



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 71 OF 2002

NAKURU PACKERS LIMITEDPLAINTIFF

VERSUS

MONICA NYAMBURA WATITUDEFENDANT

RULING

This is an application stated to be brought under Order XXXV Rule 1, Order L Rule 1 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act (Cap 21); and all other enabling provisions of the law. In it, the Plaintiff seeks the following orders:

- “1. THAT the Defendant give vacant possession of ... L. R. No. 9035 Lanet Area, Nakuru District (hereinafter referred to as “the suit land”), to the Plaintiff within fourteen days of the decision of this Honourable Court.*
- 2. THAT in default an eviction order do issue against the Defendant in respect of the suit ... (land).*
- 3. (Costs).”*

The material facts in this action are not in dispute. The Plaintiff is named in the Grant over the suit land as the proprietor thereof having bought it from one Amos Watitu who was, atleast at the time of the purchase, the husband of the Defendant. The property is occupied by the Defendant who has carried out certain developments thereon. In 1996, the Plaintiff brought an action in this Court being NAKURU HCCC NO. 255 of 1996 against the Defendant seeking to recover the suit land from the Defendant. That action failed as there was a mis-description in the suit land. The Plaintiff appears to have unsuccessfully applied for review before bringing this action. The Defendant’s claim to the suit property is that her husband held it in trust for the family.

The title to landed property held under the Registered Titles Act (Cap 281) like the suit property is governed by Section 23(1) of that Act which provides as follows:

“The Certificate of the title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

Those provisions are clear beyond peradventure. They have been applied in numerous cases cited before me with the same result that I do not see the need to repeat what the Courts have said here. The Plaintiff is shown in the Grant in respect of the suit property as the proprietor thereof. That is conclusive proof that it is the absolute and indefeasible owner of it. Its title cannot be challenged unless the Defendant can show that the Plaintiff obtained that title by fraud or misrepresentation to which the Plaintiff was a party. Nothing of that sort has been shown before me. As was put by the Learned Judges of Appeal in the case Wreck Motor Enterprises v. Commissioner of Lands & Others Civil Appeal No. 71 of 1997 the Plaintiffs title in this case is sanctified and takes precedence and is supreme over all other alleged equitable rights such as the Defendant's claim to it.

There was a submission that the title granted to the Plaintiff was illegal as no consent to transfer was obtained from the Land Control Board but I agree with Mr. Kibet for the Plaintiff that such consent was not required as it is clear from the special conditions pursuant to which the title was held that the suit land was not agricultural land. I would also like to state in one line that this suit cannot be said to be res judicata in view of the earlier suit mentioned above as the Court in the earlier suit did not go into the merits of the case then. There was also a submission advanced by Mr. Karanja for the Defendant that the Plaintiff's application could not stand in its form as there was no prayer to strike out the Defence and counterclaim.

I do not understand the basis of this submission. It does not have support in our Civil Procedure and practice. In my view, this Court's jurisdiction to strike out pleadings and grant summary judgment are supplementary to each other and may be available to a litigant as circumstances permit.

Having said the above, I am not satisfied that the Defendant has shown to this Court that she should be granted leave to defend the Plaintiff's claim. Her defence and counterclaim do not raise any or any reasonable issues fit to go for trial.

I, therefore, allow the Plaintiff's application dated October 1, 2002 with costs.

Dated and Delivered at Nakuru this 29th day of September, 2003.

ALNASHIR VISRAM

JUDGE