

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. HCCC NO. 261 OF 2009

MOHAMED OMAR MASUMBUKO.....PLAINTIFF

-VERSUS-

MOHAMED MAHFUDH & ANOTHER.....DEFENDANTS

RULING

1. There are two applications for determination brought by both the plaintiff and the 1st defendant. The plaintiff's application is dated 10th August 2011 brought under Order 2 Rule 15 (1) & (2) of the Civil Procedure Rules. The 1st defendant's application is dated 21st September 2010 and brought under Order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules.
2. The application made by the plaintiff prayed for the striking out of the defendant's defence since it discloses no reasonable defence in law. It is supported by the 3 grounds on the face of the application ; the key ground being that the title documents in favour the defendants have been revoked by the government vide gazette notice No 11533 thus destroying the substratum of the defence case.
3. The application is opposed by the defendant by their grounds of opposition dated 4th October 2011. The defendant averred that the gazette notice relied on does not allocate the plot to the plaintiff. Further that the gazette notice was subjudice Mombasa High Court Case No 8 of 2008 between KACC and the present defendants. Lastly that the gazette notice contravenes the provisions of the Constitution. The defendant urged for the dismissal of the application.
4. The 1st defendant's application sought for the striking out of the plaintiff's suit for not complying with Order VI Rule 8 (1) of the Civil Procedure Rules and section 27 (b), 39 (1) and 143 (2) of the Registered Land Act (repealed). The application was further supported by the affidavit deposed by the 1st defendant giving a narrative on how the 1st defendant acquired the title and further that the plaintiff's claim is based on a letter of allotment where as the defendant holds an indefeasible title.
5. The application is opposed by the plaintiff through his replying affidavit sworn on the 21st October 2010. In this affidavit, the plaintiff stated that in paragraph 5 of the plaint, he clearly stated that the defendant obtained his title deed by fraud. That the defendant did not mention lack of particulars of fraud in their defence hence this application is an after thought. Further that the question of limitation of time is a matter that require evidence. Lastly that the right of amendment is available to both parties before closure of pleadings therefore it is premature to apply for striking out.
6. The advocates on record for the parties filed written submissions to both applications which I have taken into consideration. The main ground put forth by the 1st defendant for seeking to strike out the suit is failure by the plaintiff to particularize the fraud alleged against him in the plaint filed. This is a matter that can be cured by an amendment. As regards the issue limitation of time, it is an issue that would require evidence to explain when the cause of action arose. In any event, the plaintiff relies on a letter dated 15.1.2009 exhibited as annexure "OMM 4". This Court cannot close him out without giving him an opportunity to be heard.
7. On the plaintiff's application to strike out the defence, the grounds contained in the grounds of opposition filed raises very heavy matters that cannot be resolved by way of interlocutory application. For instance, whether the gazette notice cancelled the 1st defendant's title and whether that notice was subjudice Mombasa HCC 8 of 2008. Lastly whether the gazette notice gave the

- plaintiff the suit property to the exclusion of the defendant.
8. Taking the issues raised by the pleadings and the submissions, this Court has come to a conclusion that both applications fails to meet the ingredients for striking out suits as was stated in the renowned case of D.T Dobie (K) Ltd vs Muchina (1980) eKLR. I hereby order as dismissed the applications dated 21.9.2010 and 10.8.2011 with each party bearing their respective costs. Parties are directed to comply with Order 11 and set this suit down for pre – trial directions without further delay.

Ruling dated and delivered in Mombasa this 10th day of February 2016

A. OMOLLO

JUDGE