



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 70 of 2008

BRITISH RONALD JACK ANDREWS.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL

**LAZIMA RUWA
KHAMISIDEFENDANTS**

R U L I N G

The Chamber Summons application dated 18-2-09 is made under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules.

It seeks that the defence dated 6th November 2008 and filed on 14th November 2008 be struck out with costs to the plaintiff. Further that judgment be entered in favour of the plaintiff against the first defendant in terms of prayer (b) in the plaint dated 1-9-08. Alternatively that the instant suit be set down for formal proof by the plaintiff of the value of the suit property as at 5th October 2007 as sought in prayer (a) in the plaint.

It is founded on grounds that:

- (1) it is scandalous, frivolous and vexatious
- (2) it closes no reasonable defence
- (3) it may prejudice, embarrass or delay fair trial of the action.

The application is supported by the affidavit sworn by Ronald Jack Andrews (the applicant) who depones that the defence is a general denial and has not addressed any of the averments stated in the plaint – which averments are factual and are backed by evidence which cannot be rebutted by a mere denial – he points out to averments regarding registration of Cyrus Gichohi Waichanjuru as the proprietor of Title No. Kilifi/Madeteni/424 and issuance of certificate of Title thereto, annexed and marked RJA 1.

He also makes reference to the sale agreement he entered into over the property and the money paid as consideration and that thereafter the Land Registrar Kilifi District failed or refused to transfer the suit property.

Applicant points out the steps he then undertook after registration of Cyrus Gichohi, inter alia being to lodge a caution, execution of a Deed of Trust by the vendor Cyrus Gichohi in his favour and the Power of Attorney on the said Cyrus Gichohi appointed him to be his attorney in relation to his interests in the suit property.

Then he makes reference to an embargo placed by the Government restricting dealings with land in Kilifi/Chembe/Kibambamshe area and a promise by the Chief Lands Registrar on 22-8-05 that the embargo was about to be lifted and the transfer would be effected in the applicant's favour – letters from the Chief Land Registrar are annexed and marked RJA 7.

On 3rd July 1986, the Commissioner of Lands wrote to Cyrus Gichohi advising him that Lands Adjudication Act, Cap 284 was improperly applied to land in Kilifi Madeteni and that in the circumstances the registration of Cyrus Gichohi as the absolute proprietor was a nullity ab initio so the Certificate of Title thereto was defective.

Further, that the Government of Kenya, made a decision to cancel Title No. Kilifi/Madeteni/424 and therefore the Land Registrar Kilifi was required to rectify the register. However the Commissioner of Lands stated in the letter RJA 8, that the Government intended at its own discretion and on a without prejudice basis to allocate the land to the said land to Cyrus Gichohi under the Government Lands Act – then later in fact a year later, the Land Registrar Kilifi indicated that the exercise of surrendering Title Deeds for the affected cancelled Titles in exchange of new ones had been cancelled and the matter was under consideration by the Government of Kenya.

Then in 1994, the Commissioner of Lands wrote a letter RJA 21, advising that an order to facilitate the issuance of leasehold title in exchange for a freehold interest, applicant was required to surrender the original Certificate of Title to the Commissioner of Lands. The then Minister for Lands and Settlement Hon. J. K. Mulinge, issued a press statement saying that document of land in Madeteni area, Kilifi, was erroneously done. Applicant's contention is that subsequently, a Certificate of Title was issued to second defendant on 5-10-07 in respect of the suit property as per annexure RJA 27.

The respondents did not file any response to the application.

Mr. ole Kina who argued this application on behalf of the firm of A. F. Gross reiterated what is deponed in the very lengthy and detailed affidavit sworn by the applicant, and posed the question – how does the Government seek to defend the Title in view of all the correspondence as everything stated in the claim is supported by annexures and so there can be no defence. He referred to several cases.

Order VI Rule 13 addresses the issue of striking out pleadings and subrules a-d deals with the grounds invoked by the applicant. Is the defence vexatious? In the 12th Edition of Bullen and Leak's, precedents of Pleadings at pg 145, it is stated;

“A pleading or an action is frivolous here it is without substance of groundless or fanciful and it is vexatious where it lacks bonafides and is hopeless and offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense...”

A pleading tending to embarrass or duly fair trial is described as one which is ambiguous and unintelligible or which states immaterial worth and so raises irrelevant issues which may involve expenses, trouble and delay and that will prejudice the fair trial of the action”

So what is the nature of defence raised here? Is it a mere denial which does not specifically plead to all the issues raised?

The statement of defence dated 6-11-08 states that defendant denies the continuity of paragraph 5 (I-VII) of the plaint and further states that the Kilifi Land Registrar did not contravene provisions of the Registered Land Act. It is also denied that rectification of the record of proprietorship was wrongfully done.

I suppose the paragraphs which offends the applicant most are paragraph 5 which deny a promise to issue a letter of allotment to one Cyrus – yet such a letter exists and has been annexed and also the denial that applicant has not suffer prejudice or loss and is not entitled and indemnity yet applicant says he failed with sh. 200,000/, as consideration for the suit property. I would agree that those two paragraphs are vexatious and lack bona fides.

Yet there are other paragraphs which require viva voce evidence namely paragraph 3 and 6. This must be seen then in the context of what evidence the applicant has given and which in fact shows that there are triable issues raised.

(1) The constant shift of position regarding the documentation process – the one constant refrain that runs through even the applicant’s own affidavit is that there is a major problem regarding documentation of land in Madeteni area, Kilifi District – that is why at one point the Government places an embargo restricting dealings with not just the suit property haven but generally laid in Kilifi Chembe/Kibambamshe, Jimbi, Madeteni area.

That is why at one time signals are sent requiring surrender of title, their cancellation of titles, then suspension of issuance of new titles.

These are not frivolous or vexatious issues, they are triable issues which cannot be solved by a simple stroke of the pen striking out the defence. Why for instance did the Land Registrar give an assurance that despite the irregularities notes, the suit property would still be regarded in the name of Cyrus Gichohi and why then without lifting of the embargo did the Land Registrar issue title to the second defendant?

Why was the embargo imposed in the first place? The applicant by his own affidavit has disclosed so many triable issues and the solution does not lie in striking out the pleadings without the benefit of hearing what explanation exists for the prevailing situation. It would be totally pretentious and myopic of me to act as though I am not aware of the massive complication involving land in the area where the suit premises is situated and I take Judicial notice of that.

These aren’t just mere denials or a general traverse in the defence, defendant has specifically pleaded that the land Registrar did not act in contravention to the provisions of the RLA which had been pleaded by the applicant – surely to plead more than that would in fact be pleading evidence.

The case of Trust Bank Ltd v Amin and Co. Ltd. (2000) KLR pg 164 which Mr. Ole Kina referred to in fact held that:

“If a pleading is arguable or if a pleading raises even a single triable issue, the court will allow the defendant to argue it”

That is the situation prevailing here, surely from what the applicant has stated and the paragraphs referred to by the defence, would one say that the defence is completely hopeless and so weak as to be beyond redemption? In the case of D. T. Dobie v Mbaria (cited by Onyango – Otieno J in Time Magazine International Ltd and 2 others v Rotich and Another (2000) KLR pg 551), the honourable judge quoted what Madam JA said regarding striking to of pleadings.

“If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overreact by considering itself in a bind summarily to dismiss the action. A court should aim at sustaining suit rather than terminating it...”

The constant reference to erroneous documentation is in fact a confirmation of why paragraph 3 and 6 are pleaded, and the explanation for that can only be obtained by way of evidence.

All the decisions cited by Mr. Ole Kina i.e Kenya Airports Authority v Queu Insurance (2001) KLR pg 44.

Time Magazine International Ltd & 2 others v Rotich (2000) KLR

Trust Bank ltd v Another & Co. KLR (2000) pg 64 and

Francis Amani V Vanguard Electrical Services CA 152 of 1996 have in fact cited the same passage drawn from Bullen and Leak and from Madam J observation in the D T Dobie & Co. ltd v Muchina and Another Civil Appeal No. 37 of 1978 (unreported) case regarding issues to be considered when striking out.

My finding is that the defence is not so weak as to warrant being shut out without being heard regarding their constant change of mind and blame being laid on paper work.

I therefore decline to strike out the defence and subsequently the application dated 18-2-09 is dismissed. I make no orders on costs.

Delivered and dated this 9th day of July 2009 at Malindi.

H. A. Omondi

JUDGE

Mr. Ole Kina holding brief for A. F. Gross

No appearance for respondent