



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 3 OF 2015

SOLOMON KIPCHOKE KIPSISEI.....1ST PLAINTIFF

ALEX PAUL KIPSISEI.....2ND PLAINTIFF

VERSUS

LAKE VICTORIA NORTH WATER SERVICES BOARD.....1ST DEFENDANT

NDIWA K. CHEMARUYM.....2ND DEFENDANT

CHARLES BARASA BERA.....3RD DEFENDANT

COUNTY GOVERNMENT OF BUNGOMA.....4TH DEFENDANT

R U L I N G

What calls for my determination in this ruling is the plaintiffs' Notice of Motion dated 8th August 2019 in which they seek the following prayers: -

- 1. That summary Judgment be entered in favour of the plaintiffs/Applicants herein as prayed in the plead.**
- 2. That the 1st, 2nd, 3rd and 4th defendants' defence herein be struck out.**
- 3. That the costs of the application be borne by the defendants.**

The application is based on the grounds set out therein and is also supported by the affidavit of **SOLOMON KIPCHOKE KIPSISEI** the 1st plaintiff herein.

The gravamen of the application is that the plaintiffs are the co – registered owners of the land parcel **NO ELGON/KAPSOKWONY/35** (the suit land) and the 1st, 2nd, 3rd and 4th defendants' defence is a mere denial and only serves to delay the trial of this case. That the granting of the orders sought will not prejudice the 1st, 2nd, 3rd and 4th defendants and there is need to urgently dispose of this suit.

The 1st, 2nd and 3rd defendants filed grounds of opposition dated 5th September 2019 alleging, inter alia, that the defences by the 1st, 2nd and 3rd defendants raise triable issues and there is a factual dispute on the ground with respect to the ownership of the suit land. That this case should therefore be determined on it's merits and not technicalities.

On 21st November 2017, this Court delivered a ruling on an application by the 1st, 2nd and 3rd defendants dated 24th January 2019 which sought the main order that the suit against them be struck out for not disclosing any cause of action. I granted orders striking out the suit against the 2nd and 3rd defendants but directed that the suit as against the 1st defendant shall proceed. No appeal appears to have been filed against that ruling. Therefore, as there is no pending suit against the 2nd and 3rd defendants, no summary Judgment can be entered against them.

I shall therefore only consider the plaintiff's Notice of Motion dated 8th August 2019 in so far as it relates to the 1st defendant.

By their amended plead dated 20th March 2018 and filed herein on the same day, the plaintiffs sought Judgment against the 1st, 2nd, 3rd and 4th defendants in the following terms: -

1. An order for a permanent injunction restraining the defendants by themselves, their agents, workers and/or servants from entering, invading, constructing or interfering in any manner with the land title NO ELGON/KAPSOKWONY/35 and such order be issued to the Land Registrar to cancel any new title and/or cancel any planned registration of title NO ELGON/KAPSOKWONY/425 and stop any further processing of any new land titles and stop any further transfer and issuance of any new titles.

2. Costs of this suit.

3. Any further relief the Court may deem fit and just to grant.

In its defence, the 1st defendant pleaded that it rehabilitated the LABAA DAM under the National Water Harvesting and Storage Programme and that the said dam is situated on the land parcel NO ELGON/KAPSOKWONY/425 which is registered in the names of the County Government of Bungoma and not parcel NO ELGON/KAPSOKWONY/35 which is the suit land. Further, that the plaintiffs have encroached on public land forming part of land parcel NO ELGON/ KAPSOKWONY/425 and have only filed this suit to sanitize their encroachment. That the plaintiffs have clandestinely avoided suing the County Government of Bungoma for fear of the truth. That the 1st defendant will therefore seek to enjoin the County Government of Bungoma.

The County Government of Bungoma was subsequently enjoined in this suit as the 4th defendant. However, this application does not seek any orders against them.

It is therefore clear from the defence filed by the 1st defendant and the plaint herein that this dispute involves ownership of land. The issues that the Court will be called upon to determine will include whether the plaintiffs are entitled to an order of permanent injunction to restrain the 1st and 4th defendants (who are the only defendants against whom this suit still subsists following my ruling delivered on 21st November 2019), or whether in fact the plaintiffs have encroached on the land parcel NO ELGON/KAPSOKWONY/425 which is public land registered in the names of the 4th defendant. Those are not the type of controversies for which the procedure for summary Judgment was meant to address.

Order 36 Rule 1(1) of the Civil Procedure Rules provides as follows: -

“In all suits where a plaintiff seeks Judgment for –

(a) a liquidated demand with or without interest;

or

(b) the recovery of land with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non – payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser where the defendant has appeared but not filed a defence the plaintiff may apply for Judgment for the amount claimed, or part thereof, and interest or for recovery of the land and rent or mesne profits.” Emphasis added.

The plaintiffs claim herein is not a liquidated one and so **Rule 1(1) (a)** does not apply. And with regard to **Rule 1 (1) (b)**, it is clear that the claim if it is for recovery of land, has to be from a tenant. From the pleadings by both parties, there is no landlord tenant relationship between them. Further, for summary Judgment to be entered against a defendant, he needs to have **“appeared but not filed a defence.”** The 1st defendant herein entered appearance on 9th November 2016 and filed it’s statement of defence on 7th December 2016. No summary Judgment can therefore be entered against it.

Even assuming that this is a proper case for the entry of summary Judgment, the plaintiffs would still have to satisfy the principles set out in the case of **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .V. DABER ENTERPRISES LTD (2000) 1 E.A 75** where the Court of Appeal stated that the purpose of proceedings for summary Judgment are meant to enable a plaintiff obtain a quick Judgment where there is plainly no defence to the claim where the case is plain and obvious. In **DHANJAL INVESTMENTS LTD .V. SHABAHA INVESTMENTS LTD C.A CIVIL APPEAL NO 237 OF 1997**, the Court stated thus: -

“The law on summary Judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of KANDLAL RESTAURANT .V. DEUSHI & COMPANY 1952 E.A.C.A 77 and followed by the Court of Appeal for Eastern Africa in the case of SOUZA FIGUERIDO & COMPANY LTD .V. MOORING HOTEL LTD 1959 E.A 425 that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions.”

Therefore, in order to avoid delays and expedite the trial process as mandated by **Article 159(1) (b)** which provides that: -

“Justice shall not be delayed.”

and in order also to conform with **Section 1A (1) of the Civil Procedure Act** which calls for the **“just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act”**, and in appropriate cases, the Courts are empowered to enter summary Judgment. And as regard what is a defence that raises triable issues, the Court of Appeal in **KENYA TRADE COMBINE LTD .V. SHAH** stated that it need not be a defence that must succeed. In **BLACK’S LAW DICTIONARY 10TH EDITION**, the term triable is defined as: -

“Subject or liable to Judicial Examination and trial.”

As **MADAN JA** (as he then was) put it in **GUPTA .V. CONTINENTIAL BUILDERS LTD 1976 – 80 1 KLR 809**: -

“If a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary Judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”

It must be clear from the above therefore that this is not a plain and obvious case for the procedure of summary judgment to be invoked.

The plaintiffs’ Notice of Motion dated 8th August 2019 is accordingly dismissed with costs to the 1st defendant.

I implore the parties to comply with the pre – trial directions so that this suit which was filed in January 2015 is expedited.

It is so ordered.

Boaz N. Olao.

J U D G E

30th January 2020.

Ruling dated, delivered and signed in Open Court this 30th day of January 2020 at Bungoma.

Plaintiffs present

1st defendant absent

4th defendant absent

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

30th January 2020.