



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 81 OF 2016

JAMES MUGWE NDUWA.....PLAINTIFF

=VERSUS=

PATRICK MAKAU MUSYOKI.....1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 5th December 2016 and Amended on 5th January 2019 brought under certificate of 36 rule 1, 2 and 6, order 13 rule 2 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil procedure Act and all enabling provisions of the law.

2. It seeks orders:-

(1) That summary judgment and judgment on admission be entered in favour of the plaintiff against the defendants as prayed for in the plaint.

(2) That consequently, the suit be set down for formal proof and assessment of general damages and costs as prayed for in the plaint.

3. The grounds are on the face of the application and are:-

(a) The first defendant's defence lacks merit and is full of falsehoods and half truth.

(aa) The second defendant in its amended defence dated 18th September 2017 has clearly admitted that from its own records the suit property, plot no. 56 Umoja Innercore Sector III, now Title No. Nairobi/Umoja Block 83/1585 lawfully belongs to the plaintiff.

(aaa) The report from the director of criminal investigations dated 9th April 2018 confirms that the suit property is the property of the plaintiff and that the first defendant was defrauded and hoodwinked to buy the same from one who did not have any title to the property.

(b) It is quite clear from the exhibits annexed to this application that the suit premises belongs to the plaintiff having bought the same from one who had bought the said parcel of land from the original allottee.

(c) The said first defendant's defence is scandalous, frivolous, vexatious and otherwise an abuse of the process of this honourable court.

(d) The first defendant's defence is only calculated to prejudice, embarrass and delay the fair trial of this suit.

(e) The first defendant's defence is a sham and only calculated to delay the fair trial of this suit.

4. It is supported by the affidavit of James Mugwe Ndua, the plaintiff/applicant herein sworn on the 5th December 2016 and a further affidavit sworn on 24th October 2018.

5. The application is opposed. There is a replying affidavit sworn by Patrick Makau Musyoki the defendant/respondent sworn on the 10th March 2017 and a supplementary affidavit sworn on 16th November 2018.

6. There are also grounds of opposition filed by the 2nd defendant/respondent dated 12th January 2017.

7. On the 7th February 2019 the court directed that the application be canvassed by way of written submission.

8. I have considered the pleadings, the notice of motion, the affidavit in support and the annexures. I have also considered the affidavits in reply and the annexures together with the grounds of opposition. I have considered the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

9. The 1st defendant's defence is that he is the registered owner of LR NO. Nairobi/Block 83/1585. He said he bought the same from one Lilian Wanjiru Muiruri for Kshs.5,900,000/-. A certificate of title was issued to him on 18th December 2013. He claims he is an innocent purchase for value. The 2nd defendant on its part maintains its defence raises triable issues as against the plaintiff and the 1st defendant. It has not admitted the grounds of collusion and fraud alleged by the plaintiff.

10. In the case of **Mercy Karimi Njeru & Another vs Kisima Real Estate Ltd [2015] eKLR** the court held that the Honourable court is obligated to consider all the issues raised by the defence to ascertain whether on the facts, there is an admission of the claim or that there is no triable issue capable of being ventilated through a full hearing. The court referred to the Court of Appeal in **Job Kilach vs Nation Media Group & 2 Others [2015] eKLR** observed that:-

“Before the grant of summary judgment, the court must satisfy itself that there are triable issues raised by the defendant, either in his statement of defence or on the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bonafide triable issue? A bonafide triable issue is any matter raised by the defendant that would require further interrogation by the court during full trial. The Black Law Dictionary defines the term Triable as ‘subject or liable to judicial examination and trial’ it therefore does not need to be an issue that would succeed but just one that warrant further intervention by the court”.

I am guided by the above authority.

11. In the case of **Mercy Karimi vs Polly Kaari Aburili J** quoted the case of **Kenya Trade Combine Ltd vs Shah Civil Appeal No. 193 of 1999** where the Court of Appeal stated as follows:-

“In a matter of this nature all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”

I am also guided by the above authority.

12. I must point out that the defences herein raises triable issues. The defendants ought to be given a chance to give their side of the story. I am also guided by Article 50 (1) of the Constitution in stating that the defendants deserve a chance to prosecute their defences. An admission must be plain and clear, which is not the case in the instant suit.

13. In conclusion, I find that this application does not meet the threshold of grant of summary judgment. I find no merit in this application and the same is dismissed. The costs to abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd Defendant

.....Court Assistant