

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1484 OF 2001

STEPHEN KIPKEBUT.....PLAINTIFF

V E R S U S

MATHEW WAMBUGU.....DEFENDANT

R U L I N G

By Notice of Motion dated 23rd January, 2002 the Plaintiff in the main suit invokes the summary procedure under Orders 35 rule 1(a) and Order 6 rule 13 of the Civil Procedure Rules seeking both the striking out of the defence filed and summary judgment. Order 35, however, is a mere surplusage as the Court may under Order 6 rule 13 enter judgment upon striking out the defence. Invoking such order also complicates the prayer for striking out on the ground that the defence is not reasonable which ought not to be supported by any evidence.

The Applicant has also omitted to specify under what provision of Order 6 rule 13 he relies on and goes ahead to seek a prayer under Rule 13(1)(a) which admits of no evidence but an affidavit is annexed thereto. To that extent that prayer is incompetent and is struck out.

That leaves the ground that the defence is scandalous, frivolous and vexatious, will delay the suit and is an abuse of Court process.

Both parties claim ownership of some land in the City of Nairobi which the Plaintiff identifies as LR NO. 209/14318 and the Defendant identifies as LR NO. "A" Makadara District Centre. The Plaintiff says he has a registered title to it issued on 21st June, 2001 while the Defendant says he has a sale agreement and an allotment letter from the City Council of Nairobi issued on 15th August, 1999. He has already taken possession fenced, subdivided and commenced development but the status quo has since been maintained by a consent order of this Court. The Defendant submits that he is not a trespasser on the plot he is developing and contends that the Plaintiff's plot must be different from his. Unfortunately none of the parties submitted any independent survey plan to resolve this central issue of the identities and location of the subject matter in dispute. Striking out is a draconian remedy and is only resorted to on clear and obvious cases. The discretion of the Court must also be exercised with extreme caution as it may deprive a party of his constitutional right to a fair day in court.

By alleging that the defence is "frivolous" the Plaintiff says it is trifling or lacking in seriousness, and "vexatious" because it is irritating or harassing. It is an irritating irrelevance. It would delay the trial unnecessarily and would be embarrassing if it was frivolous and vexatious.

I have perused the defence filed herein and considered the submissions of counsel which went no further than what is pleaded. The defence responds to the pleadings made in the plaint and since there is no reply thereto, there is a joinder of issues which can only be resolved in a trial where the evidence is tested in cross examination. I see nothing frivolous or vexatious about the defence at this stage, particularly the central issue of the physical location of the plots claimed by both parties.

This is not a fit case for summary trial and I dismiss the application with costs.

DATED at Nairobi this 28th day of February, 2002.

P.N. WAKI

JUDGE