



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 737 OF 2017

KENNETH NGANGA.....PLAINTIFF

VERSUS

VERONICA NDOLO MBUVA.....DEFENDANT

RULING

The application before Court is the Plaintiff's Notice of Motion dated the 24th July, 2017 brought pursuant to Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules. It is based on the following grounds which in summary is that the statement of Defence is scandalous, frivolous as well as vexatious and may embarrass or delay the fair trial of this suit. The statement of Defence is an abuse of the court process. The Plaintiff is the registered owner of Land Parcel number KAJIADO/KAPUTIEI – NORTH/22350 having bought the same from Sidian Bank Limited. The Plaintiff/Applicant's proprietary interests over the suit property are protected under the Land Act.

The application is supported by the affidavit of KENNETH NGANGA the Plaintiff herein where he deposes that he bought the suit land through a public auction on 23rd March, 2016 which transferred the same to him after they obtained the necessary consent to transfer. He avers that after the transfer, he issued a notice to the Defendant to vacate the suit land but she has ignored the said notice. He insists the Defendant's Defence amounts to a mere denial and does not disclose an interest over the suit property. Further that the only remedy available to the Defendant is to sue Sidian Bank Limited. He is aware the Defendant has sued Sidian Bank vide Kajiado ELC Case No. 598 of 2017, seeking a permanent injunction restraining them from selling and transferring the suit land which suit has been overtaken by events.

The application is opposed by the Defendant who filed a replying affidavit sworn by VERONICA NDOLO MBUVA where she deposes that she charged her land KAJIADO/KAPUTIEI NORTH/22350 to guarantee one MICHAEL MUTISYA MUNENE. She states that vide KAJIADO ELC Case No. 598 of 2017 she sued the Chargor and Chargee prohibiting them from selling her land. She confirms that the Applicant herein is not a party to that suit. She insists she was not aware of the public auction and that she could have prevented it as the suit land is her only matrimonial home. She claims she is not defiant as claimed by the Applicant but only moved to court when she noticed strangers loitering around her land. She denies being served with any notice of default, sale or vacation of suit land. She seeks the Court's intervention to assist her recover her matrimonial home.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 24th July, 2017 including the supporting and replying affidavits as well as the annexures thereon, I find that the following are the issues for determination:

- whether the Defendant 's Defence discloses no reasonable cause of action and calculated to delay trial and an abuse of Court process
- whether the Defendant's Defence should be struck out

In the first instance as to whether the Defendant's Defence discloses no reasonable Cause of action, the Court notes that she denied all the averments in the Plaint except for the descriptive section, and admitted that the suit property is subject of contention in KAJIADO ELC CASE NO. 598 of 2017 VERONICA NDOLO MBUVA versus MICHAEL MUTISYA KAMENE and ANOTHER. Further she denies knowledge that the suit land was sold to a third party as she was not notified of the same.

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.”

In the case of **Margaret Njeri Mbugua Versus Kirk Mweya Nyaga Civil Appeal No. 110 of 2012 (2016) eKLR**, the Court of Appeal held that a mere denial is not a sufficient defence and a defendant has to show there is a good defence.

In the current scenario, the Defendant has instituted another case against third parties, which fact she admits that the Plaintiff is not a party to that suit. In her replying affidavit she insists the suit land is her matrimonial home and there is an existing law suit where she has sued for recovery⁰. I note in the instant case, the Plaintiff is the registered proprietor of the suit land having bought it at a public auction. A fact not refuted by the Defendant.

In 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 defence.

I note that the Defendant claims the suit land belongs to her and denies knowledge of sale of the same to the Plaintiff, yet she has sued the bank and the person she guaranteed the loan, in another suit vide **Kajiado ELC 598 of 2017**. I note the Defendants only defence is the existence of **Kajiado ELC 592 of 2017** which is still pending.

Section 99 of the Land Act provides as follows:

‘(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power. ‘

I note the Plaintiff purchased the suit land through an auction and got registered as its owner and is hence protected by section 99 above. The Defendant is not denying in principle that she granted the suit land to a third party to secure a loan and further that there is already a pending suit which is related to the instant suit as it concerns the same suit land.

In the circumstances, I find the Plaintiff’s application dated the 24th July, 2017 is merited and allow it as prayed.

Dated signed and delivered in open court at Kajiado this 13th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Kaberia for Plaintiff/Applicant

Kungu holding brief for Ochieng for Defendant