



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1318 OF 2015

KINYUA MUREITHI.....PLAINTIFF/APPLICANT

=VERSUS=

DAVID CURURU WANGUNYU.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 11th May 2016. It is brought under Section 19(1)(2) and 13 (7) (h) of the Environment and Land Court Act, 2011 Order 2 Rule 15(i) b, c and d of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders:-

- (1) That the statement of defence filed on 22nd February 2016 be struck out.***
- (2) That judgment be entered for the plaintiff/applicant as prayed in the plaint.***
- (3) Costs of this application be paid by the defendant/respondent.***

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

- (i) The defence filed is frivolous, vexatious and a sham.***
- (ii) The defence filed serves no useful purpose and will prejudice and delay the fair and expeditious determination of action.***
- (iii) The defence filed is an abuse of the court process.***
- (iv) It is in the interest of justice that the orders sought be granted.***

4. The application is supported by the affidavit of Kinyua Mureithi, the plaintiff and applicant sworn on the 11th May 2016.

5. The application is opposed. There is a replying affidavit by David Cururu Wangunyuu, the defendant/respondent sworn on the 29th August 2016.

6. On the 8th September 2016 the court directed that the application be disposed of by way of written submissions.

The Plaintiff's/Applicant's submissions

7. The plaintiff and defendant being tenant in common entered into a written memorandum of understanding dated 9th May 2000. The plaintiff was to compensate the defendant for the difference of the area measuring 0.0064 Hectares or thereabouts for the sum of Kshs 65,000/- which amount was to be held by M/s Kabiro, Ndaiga & Co. Advocates as stakeholders pending the survey and amalgamation of the easement in LR NO 13460/41.

8. The parties herein were in consensus that an easement in favour of LR NO 13640/41 would be created to serve LR NO 13640/43. A sum of Kshs 100,000/- was paid for use of the easement and a deed of easement was executed though the easement was not registered as against the title. The defendant/respondent is estopped by the doctrine of estoppel from denying knowledge of the easement over LR no 13460/41 as

he was an active participant and beneficiary to the creation of the same. They have relied on the cases of **Eco Bank (K) Ltd vs Bobbin Ltd & 2 Others HCCC NO 606 of 2012, Peeraj General Trading & Contracting Company Ltd & Another vs Mumias Sugar Company Ltd and Muguna General Stores vs Pepeo Distribution Ltd [1987] KLR 150.**

The Defendant/Respondent's Submissions

9. The defendant/respondent purchased the property known as LR NO. 13460/41 from Sarah Njambi Kahahu in the year 1996 independently from the plaintiff. No easement in favour of the plaintiff has been registered against the title. The defendant/respondent disputes the memorandum of understanding dated 9th May 2000. The deed of partition dated 5th February 2002 does not mention the creation of an easement over LR NO 13460/41 to serve LR NO 13460/61 and 13460/62. The undated Deed of Easement from Sarah Njambi Kahahu to Anne Wairimu Wanjiku is between people who are not parties to this suit. The defendant/respondent urges that the matter goes to full trial.

10. He relies in the cases of **Kenindia Assurance Company Ltd vs Commercial Bank of Africa & 2 Others [2006] 2 KLR 280** and **Transcend Media Group Ltd vs IEBC [2015] e KLR**. He prays that the application be dismissed with costs.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether the defendant's defence ought to be struck out.

(ii) Whether judgment should be entered in favour of the plaintiff.

12. The substantive law governing striking out of pleadings is found in the provisions of Order 2 rule 15 of the Civil Procedure rules. Sub rule (1) provides that:

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

(a) it discloses no reasonable cause of action or defence in law; or

(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 otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

13. I have gone through the statement of defence dated 18th February 2016.

Paragraph 6 provides that:

“Paragraph 6 and 7 of the plaint are categorically denied and the defendant avers that it is the plaintiff's tenants on Land Reference Number 13460/61 who created the said access route over the defendant Land Reference Number 13460/41 in order to avoid using the designated access to Land Reference Number 13460/61 which has been invaded by squatters who have built as slum thereon”.

Paragraph 7 provides that:-

“The defendant denies the contents of paragraph 9, 10 and 11 of the plaint in so far as they relate to existence of an easement/right of way and reiterates that there is no easement/right of way over her property being Land Reference Number 13460/41 that is capable of being registered”.

14. It is the defendant's main contention that no easement in favour of the plaintiff has been registered against the title. The above paragraphs of the statement of defence in my view, raise triable issues.

The Court of Appeal in the case of **DT Dobie & Company (Kenya) Limited vs Muchina [1982] KLR** enunciated the principles applicable in considering whether or not to strike out pleadings. The Court of Appeal in the above case was categorical, Madan JA (as he then was) adopting the finding of Seller L. J in **Wenlock v Moloney [1965] 1 WLR 1238** where the learned judge had this to say:

“This summary of jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power”.

15. I am guided by the above authority in finding that the defendant ought to be given an opportunity to prosecute his defence.

16. I am also guided by the case of **Kenindia Assurance Company Limited vs Commercial Bank of Africa Limited and 2 Others [2006] 2 KLR 250** where the court held that summary judgment was a procedure to be resorted to in the clearest of cases and that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions. Further, that a defence which raised triable issues did not mean a defence which must succeed.

17. I also agree with counsel for the defendant/respondent that the authorities cited by the plaintiff/applicant are distinguishable from the facts of this case, as they relate to claim for liquidated sum of money and there were clear admissions from the defendants that they had entered into credit arrangements with the plaintiffs.

18. The upshot of the matter is that I find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 8TH day of NOVEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant