



REPUBLIC OF KENYA

IN THE ENIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 39 OF 2015

**DINAH JEKEMBOI BARTILOL :.....1ST
PLAINTIFF**

**JAPHETH KIPROTICH BARTILOL :..... 2ND
PLAINTIFF**

VERSUS

**MARTIN S. NGOMAT :.....
DEFENDANT**

RULING:

1. The Plaintiffs/Applicants filed a notice of motion dated 13.7.2015 in which they sought the following prayers:-

- (1) That the application be certified urgent and the same be fixed for hearing on priority basis.
- (2) That the defendant/Respondent be restrained by himself, his agents or workers howsoever from tilling or ploughing or in any way interfering with or purporting to retake any part of land known as Plot No.5 Ndalala scheme and that he be ordered to fort with remove the men he stationed on the farm on 8.7.2015 to intimidate and threaten the plaintiffs, their agents or workers on the farm with grievous harm.
- (3) That the defendant's defence filed on 29.4.2015 be struck out
- (4) That the defendant's counterclaim filed on 29.4.2015 be struck,out.
- (5) That the judgment be entered against the defendant for rescission of the agreement of sale of land dated 27.12.2005.
- (6) That judgement be entered against the defendant to pay mesne profits on 75 acres of land at the rate of Kshs.10,000/= per acre per year from the 11.1.2006 upto 31.12.2014.
- (7) That judgment be entered against the defendant for eviction of the defendant from plot No.5 Ndalala Scheme.
- (8) That the defendant be ordered to pay interest on the sum found due and payable by him at court rates as per section 26 of the Civil Procedure Act.

(9) Costs of the suit and the application.

2. The application is brought under the provisions of order 36 rule 1(b), 10 rule 3 and section 63(c) of the Civil Procedure Act. The applicants contend that the respondent filed a defence and counter-claim to the applicants claim on 29.4.2015 but did not serve the same upon their lawyer as required under the Civil Procedure rules. The applicants also contend that the respondent's defence and counter-claim are an abuse of the process court and is sub-judice Kitale ELC 37 OF 2015 which is between the same parties. That the defendant has no defence on merits.

3. The applicants further contend that the respondent's rights were terminated by notice dated 27.8.2014 and that the respondent is in breach of the sale agreement of 27.12.2005 which is no longer binding to the parties and further that the respondent's reliance on the agreement of 7.3.2015 is incompetent and cannot confer any rights upon him.

4. The applicants further contend that the respondent is seeking to re-enter the suit land, having been disposed of the same in January 2015 and the suit-land having been leased out to a third party. The applicants argue that the respondent's acts are likely to cause a breach of the peace. The applicant further argue that the suit land is subject of a succession cause in Eldoret being Eldoret High Court succession cause No.17 of 2001 which is pending confirmation.

5. The applicants application is opposed by the respondent based on a replying affidavit sworn on 27.10.2015. The respondent contends that the applicants application is frivolous, malicious and incompetent. He argues that he filed a defence and counter- claim only that the same was not served and therefore the applicants cannot invoke the provisions of order 36 rule 1 (b) of the civil Procedure rules.

6. The respondent argues that he should be granted an opportunity to be heard and that court should invoke Article 159 of the constitution and section 1A of the Civil Procedure Act to save the defence and counter-claim as there will be no prejudice suffered by the applicants.

7. The respondent depones that though he did not pay the entire purchase price an agreement was later reached in which he agreed to take 25 acres instead of the 50 acres he had wanted to purchase. He states that he is not willing to take more than 25 acres and that he has floated a proposal to that effect only that the applicants are the ones who have become evasive.

8. I have carefully considered the applicants application, the opposition to the same by the respondent as well as submissions by counsel for the parties. There a number of issues to be determined. The first one is whether the court should strike out the respondent's defence and counter-claim. Order 10 Rule (3) provides that where a party fails to serve a memorandum of appearance and defence as required, the court may on its own motion or on application by the plaintiff strike out the memorandum of appearance or defence as the case may be and make such order as it deems fit in the circumstances.

9. In the instant case, there was service of memorandum of appearance but there was no service of defence and counter-claim. The wordings of order 10 Rule (3) are not couched in mandatory terms. The court is left with discretion whether to strike out the defence and counter-claim or not. In the circumstances of this case, I will not strike out the defence and counter-claim. The respondent had been represented by the firm of Ngeywa & Co. Advocates who filed defence and counter-claim. The said law firm was replaced by the firm of Barongo Ombasa & Co. Advocates. This perhaps explains why the defence and counter-claim were not served. In any case Article 159 of the constitution enjoins courts to dispense justice without undue regard to Procedural/Technicalities.

10. A second issue to be determined is whether a party can apply for summary judgement under order 36 Rule 1 (b) where a defence has been filed. Order 36 Rule 1 (1) provides as follows:-

“In all suits where a plaintiff seeks judgment for:-

(a)

(b) The recovery of land with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quite or been forfeited for non-payment of rent or for breach of a covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits”

11. It is clear from the above section that the plaintiff can only apply for summary judgement where the defendant has entered appearance but has failed to file defence. In the instant case, the respondent had entered appearance and filed defence. The applicants cannot therefore move under Order 36 Rule 1(b). It therefore follows that the prayer for mesne profits is misconceived. The same case applies with the prayer for interest.

12. The third and last issue for determination is whether the respondent's defence should be struck out. A look at the defence of the respondent shows that it raises serious triable issues. A defence can only be struck out if it is demonstrated that it is so hopeless and that even no amendment can breath any life into it. In the instant case, there is evidence that the respondent entered into a sale agreement on 27.12.2005. He was put in possession. Though he did not complete paying the amount, he later opted to take less acreage than he had wanted to buy. Whether that agreement is binding or not cannot be decided at this stage. I therefore decline to strike out the defence.

13.. All in all, I find that the applicants application lacks merit. The same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 21st day of January,2016.

E. O. OBAGA

JUDGE.

In the presence of Mr. Analo for Mr. Kraido for applicants and Mr. Ollara for Mr. Barongo for the respondent.

Court Assistant - Isabellah.

E. O. OBAGA

JUDGE.