



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 16 OF 2014

MATHIAS DABASA.....PLAINTIFF

=VERSUS=

FRANCIS CHEGE.....DEFENDANT

R U L I N G

Introduction:

1. What is before me is the Application by the Plaintiff dated 2nd July 2014 seeking for the following orders:

(a) That the Defendant's/Respondent's defence be struck out as it does not disclose any reasonable defence and or

That, a mandatory injunction be issued against the Defendant, his agents, servants or any person whatsoever from interfering with piece of land LAMU/LAKE/KENYATTA 11/397 pending the hearing and determination of the suit or further orders of the court.

(b) That, the Defendant/Respondent be restrained by the Order of temporary injunction from entering, tilling, cultivating or in any other manner whatsoever setting foot on the parcel of land known as LAMU/LAKE KENYATTA 11/379 pending the hearing and determination of the suit/Application or further orders of this court.

(c) That, the court do make such incidental and or ancillary relief(s) it deems fit in the circumstances.

The Plaintiff's/Applicant's case:

2. According to the Plaintiff's affidavit, he was allocated plot number Lake Kenyatta 11/379 on 31st January, 1997 by the Settlement Fund Trustees and paid for the same. He was then issued with a Title Deed on 28th August, 2006.
3. The Plaintiff has deponed that when he visited the suit property in the year 2007, he found someone on the land who told him that he was there at the behest of the Defendant.
4. According to the Plaintiff, he does not know one Husuni Alawi Mohamed who purportedly sold

the suit property to the Defendant.

The Defendant's/Respondent's case:

5. In his reply, the Defendant deponed that the Plaintiff has never occupied the suit property; that he has cultivated and developed the suit property; that the Plaintiff entered into an agreement with one Husuni Alawi Mohamed who eventually allowed him on the land and that in any event he is the one in occupation of the land.

Submissions:

6. The Plaintiff's advocate submitted that the Defendant's defence is merely interposed and is a sham considering that the alleged agreement was not signed and witnessed as required by the law and that the land in question was government land and no period of time can therefore run against the government.
7. Counsel submitted that the Defendant has not applied to enjoin one Husuni Alawi Mohamed as a third party but has instead included him in his list of witnesses. This, it was submitted, is a tactic calculated to delay and abuse the court process.
8. The Defendant's advocate submitted that although the Plaintiff is seeking to have the Defence struck out, there is no prayer for striking out of the Counter claim; that the Defence and Counterclaim is not a sham and that the Defendant entered the land in the year 2003 before issuance of the Title Deed and with the consent and knowledge of the Plaintiff upon the Plaintiff surrendering the same to Husuni Alawi Mohamed who was indebted to the Defendant.
9. The Defendant's counsel finally submitted that in the Counterclaim, the Defendant is asserting his rights as the owner of the suit property and that there is no provision in the Civil Procedure Rules that allows for the striking out of pleadings.
10. On the issue of whether a mandatory or temporary prohibitory injunction should issue, counsel submitted that the Plaintiff has never been in possession of the suit property at all having surrendered the same to the Defendant; that the Defendant has developed the land and that the purpose of an injunction is to preserve the status quo pending the hearing of the suit.

Analysis and findings:

11. The issue for determination in the current Application is whether this court can strike out a Defence on the ground that it does not disclose any reasonable defence and in the alternative whether a mandatory or prohibitory injunction can issue.
12. Order 2 Rule 15(1) of the Civil Procedure Rules provides that at any stage, the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law.
13. Where a party files an Application to have the suit or defence struck out on the ground that the suit or defence does not disclose a cause of action or defence in law, he cannot rely on affidavit evidence. (see order 2 Rule 15(2) of the Civil Procedure Rules). The court is only supposed to look at the Plaintiff and the Defence in determining such an Application.
14. The Plaintiff has annexed on his Affidavit documents to show that he is the registered proprietor of the suit property. The documents annexed on the said Affidavit include the letter of allotment, the charge, the discharge and the Title Deed.
15. The Plaintiff's claim cannot succeed unless the court peruses the said documents with a view of determining whether the Plaintiff's legal rights over the suit property supercedes the Defendant's possessory rights over the same property.
16. Consequently, having premised the Application solely on the ground that the Defendant's Defence does not disclose a reasonable Defence, the Application cannot succeed because the court will have to peruse the evidence on record to establish if indeed the Plaintiff is entitled to the said orders. Such examination will be contrary to the express provisions of Order 2 Rule 15(2) of the Civil Procedure Rules.
17. In any event, the Plaintiff is only seeking to strike out the Defence and not the Counterclaim.
18. In the Counterclaim, the Defendant is seeking for a declaration that the Plaintiff having

- relinquished all his rights and property in the suit property, and having transferred the same to the Defendant in the year 2003, the issuance of the Title Deed to the Plaintiff renders the Plaintiff a constructive trustee for the Defendant and that the Plaintiff holds the said title in trust for the Defendant. This in my view is a triable issue that can only be determined by the court after trial.
19. The Counterclaim in this matter cannot be separated from the Defence because it is dealing with the same transaction. The failure by the Plaintiff to pray for the striking out of the Counterclaim is therefore fatal to the Plaintiff's Application.
 20. In view of the fact that the Defendant has alleged that he was allowed on the land in the year 2003 by one Husuni Alawi Husuni Mohamed, who will be called as a witness to explain how he came into possession of the suit property, I find and hold that the Defence raises triable issues and the same cannot be said to be a sham.
 21. On the issue of whether the order of Mandatory or Prohibitory injunction should issue, I find and hold that the two prayers cannot be granted because the Defendant has been in occupation of the suit property since the year 2003 as claimed by him, or since the year 2007 as claimed by the Plaintiff in his Plaint.
 22. A mandatory injunction can only issue at an interlocutory stage in special circumstances and only in clear cases where the court thinks that the matter should be decided at once (**See Locabal International Finance Ltd Vs Agro Export & Others (1986) I ALL & R.901.**)
 23. This is not a clear case. As I have already stated, the Plaintiff will have to prove how he acquired the suit property and why he never took possession of the same upon being granted the letter of allotment.
 24. In view of the fact that the Plaintiff has admitted that the Defendant has been in occupation of the land since the year 2007, and considering that the court will decide at trial who between the two has a better title over the suit property, the prayer for a prohibitory injunction at this stage cannot issue. The balance of convenience is in any event in favour of the Defendant.
 25. For those reasons, I dismiss the Plaintiff's Application dated 2nd July 2014 with costs.

Dated and delivered in Malindi this 15th day of **May**, 2015.

O. A. Angote

Judge