



Fazal v Horus Limited & 6 others (Environment & Land Case 220 of 2013) [2017] KEELC 3872 (KLR) (15 November 2017) (Ruling)

Mohamed Salim Fazal v Horus Limited & 6 others [2017] eKLR

Neutral citation: [2017] KEELC 3872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 220 OF 2013**

JO OLOLA, J

NOVEMBER 15, 2017

BETWEEN

MOHAMED SALIM FAZAL PLAINTIFF

AND

HORUS LIMITED 1ST DEFENDANT

AHMED SHARIFF 2ND DEFENDANT

ZAINABU M SHARIFF 3RD DEFENDANT

SETTLEMENT FUND TRUSTEES 4TH DEFENDANT

THE CHIEF LAND REGISTRAR 5TH DEFENDANT

THE REGISTRAR OF TITLES KILIFI 6TH DEFENDANT

THE ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. On 4th December 2013, the Plaintiff filed a suit against the 1st Defendant and 6 Others seeking a number of declarations and Orders. It is the Plaintiff's case that on or about 3rd August 1979, he was registered as the Owner of all that parcel of land known as Kilifi/Jimba/399 as a result whereof he became the absolute and indefeasible owner and proprietor of the said parcel of land. Consequently on or about 25th November 1982, he used the title deed issued to him to secure a loan of Kshs 150,000/= from Kenya Commercial Bank Ltd.
2. It is further the Plaintiff's case that on or about 30th October 2012, he visited his parcel of land in Jimba and discovered to his shock and dismay that somebody else had taken possession of the land and had began developments therein. When he conducted a search at the Kilifi County Lands Registry



he discovered that on an unknown date the records in the Green Card had been cancelled by the 6th Defendant herein and a new one was created on or about 22nd August 1986 showing the Government of Kenya as the proprietor of the land. The records further revealed that on or about 9th August 2000, the Settlement Fund Trustees (the 4th Defendant) transferred the land to one Ahmed Shariff Sheikh (2nd Defendant) and Zainabu M. Shariff (3rd Defendant) for Kshs 8,950/= Subsequently on 30th April 2002, for an unknown consideration, the 2nd and 3rd Defendants transferred the suitland to Horus Ltd (the 1st Defendant) who is currently in possession and occupation of the land.

3. The Plaintiff maintains that the acquisition of the suit property by the Government and the subsequent transfer of the same to various parties as aforementioned was illegal, fraudulent and wrongful and hence necessitating the suit and declarations and orders sought herein.
4. Having failed to trace the 1st, 2nd and 3rd Defendants for purposes of Service of Summons, the Plaintiff filed an application in Court on 10th April 2014 seeking the grant of leave to enable him serve the summons and pleadings by way of Substituted Service. The orders were granted on 27th May 2014 and subsequently on 25th June 2014, the Defendants were served through an advertisement carried in both the Daily Nation and the Standard Newspapers. The said advert required the parties served to enter appearance within 21 days of the advert.
5. On or about 28th October 2014, the 1st Defendant filed a Memorandum of Appearance through Messrs Kiarie Kariuki & Co. Advocates. Later on 17th February 2015, another firm of Advocates, Messrs Omondi Waweru & Company filed a Notice of Appointment of Advocate to act for the 1st Defendant.
6. A year later on or about 15th April 2016, the said firm of Omondi Waweru & Company filed a Preliminary Objection to the suit stating as follows:-

That this Court lacks jurisdiction to entertain this claim on merit for the reasons that:

- (a) The claim herein is time barred pursuant to the *Limitation of Actions Act* the same having been lodged way after the prescribed limited time, yet leave of Court was neither sought nor obtained prior to the filing of the same.
 - (b) Consequently the claim herein is incurably defective.
7. On the same day 15th April 2016 the 1st Defendant filed a Defence denying knowledge of most of the averments made in the Plaint and stating in response that it was the sole proprietor of the parcel of land in dispute to which they said they were validly issued with a title deed on 30th April 2002. The said Statement of Defence filed a year after appearance on 20th April 2016 deemed by the Court to have been filed within time. The Defendants were then granted 30 days within which to file their List of Documents and Witness Statements. On the same date the Court set the matter for hearing on 27th July 2016.
 8. It would appear that on the date set for hearing, the Court did not sit and instead the Plaintiffs Advocates moved to the Court Registry on the same day and fixed the matter for hearing on 15th November 2016. Notice of this hearing date was subsequently served on the 1st Defendants' Advocates on 15th August 2016.
 9. On 15th November 2016, when the matter came up for hearing, the 1st Defendant had neither filed a List of Documents nor Witness Statements. Their counsel informed the Court that the 1st defendant's Directors resided abroad and sought an adjournment to be allowed to comply. The Honourable Justice Angote then seized of the matter disallowed the application and proceeded to hear the case after which



both the Plaintiff's case and that of the Defendants were closed and the Parties were ordered to file written submissions within 14 days pending a mention on 6th February 2017.

10. On 2nd February 2017, the 1st Defendant moved to Court under Certificate of Urgency and filed the present application seeking the following Orders:-
 1. That the application be certified as urgent and service thereof be dispensed within the first instance.
 2. That the Honourable Court be pleased to review its Orders made on 15th November 2016
 3. That the Honourable Court be pleased to grant the 1st Defendant leave to re-open his case for purposes of adducing evidence and producing documents which shall assist the Court in coming up with a fair and just decision.
11. In addition, the 1st Defendant filed a Chamber Summons application also dated 2nd February 2017 seeking the following Orders:-
 1. That the 1st Defendant do serve a Third party Notice on the Attorney General, the 7th Defendant.
 2. That the costs of the application be provided.
12. The Plaintiff is opposed to the two applications. In Grounds of Opposition filed to the two applications on 24th April 2017, the Plaintiff states, inter alia:
 - (a) That the Notice of Motion is an afterthought and is brought after a long unexplained delay hence caught up by indolence and laches and equity cannot aid the 1st Defendant in the circumstances.
 - (b) That the application is a delaying tactic all along employed by the Defendants throughout these proceedings in an attempt to frustrate and delay the expeditious hearing of the suit.
 - (c) That the Applicant has not met the crucial parameters upon which this Court must or usually exercises its review jurisdiction.
13. I have considered both the applications and the grounds of opposition thereto. I have equally given keen consideration to the history of this suit as borne from the record and stated in the background hereto. Essentially, what the applicant is seeking from this Court is an Order setting aside the decision of the Honourable Angote J made on 15th November 2016 in which the Learned Judge declined to allow a further adjournment of the case to enable the Applicant to file their Witness Statements and/or documents.
14. The decision whether or not to set aside such an order is a matter of the discretion of the Court. There is ample authority to show that the exercise of such discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error (see for instance Patel –vs- EA Cargo Handling Service Ltd, (1974) EA 75). The exercise of such discretion is not designed to assist a person who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah –vs- Mbogo (1968) EALR 13). In a case like this, the nature of the action and the reason for failure to comply with the Court's Orders or discretions must be considered.
15. The suit herein was, as we have seen, filed in December 2013. The Summons to Enter Appearance were served upon the Defendants by way of an Advertisement carried out in two newspapers with a national circulation on 25th June 2014. Despite the fact that the said notice required the Defendants to enter appearance within 21 days of the advertisement, it was not until 28th October 2014 that the 1st



- Defendant filed a Memorandum of Appearance. Thereafter it took another 1 year, 6 months before the 1st Defendant filed its Statement of Defence on 15th April 2016. By then the Plaintiff had requested for Judgment and tried to set the suit down for formal proof a number of times.
16. Despite the enormous delay in filing the same on 20th April 2016, when the matter came up for formal proof before the Honourable Justice Angote, the 1st Defendant's Statement of Defence was deemed to have been duly filed and the 1st Defendant was at their own request granted 30 days within which to file their Witness Statements and the List of Documents if any that they intended to rely on. No such Statements and/or List of Documents were however filed even after the matter subsequently came up for hearing on 27th July 2016. These must be the facts that weighed in on the Learned Judge's mind when on 15th November 2016 he declined to grant a further request for adjournment by the 1st Defendant ostensibly to allow them comply with the earlier Orders.
 17. From the foregoing, the conduct of the 1st Defendant throughout the proceedings do not depict a party that is desirous to have this matter heard and concluded. Indeed it is curious that on all the previous occasions, the 1st Defendant always sought an adjournment on the basis that the 1st Defendant's Directors resided abroad and have not been able to come into the country to execute appropriate documents. I take note that the Notice of Motion before me has attached to it a document titled the "1st Defendants Witness Statement". That Statement is signed by one Chula Kahindi Koi who describes himself as a resident of Watamu. From a reading of the said document, it is clear that the author is not a director of the 1st Defendant. No reference is made whatsoever as to his position or source of authority to make the Statement on behalf of the 1st Defendant. Strangely, there is no scintilla of evidence to show that the said Chula Kahindi Koi was abroad and/or that himself or any other director of the 1st Defendant was prevented from preparing the document earlier by one reason or the other in order to justify the present application by the 1st Defendant.
 18. The only conclusion one is left with after reading the two applications filed by the 1st Defendant herein is that it is bent on delaying and frustrating the finalization of this case at whatever cost. I find no merit in the application to review and/or set aside the Orders granted herein. The same is accordingly dismissed with costs.
 19. In view of the fact that the Learned Judge who heard the matter to its conclusion has since moved to the ELC in Machakos, the Deputy Registrar is hereby directed to remit this file to the Honourable Justice Angote in Machakos for preparation of Judgment and/or further directions.
 20. The Judgment shall be delivered on notice in any event.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2017

J.O. OLOLA

JUDGE

