



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.2185 OF 2001

HORKAN INVESTMENT LIMITEDPLAINTIFF

V E R S U S

NAMAYUK SELF HELP GROUPDEFENDANT

R U L I N G

This is a Notice of Motion dated 19th June 2002 asking for striking out of the plaint and the setting aside of all orders herein before given earlier because the defendant sued is a non – existent body and that the said suit is frivolous and vexations. The supporting affidavit by Peter Kamante Ole Kantet Secretary of the defendant Society says that as a group they bought the land from three owners W.D Rehm, J. Warren and G. Rehm, 15 years ago but on 16th June 2002 plaintiffs came to invade it. That they have never been served with summons and that the plaintiffs lost claim to the land long time ago in 1979 surrendering it all together in 1982.

The plaintiff/respondents oppose the application and by affidavit state that plaintiff is the registered owner of the land in dispute but the defendants by use of allotment letter dated 20th January 1998 claim ownership and although the defendants have been informed of this by the Commissioner of Lands they still claim the land and are staying therein illegally.

The main case is a plaint dated 18th December 2001 in which the plaintiff a limited liability company sued defendant a Registered Society in its own name in which the plaintiff seeks both prohibitive and mandatory injunctions from interfering with plaintiffs enjoyment of LR No.2248/5 Langata and general damages although I may note that the prayer (b) is not for mandatory but prohibitive injunction and general damages apparently from trespass.

By chamber summons dated 18th December 2001 plaintiffs sought to stop defendants from occupying the land and an order to evict them. On 13th February 2002 Visram J. granted the order in default of appearance and replying affidavit by defendant but the order could not be served because of violent resistance. So on 4th March 2002 Githinji J. said that there was no certainty that the defendants were a registered society so each of the 15 persons on the land be identified and served. On 20th March 2002 applicant/respondents appeared before Hon. Mutito J. Who ordered police to intervene. It is after these that defendants now made this application.

The plaintiff has exhibited certificates of title showing that LR No.25212/54 is registered in the name of Namunyak Resettlement project showing that same was transferred to Koluyanke Ole Koitek on 26th November 1998.

The plaintiff now says that, that is the land defendants should claim and not LR. No.2248/5 and therefore they have no locus.

The dispute between the plaintiff and the defendants is on the ownership of land under Order 6 Rule 13 b, c and d. But I do not think that a wrong party being sued falls under Order 6 Rule 13 b, c and or d. It is simply a question of misjoinder. The survey over Order 6 Rule (1) 3 b, c and d are as follows;- as I said once in the case of JOHN OKUMU SIMIYU VS STANDARD CHARTERED BANK HCCC NO.899 of 1994 as follows:-

“Taking the sub rules under Rule 13 (1) (b) the affidavit should show that the defence is scandalous frivolous or vexations. Pleading is scandalous if:-

(i) It states matters that are indecent or

(ii) Matters that are offensive or

(iii) Matters made for the mere purpose of abusing or prejudicing the opposite party (iv) Matters that are immaterial or unnecessary which contain imputation on the opposite party or see CHRISTINE V. CHRISTINE (1973) LR.8 Ch.499

(v) Matters that charge the opposite party with bad faith or misconduct against him or anyone else MARKHAM VS WERNER, BELT & CO. (1902) 18 TLR 763.

(vi) Matters that contain degrading charges

(vii) Matters that are necessary otherwise accompanied by unnecessary details.

BLAKE VS ALBION LIFE ASS. SOCIETY (1876) L.J. Q.B. 663. But they may not be scandalous if the matter however scandalizing is relevant and is admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

Secondly a matter is frivolous if:-

(i) It has no substance or

(ii) It is fanciful or

(iii) Where party is trifling with court.

See Chatters Vs. Golds Mid (1894) 1 Q.B. 186 OR (iv) When to put forward the defence would be wasting courts time.

(v) When it is not capable of reasoned argument.

DAWKINS VS PRINCE EDWARD OF SAVE WEIMBER (1876) IQBD 499

Then pleading is said to be vexatious when:-

(i) It has no foundation or

(ii) It has no chance of succeeding

(iii) The defence (pleading) is brought merely for purpose of annoyance or

(iv) It is brought so that the party pleading should get some fanciful advantages or

(v) Where it can really lead to no possible good i.e. in the case of: WILLIS VS EARL BEAUCHAMP (1886) II PD 59. Where Cotton L.J struck out a case brought to revoke

letters of administration after nearly 90 years. The court only exercises its discretion where it is plain on the pleading and where it is obviously frivolous or vexatious or unsustainable. The court can go behind the pleadings to understand the case and may admit affidavit evidence.

REMYINGTON VS SCOLLES (1897) 2 CHA.1 I have looked at the defence in the light of these guidelines and I do not see that it offends R.13 1 (b). I looked at Order 6 Rule 13 1(c). Under this rule R.13 (1) (c) pleadings tending to prejudice embarrass or delay fair trial when:-

(i) It is evasive or

(ii) Obscuring or concealing the real question in issue between the parties in the case . Each party may claim ex debito justice to have opponents case presented in intelligible form so that he may be not be embarrassed in meeting it. The opposite party`s pleading must be within rules of procedure set down by law. Not his own concoctions and patch”.

That is the law as I set it out and as I understand it to be I do not see that the plaint here is any of those descriptions. The case seems to be properly based on illegal trespass and prays damages which is a traditional remedy for trespass. It raises issues of ownership, the nature of ownership right conferred by letter of allotment and the effect of Section 23 of R.T.A. 2000. There is reasonable cause of action. Such case cannot be struck off under Order 6 Rule 13. For these reasons the prayer to vacate or set aside the interim orders do not arise.

Application dismissed with costs.

A. I. HAYANGA

J U D G E

10/9/2002

Ruling read to Mr. Imende for the plaintiff and Miss Njuguna

10/9/2002