REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 84 OF 2011

MARY CHELANGAT TOGOM……..……PLAINTIFF

VERSUS

DAVID K. SOI ……....…..…….DEFENDANT

RULING

(Application for summary judgment; plaintiff having title to land; however defendant also claiming the same land and asserting that it was allocated to him; this not a suitable case for summary judgment; defendant entitled to have his claim over the land tried; application dismissed)

1. The application before me is that dated 23 January 2013. It is an application by the plaintiff brought pursuant to the provisions inter alia of Order 36 Rule 1(1) (b) of the Civil Procedure Rules, 2010. It seeks that summary judgment be entered against the defendant as prayed in the plaint. The application is opposed and I think that it is necessary that I give a little background to this suit.

2. This suit was commenced by way of plaint that was filed on 11 April 2011. The plaintiff has pleaded that she is the rightful owner of the land parcel Nakuru/Tinet Sotik Settlement Scheme/925 and has a title issued on 15 November 2006. It is pleaded that on or about 28 March 2011, the defendant without any justifiable cause, invaded the plaintiff's land, built a temporary structure, and began cultivating it. It is pleaded that the plaintiff purchased the land from one Erastus Maina and that the defendant has never owned it. In the suit, the plaintiff has sought for orders of permanent injunction to restrain the defendant from the suit land together with mesne profits and costs. On the same day that the plaint was filed, an Amendment was done to it to include a prayer for an interlocutory injunction pending hearing and determination of the suit. An application for interlocutory injunction was filed alongside this amended plaint.

3. On 4 May 2011, the the law firm of M/s Konosi & Company Advocates filed a Notice of Appointment of Advocates for the defendant. The defendant also filed a replying affidavit to the application for injunction and a notice of preliminary objection. In the replying affidavit he averred that he is a member of the Ogiek clan and has been staying on the suit land for over 40 years. He stated that in the year 2007, the Government began allocating land to the Ogiek community and he was allocated the suit property. He stated that when the Government was allocating land to the Ogiek, it considered where the person had settled. He annexed photographs of his developments on the land. He revealed that in the year 2007 he filed before the Land Disputes Tribunal a land case No. 152 of 2007. The Tribunal ruled in his favour but the plaintiff filed an appeal before the Appeals Committee which set aside the decision of the Tribunal. In the same year, 2007, the plaintiff filed a suit being Nakuru HCCC No. 125 of 2007 which case the defendant stated is still pending hearing. He annexed the pleadings of the said case. He contended that to

his knowledge, Erastus Maina is not a member of the Ogiek and never resided in the suit land and he could not have been allocated the suit land. He opined that this case is an abuse of the court process and should be stayed pending hearing of the case Nakuru HCCC No. 125 of 2007. In the preliminary objection, the defendant raised the issue that this suit is similar to Nakuru HCCC No. 125 of 2007 and should be stayed following the provisions of Section 6 of the Civil Procedure Act.

4. The application for injunction was not prosecuted. However, on 2 November 2011, the plaintiff filed an application dated 12 October 2011, inter alia under the provisions of Order 36 Rule 1, seeking that summary judgment be entered as against the defendant. That application was dismissed on the preliminary point that there was no evidence that summons had been served upon the defendant.

5. It is apparent that in this application, the plaintiff wishes to have a second bite at the cherry and give a second try on the application for summary judgment. I will entertain it since the first application was not considered on merits. While this application was pending, the defendant filed a Statement of Defence and Counterclaim. I do not think that it was proper for these documents to have been filed as there was already a pending application for summary judgment, but be as it may, the plaintiff did file a reply to defence and defence to counterclaim.

6. Together with the defence, the defendant also filed a replying affidavit to this application for summary judgment. He reiterated his assertion that he was allocated the suit property and that he is the rightful owner of it. He inter alia annexed what he deemed to be a letter of allocation of the suit land.

7. I have considered the matter and the submissions of Mr. Matiri for the applicant and Mr. Konosi for the respondent. I have already pointed out that it was not proper for the defendant to file a defence while an application for summary judgment was pending. What he ought to have done was to show cause that he is entitled to defend the case.

8. I observe that this application for summary judgment is premised on the contention that the plaintiff is the registered owner of the suit property and that the defendant has no justifiable cause to claim the same. I note that the defendant asserts that the suit land was actually allocated to him and he is the person who is entitled to be issued with title to it.

9. In my view, there is case to be tried as to whether the plaintiff's title is a good title which should be protected or whether the defendant is the person who is entitled to the suit land. I am not of the opinion that this is a suitable case for summary judgment. Summary judgment should only be entered in the clearest of cases and where it is discernible that the defendant has no defence or no claim over the subject matter of the case. In our circumstances, the defendant does have a claim over the suit property and he deserves to have that claim ventilated. He indeed in the earlier suit, Nakuru HCCC No. 125 of 2007, filed a defence and it will be harsh not to allow him to defend this cause yet the previous suit was defended.

10. I will therefore allow the defendant to defend this case. The defence and counterclaim have already been filed. Although I think they were improperly filed, instead of striking the same out, in my discretion, I admit them and order that they be deemed to have been properly filed. The parties will therefore litigate on the basis of the plaint, defence and counterclaim, and the reply to defence and defence to counterclaim which are on record.

11. The result is that this application is dismissed. I am not of the view that it was merited in the first place, given that the plaintiff had an earlier suit where the defendant had filed a defence. The defendant shall therefore have the costs of this application.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Ndungu present for the plaintiff/applicant

Ms. Chepngetich present for the defendant/respondent

C/Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU