the plaint claims to have given the land to

the respondent for use in 1995.

There is no doubt that the respondent is in occupation of the said land as the applicant seeks an order of eviction. However the respondent contends that the sale agreement allegedly entered into between the parties and annexed to his replying affidavit in the application dated 16.4.2002 indicates that part of the sale price was paid on 15.2.2004 where the applicant admitted receiving Ksh. 56,000/- which is in addition to another instalment of 36,000/- which totalled 92,000/- leaving a balance of 48,000/-. As per the agreement, the balance was to be paid by February 1998 and that the applicant refused to accept the last payment. In the same affidavit referred to the respondent claims that the actual sale agreement between the applicant and himself was entered into sometime in 1991. The respondent contradicts himself in his defence when he pleads at paragraph 6 of the defence that the sale agreement was entered into on 15.2.1994. it is therefore not clear whether the alleged sale agreement was made in 1992 or 1994 if at all any did exist.

For the respondent to have acquired a beneficial interest in the land by way of adverse possession, he should have been in continuous and uninterrupted occupation and use of the land for a period of 12 years. If the court were to assume that an agreement was entered into in 1991 then 12 years would mature in 2003.

This suit was filed in 2002 before 12 years were over and the respondent can not claim ownership of the said land by way of adverse possession.

It is the respondent's contention that a valid agreement exists between them and has not been concluded. If the sale agreement was entered into in 1991 the consent of the Land Control Board should have been sought within 6 months of the said agreement.

Likewise if the agreement was for 15.2.1994 the consent of the Land Control Board should have been sought by 15.8.1994. This is agricultural land which is controlled by provisions of the Land Control Board Cap 302. Consent is mandatory under Section 6 of the said Act. There is no evidence of the said consent. Counsel for respondent argues that the court should wait till the hearing when they can avail one. The parties had been ordered by this court to file their list of documents by 25.9.2002. The plaintiff has filed the lists. Defendant/Respondent have not and no reason why not. The court will not wait for a hearing as the documents should have been in court since the respondent should have had it from 1991 or 1994 whatever is the correct date. There being no consent of Land Control Board, the alleged contract of sale is void and unenforceable. Under Section 7 of the Land Control Act, the only remedy available to the respondent is to sue for his Ksh. 92,000/- he alleges he paid, as a civil debt.

In her submissions Mrs. Mutua for respondent argued that the application cannot be granted under Order 35 Civil Procedure Rules as that order presupposed a situation where no defence is filed. I do not agree with Counsel's argument. She should understand Order 35 Civil Procedure Act in its entirety. At Rules 2 and 4 of the same order it is provided that a defendant who has not filed a defence can seek for leave to file his defence if such an application has been made. This means that the preceding Rules assume that a defence is filed. The use of the word 'applicant' in Rule 1 (D) of Order 35 means one has appeared and filed a defence and that is why the court looks at the defence to determine whether there are triable issues or not. That argument by Mrs Mutua is misplaced. The application is properly brought under Order 35 Civil Procedure Rules.

The sum of the above finding is that the defence raises no triable issues. Though this is a land case and the courts will be reluctant to grant such orders at an interlocutory stage this is a clear case where the defendant/respondent has no defence and there are no triable issues raised in the defence filed and there is no reason why the court should await the hearing of this matter. The court will allow the application, enter summary judgement for the plaintiff/applicant as prayed in the plaint with costs of the suit and costs of this application to the plaintiff/applicant.

Dated, read and delivered at Machakos this day of 2004.

R. V. WENDOH

JUDGE