



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 714 OF 2017

MICHAEL WAITITU KARANU.....PLAINTIFF

VERSUS

LAWRENCE NJOROGE MBURU.....DEFENDANT

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 8th September, 2017 brought pursuant to Order 2 Rule 15 (1) (c) (d), Order 13 Rule 2 of the Civil Procedure Rules, and Section 3 & 3A of the Civil Procedure Act. It is based on the following grounds which in summary is that the Defendant and the Plaintiff acquired land parcel number NGONG/NGONG/29050 (suit land) measuring 0.05 hectares at a consideration of Kshs. 200,000, under a joint ownership and consequently a certificate of title was issued on 27th July, 2005 in both their names as registered absolute proprietors. In total disregard to the Plaintiff's input as co – owner of the suit land, the Defendant acting unilaterally by purporting to construct on the said land, despite the fact that the same had not been surveyed in their presence and mode of subdivision as well as distribution agreed upon. The Defendant has acknowledged the said facts at paragraph 3 of his Defence. The Defence constitutes a mere denial and is embarrassing as well as prejudicial to the expeditious disposal of this claim.

The application is supported by the affidavit of MICHAEL WAITITU KARANU the Plaintiff herein, where he deposes that as joint tenants with the Defendant, they are both lawfully regarded as one in so far as holding of the suit land is concerned and the joint tenancy has not been severed. Further, that he has a right to occupy the suit land as well as the Defendant. He reiterates that under the Land Registration Act, joint tenants are free to sever the tenancy which severance must be completed by registration. Further, that he has been willing to convert the joint tenancy to common tenancy and pleaded with the Defendant severally to surrender the necessary documents to enable them undertake the conversion at the Registry, but the Defendant is not cooperative as he has allocated the whole suit land to himself. He contends that he has issued several notices to the Defendant to withhold further developments on the suit land but all have fallen on deaf ears' as the Defendant is unwilling to stop the unlawful acts. Further, that the Defendant has failed to obey the court orders granted herein. He insists as per the Defence filed on 2nd August, 2017, the Defendant clearly and expressly acknowledges the said facts in his Defence. He is apprehensive the Defendant's acts over the suit land are in a bid to defeat his beneficial interest as a co-owner. He seeks the Defendant to be stopped from interfering with the suit land to safeguard his interest. He confirms that the Defendant has altered and continues to alter the physical structure as well as state of the suit land to his detriment, causing him irreparable harm. He reiterates that the Defendant's Defence is frivolous, vexatious and scandalous, it discloses no reasonable defence, comprises mere denials likely to embarrass a fair trial of this suit and ought to be struck out.

The Defendant opposed the application and filed a replying affidavit sworn by LAWRENCE NJOROGE

MBURU where he deposes that the instant application is bad in law and an abuse of the court process. He avers that in the year 2004, together with the Plaintiff, they contributed towards the purchase of the suit land where they were each to contribute equal shares of the purchase price. He claims they started the process of paying the deposit of the purchase price, but in the process the Plaintiff had difficulties contributing his share and in 2005, the Plaintiff asked him to clear the balance, which he did, and the title deed was issued in their names. He confirms they jointly own the suit land with the Plaintiff and they were issued with a title deed on 27th July, 2005. He contends that in October, 2005 he decided to construct a house on the suit land and the Plaintiff was well aware of his intentions. Further, that he got the suit land surveyed and measured by a Surveyor who demarcated the property in half, and he indeed constructed on his portion. He contends that since the suit land was undeveloped, he levelled it, built a perimeter wall around it and has used a total of Kshs. 500,000 to develop it. He insists he constructed a dwelling house for his family and they have lived thereon since 2005, which is a period of twelve years. He confirms that the Plaintiff upon buying the property left and never set foot on it but only recently resurfaced to make claims that he recently started construction on the suit land. He reaffirms that as a joint owner of the suit land, he has proprietary rights over it, which he has utilized by constructing on the property but being careful not to infringe on Plaintiff's rights. Further that the Plaintiff was well aware he was constructing on the suit land but never raised any objection and he was surprised when the Plaintiff came to court, objecting to his construction. He avers that the Defence raises triable issues and it would be unfair as well as unjust, to strike it out. Further that striking out the Defence and entering judgement shall strip him off his rights to a fair trial as enshrined in the Constitution

Both parties filed their written submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented by the Plaintiff and Defence in respect of the Notice of Motion dated 8th September 2017, I find that the following are the issues for determination:

- whether judgement should be entered on admission as against the Defendant
- whether the Defendant 's Defence discloses no reasonable cause of action and calculated to delay trial and an abuse of Court process

In the first instance as to whether the Defendant's Defence amounts to an admission, the Court notes that the Defendant has expressly admitted at paragraph 3 of the Defence that they bought the suit land jointly with the Plaintiff. He further does not dispute even in the replying affidavit that the suit land is registered in both their names. The Defendant has also admitted in his replying affidavit that he brought in a surveyor and has built on his half portion of the suit land. What is in dispute is the Plaintiff's claim that the Defendant has declined to cooperate to convert the title into tenancy in common so as to subdivide it to enable each party have their distinct portion. The Defendant further insists he has spent almost 500,000 to build a perimeter wall on the suit land and levelled it. I however note he did not furnish the Court with any documentation to prove this point.

I note in the Defence, except for paragraph 3, where the Defendant states as follows: **'The Defendant admits the contents of paragraph 3 and 4 of the Plaintiff and avers that both him and the Plaintiff bought the property LR No. NGONG/NGONG/29050 for a total consideration of Kenya Shillings Two Hundred (Kshs. 200,000/=) and a title deed was issued to that effect.'**

The Defendant thereafter denies all the Plaintiff's averments and only admits the jurisdiction of the court. While in the replying affidavit, he in turn admits the averments in the supporting affidavit which are also contained in the Plaintiff. Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 provides as follows:-

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

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

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

(d) it is an abuse of the process of the court.”

Further Order 13 Rule 2 states that: **‘Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.’**

In the case of **Mwaura Karuga Vs. Embakasi Ranching Company Ltd (2014) eKLR** where Justice Kariuki cited in approval the Case of Milimani Commercial HCC 1158/99 **Bullion Bank Limited Versus James Kinyanjui and Anor** where Justice Kasango J relied on the authority of **Cassam Versus Sachania (1982) KLR 191** which states as follows: **‘Judgement on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.’** In relying on this case and based on the facts above, I find that the Defendant’s admission in paragraph 3 of the Defence as read together with his replying affidavit is indeed an **unequivocal and clear** admission, since he has not raised any points of law requiring the court’s interpretation.

The Defendant relied on the case of **KENYA TRADE COMBINE LTD Vs. SHAH CIVIL APPEAL No. 193 of 1999** where it was decided that **‘... 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 to trial. The Defendant is at liberty to show whatever means he chooses whether by Defence, oral evidence, affidavits or otherwise that his Defence raises triable issues,’** to support his claim.

I however note that the Defendant has admitted the claim in his Defence and Replying affidavit and not raised any issue of law as relates to the ownership of the suit land.

Section 91 (6) and (7) of the Land Registration Act stipulates that:

‘(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld. (7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.’

In relying on legal provision above, I find that the Plaintiff’s request to have a half share of the suit land, a fact not denied by the Defendant is clear and legal.

Further, I note he is not denying in principle that he does not want to subdivide the suit land, and convert the title to a common tenancy, with the Plaintiff, but claims to have incurred expenses, which he has not furnished court with any proof. In the circumstances, I find the Plaintiff’s application dated the 8th September, 2017 is merited and allow it, by entering judgement against the Defendant in the following terms:

1. A declaration be and is hereby made that the Plaintiff is the co – owner of land parcel number NGONG/NGONG/ 29050
2. The Defendant be and is hereby ordered to surrender all the necessary documents to the Plaintiff and or the Land Registrar Kajiado North, to enable them convert land parcel number NGONG/NGONG/29050 into a tenancy in common for purposes of subdivision in equal shares and for each party to obtain their respective title.
3. Each party to equally contribute to the reasonable expenses of fencing the suit land.

4. Plaintiff will have the costs of the suit.

Dated signed and delivered in open court at Ngong this 15th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Nyaga for Plaintiff

Monege for Defendant