



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 69 OF 2016 (OS)

IN THE MATTER OF LAND TITLE NO.

LOC 5/GITHUNGURI/312

PETER KARANJA KAMANI.....PLAINTIFF

VERSUS

ISAAC MWANGI KIMANI.....DEFENDANT

JUDGMENT

1. The plaintiff herein, Peter Karanja Kamani, took up the summons dated 5th April, 2016 for determination of the following questions: -

(i) Whether a declaration should issue that the suit property (Land Parcel No. Loc. 5/Githunguri/ 312) is registered in the defendant's name to hold in trust for him?

(ii) Whether the defendant should be ordered to transfer the suit property to him and in default the Deputy Registrar of this court be empowered to sign all the transfer documents to effect the transfer of the suit property to him?

(iii) Whether the defendant should be condemned to pay the costs of the suit?

2. As can be discerned from the pleadings filed in this case, the plaintiff's case is that the defendant, who is his younger brother, holds the suit property in trust for him. According to the plaintiff, the suit property was given to him by their elder brother, Wanyoike Kimani.

3. It is the plaintiff's case that because he was living away, the defendant got registered as the proprietor of the suit property to hold on his behalf.

4. The plaintiff's avers that despite having severally requested the defendant to transfer the suit property to him, the defendant has, without any justification, refused to transfer the suit property to him.

5. In a bid to prove the foregoing averments, the plaintiff produced a search certificate, a green card and the demand notice he issued to the defendant as Pexbt 1, 2 and 3 respectively.

6. Despite the defendant having been served with summons to enter appearance, he failed to enter appearance and or file his response within the time stipulated in the summons and at all. Consequently, the plaintiff applied for and obtained interlocutory judgment against the defendant.

7. When the matter came up for formal proof, the plaintiff reiterated his contention that the suit property was registered in the name of the defendant to hold in trust for him and urged the court to grant him the orders sought in the suit.

Analysis and determination

8. Although not defended, the plaintiff's suit raises a number of legal issues which this court must address in determining whether or not to allow the suit. I find these issues to be:-

(a) Whether issuance of interlocutory judgment in favour of the plaintiff in the circumstances of this case was proper?

(b) Whether the plaintiff has made up a case for being granted the orders sought?

9. With regard to the 1st issue, under **Order 10 Rules 4, 6, 9 and 10** of the Civil Procedure Rules, interlocutory judgment cannot issue in land matters unless the claim is accompanied by a prayer for pecuniary damages or for detention of goods in which case interlocutory judgment shall be entered in respect of the prayer for liquidated damages or for detention of goods only and the other claim ordered to proceed in the normal way. In this regard see the case of Solomon Mwobobia Nkuraaru v. Jacob Mwiti (2015) eKLR where this court stated:

“The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff’s claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see Order 10 Rule 2 of the Civil Procedure Rules which provides as follows:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

Liquidated demand was explained in the case of Serraco Limited v. Attorney General (2009) eKLR thus:-

“JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendant pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”

The plaintiff’s case being for recovery of land, does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under Order 10 Rule 2.

The plaintiff ought to have proceeded under Order 10 Rule 9 which provides as follows:-

“Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

In my view it is in the proceedings contemplated under Order 10 Rule 9 where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law, if the trial court is satisfied that service was effected as by law required, it would proceed and hear the plaintiff’s case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.

In this case, for unspecified reasons, the applicant decided not to list the suit for hearing but instead brought an application seeking orders which if granted, would determine the suit without the hearing contemplated in Order 10 Rule 9 (*supra*).

Being of the view that no interlocutory judgment could issue in the circumstances of this case, I set aside the interlocutory judgment entered in this matter.”

10. As the claim herein is not for liquidated damages, I find the interlocutory judgment entered in favour of the plaintiff in this matter to have been irregular and set it aside.

11. With regard to the second issue, it behooved the plaintiff not only to plead that the defendant holds the suit property in trust for him but also to prove that indeed the defendant holds the suit property in trust for him.

12. In the circumstances of this case, the plaintiff merely alleged that the suit property was given to him by his elder brother and registered in the name of the defendant to hold in trust for him without leading any evidence capable of proving the said allegations.

13. In the case of Salesio M’ itonga v. M’ithara & 3 Others (2015) eKLR the Court of Appeal stated as follows concerning the issue of trust:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists.”

14. The evidence adduced in this case falls far short of that required to prove that the defendant holds the suit property in trust for the plaintiff. The mere fact that the suit property was registered in the name of the plaintiff's elder brother before it was transferred to the defendant and the demand notices issued by the plaintiff cannot reasonably be said to be proof of the alleged trust against the defendant.

15. The upshot of the foregoing is that the plaintiff has not made up a case for being granted the orders sought.

Consequently, the suit is dismissed with no order as to costs as it was undefended.

Dated, Signed and Delivered in open court at Nyeri this 19th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Karingithi h/b for Mr. Muchoki for the plaintiff

N/A for the defendant

Court assistant - Esther