REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO.149 OF 2012

SHAYONA TIMBER LIMITED....................PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY...DEFENDANT

RULING

1. By a plaint dated 25th April, 2012 the Plaintiff Shayona Timber Limited, instituted this suit against the defendant, Kenya National Highway Authority seeking among other orders, a permanent injunction to restrain the defendant from invading, developing or in any other manner howsoever interfering with its quiet possession of L.R NO.9950/8 (original No. L.R No.9950/1/3 East of Nakuru Municipality (hereinafter referred to as "the suit property").

2. Simultaneously with the plaint, the plaintiff brought a motion of even date seeking the aforementioned remedy on interim basis.

3. Upon being satisfied that the motion was merited, this court granted the prayers therein sought pending the hearing and determination of the suit.

4. Subsequently, the plaintiff brought the motion dated 23rd April, 2013 praying that the defence filed by the defendant be struck out and judgment be entered for it as prayed in the plaint.

5. The application is brought under Order 2 Rule 15(1) (a)(b) and (c) of the Civil Procedure Rules and Sections 1B (1) (b) and (d) of the Civil Procedure Act.

6. It is premised on the grounds that the purported defence is a sham and tailored to delay a fair conclusion of the suit; that the defence is scandalous, frivolous or an abuse of the court process; that the plaintiff is the registered owner of the suit property; that the defendant has no title to the suit property or any legitimate claim to it; that the basis of the defendant's claim was nullified by court and no appeal was filed against the nullification and that the plaintiff wishes to develop the land.

7. The application is supported by the affidavit of Jayen Motichand Dodhia, the managing Director of the Plaintiff company in which the deponent has reitereated the grounds stated on the face of the application. She has also deposed that the plaintiff bought the land for valuable consideration; that the Commissioner of Lands had expressed interest to compulsorily acquire it and that the plaintiff challenged the proposed compulsorly acquisition vide Nakuru HCC No. 110 of 2009 in which the plaintiff was declared the owner of a portion of the suit property. It is also deposed that the plaintiff had sued the person who sold the suit property to the plaintiff to stop negotiations with the Government and a consent was recorded to the effect that any matter touching on compulsory acquisition of the suit property or intended acquisition of the suit property shall vest in the plaintiff absolutely and the Defendant (Craford Richard Ingram) shall have no

claim or interest whatsoever over or in respect of the suit property. It is averred that subsequently the plaintiff was issued with a title to the suit property, has been in occupation and that the defendant has no title or any colour or shadow of right over the land.

8. It is further averred that the plaintiff is suffering immense loss as it can neither develop the suit property nor use it as a security for loan; that the defence on record is a sham, vexatious, scandalous, speculative and intended to embarrass or delay fair conclusion of the suit raising no reasonable defence.

9. It is contended that if the defendant is interested in the suit property it should purchase it from the plaintiff on willing buyer willing seller basis at market prices or through the National Land Commission.

10. For the foregoing reasons, this court is urged, in the interest of justice, to struck out the defence and enter judgment for the plaintiff as prayed for in the plaint.

11. Through the affidavit of Thomas Gicira Gacoki, manager survey at the defendant, the defendant contends that the application is incompetent, bad in law and ought to be dismissed with costs, that the application is brought in bad faith to delay the hearing and final disposal of the matter; that the defence on record is valid and raises triable issues; that through Gazette Notice No. 2401 of 13th March, 2009 the Commissioner of Lands declared its intention to acquire 1.1909 Hectares of land from the suit property for the rehabilitation of Lanet-Njoro turn off road; that according to the records at the Ministry of Lands at the time of the intended acquisition, the registered owner of the suit property was Richard Ingram Crawford; further that during inquiry sittings held in respect of the suit property the plaintiff was identified as an interested party to the land earmarked for acquisition.Following valuation the Commissioner of Lands paid compensation to the then registered owner (Richard Ingram Craford) and the plaintiff.

12. It is therefore contended that the issue as to whether the suit property was compulsorily acquired by the Commissioner of Lands is a weighty issue that should go for full trial.

13. For the foregoing reason(s), this court is urged to dismiss the application with costs and order that the suit be set down for hearing and determination on its merits.

14. Before me counsel for the plaintiff reitereated the averments in the plaintiff's supporting affidavit. He maintained that the suit land has never been compulsorily acquired by the Government and whereas the plaintiff has a title to the property, the defendant doesn't. For this reason it is submitted that the defence on record is a sham and that it ought to be struck out.

15. Counsel for the defendant, Mr. Otieno, while reiterating the averments in the defendant's replying affidavit submitted that the defence raises triable issues as the plaintiff did not lead any evidence to prove that it did not receive the compensation allegedly paid to it by the Commissioner of Lands.

16. I find that the issues for determination are:-

(i) Whether the defence filed by the defendant should be struck out?

(ii) Whether summary judgment should be entered in favour of the plaintiff and against the defendant?

17. Starting with the first issue, Order 15(1) of the Civil Procedure Rules provides:-

“At any stage of the proceedings a court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action; or

(b) it is scandalous, frivolous, or vexatious; or

(c) it may prejudice, emberrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Rule 2 thereof provides-

“No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”

18. Although the plaintiff's application is brought under Order 2 Rule 15(1)(a)(b) and (c) of the Civil Procedure rules, the applicant did not make ground (a) as one of the grounds intended to be relied upon. However, in its supporting affidavit (paragraph 15) the deponent has averred:-

“I believe that the defendant has no reasonable defence and its vexatious, scandalous and speculative intended to embarass or delay fair conclusion.”

19. Failure to expressly indicate on the face of the application that the plaintiff intends to rely on the ground (ground (a) clearly offends Order 15 rule 2 aforementioned). Under rule 2, for the plaintiff to rely on the ground, it is required to state concisely the grounds on which the allegation is made. See **DT Dobie & Company (Kenya) Ltd** V. **Muchina** (1982) KLR 1 in which the Court of Appeal held:-

“**The application was incompetent as it sought for the suit to be struck out on the ground that it 'disclosed no cause of action', whereas the rules provided for striking out on the ground that it discloses 'no reasonable cause of action'. The application was further incompetent for failure to comply with the requirements of sub-rule (2) by not stating concisely the grounds upon which it is made.**”

20. As pointed out earlier, the plaintiff's application is premised on the grounds that:-

1. the purported defence is a sham and tailored to delay a fair conclusion of the matter;
2. the defence is scandalous, frivolous, or else an abuse of the court process;
3. the plaintiff is the registered owner of the suit land having bought it for valuable consideration;
4. the defendant has no title to the suit land or any legitimate claim to the land;
5. the process under which the defendant claim was nullified by the High Court of Kenya and no appeal has ever been preferred against the decree; and that
6. the plaintiff wishes to develop the land.

21. In the affidavit sworn by the respondent it is contended that the application is incompetent and bad in law. Even though no reasons have been given for such assertion, having seen the application and read Order 15 rule 1 (a) (b) and (c) of the Civil Procedure Act, on which it premised I presume that the contention is premised on the following non- conformities to the regulations:-

(i) the plaintiff's failure to comply with the provisions of rule 2 in respect of ground (a); and/or

(ii) the mixing up of the grounds, so that it is difficult to know on which of the grounds the plaintiff relies on to urge the application.

22. Although it has not been demonstrated that failure to comply with the aforementioned regulations has prejudiced the respondent. In my view, it is prudent for a person relying on these regulations to specify which grounds he or she is relying on to enable the respondent to raise an appropriate defence or reply thereto. This is especially, so with respect to ground (a) where the plaintiff is not required to adduce any evidence. Be that as it may, in this particular case, I find that the non-compliance with the regulations has

not occasioned any prejudice to the respondent. In accordance with the letter and spirit of Section 1A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution, I decline to declare the application fatally defective.

23.Turning to the merits of the application, it is submitted that the plaintiff is the lawful owner of the suit property; that the plaintiff successfully challenged the intended compulsory acquisition by Government and that it was subsequently issued with a title (annexture **Exbt JMD1**). It is conceded that there was an intention to compulsorily acquire the property but claimed that the intention did not materiarize.

24.Regarding the allegation that the plaintiff was compensated, it is submitted that the amount of Kshs. 7, 707,590/= paid to Crafford Richard Ingram (plaintiff predecessor in title) did not include the compensation that had been intended for the plaintiff in the sum of Kshs. 1, 500,000/=. It is also submitted that the evidence adduced in support of the alleged compensation is insufficient to prove that either the plaintiff or Craford Richard Ingram were indeed compensated.

25. It is further argued that if the acquisition was continued it was illegal as there was an order barring the Government from continuing with it. In the circumstances, it is proposed that the Government should seek refund from the plaintiff's predecessor in title for any money paid.

26.On basis of the foregoing this court is urged to find that the Defence filed by the respondent is a sham disclosing no reasonable defence in law and as such should be struck out.

27.The respondent on its part has maintained that the defence discloses triable issues namely, whether or not the suit property was compulsorily acquired by the government and whether compensation in respect thereof was paid to the plaintiff and/or its predecessor in title.

28. From the pleadings in this suit, the evidence and the submissions, it is common ground that the suit property vested in a third party namely, Craford Richard Ingram before ownership passed to the plaintiff. It is also common ground that the Government, through the office of the Commissioner of Lands was interested in compulsorily acquiring it from the plaintiff's predecessor in title. Some of the documents cited in evidence indicate that the agreed compensation was paid to the plaintiff's predecessor in title. Although there is evidence to the effect that the Government was, upon payment of the agreed consideration to the plaintiff's predecessor in Title, to deal with the plaintiff on any issues regarding compulsory acquisition of the suit property, there is no evidence to prove that the order or decree was served on the Government and/or whether the conditions stated thereon were met or if met when they were met.

29. The question which arises is whether given the above set of circumstances, and without going to the merits of the case, the defendant's defence has no chance of success.

30. In **DT Dobie & Company (Kenya) Ltd** V. **Muchina** (supra) the Court of Appeal held:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

31.From the affidavit evidence presented before this court, it is clear that there were some dealing between the plaintiff and persons who are not parties to this suit and whose involvement is necessarily in resolving the question as to whether the plaintiff or its predecessor in title received the alleged compensation. A court of law should not act in the darkness, especially where it appears that the evidence adduced is incapable of adequately addressing the issues arising from the pleadings. For these reason I decline to strike the defence and order that the suit be determined on its merits.

Dated, signed and delivered at Nakuru this 8th day of November 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Matiri for the plaintiff

Mr Otieno holdingbrief for Mr Anam

CC: Emmanuel Maelo

L N WAITHAKA

JUDGE