



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA
AT KERICHO
CIVIL SUIT NO.63 OF 2012

ELIZABETH TORONGEI.....1ST PLAINTIFF
JONAH KIMUTAI SOI.....2ND PLAINTIFF
JOSEPH KIPNGENO SOI.....3RD PLAINTIFF
PHILIP KIPKURUI SOI.....4TH PLAINTIFF
SAMUEL CHERUIYOT SOI.....5TH PLAINTIFF
JONATHAN KIPROP SOI.....6TH PLAINTIFF

VERSUS

DAVID KIPNGETICH SOI.....DEFENDANT

R U L I N G

(Application for summary judgment; when such application can be entertained; plaintiffs having amended their original plaint; whether necessary for defendant to amend his defence; whether in absence of amendment, the defence ought to be struck out; not necessary to amend defence due to amendment of plaint; summary judgment can only be entered where there is no defence on record; application dismissed)

The application before me is that dated 18th August, 2014 filed by the plaintiffs. It is an application said to be brought under the provisions of **Order 34 Rules 1 and 2** of the **Civil Procedure Rules**. The application seeks the following orders :-

- 1. That the defendant's statement of defence be struck out and summary judgment be entered in favour of the plaintiffs/applicants as prayed in the amended plaint.*
- 2. That such other and/or other necessary directions be given by this honourable court to meet the ends of justice.*
- 3. That the defendant/respondent be ordered to meet the costs of this application and the costs of the main suit.*

The application is based on the following grounds.

(a) That the defendant was granted leave to file and serve an amended defence but he has deliberately failed to file an amended defence to the amended plaint.

(b) The defendant's / respondent's defence is designed to delay and/or deny the plaintiffs their rightful inheritance.

(c) The defence on record is an abuse of the process of the court and is calculated to delay the fair and expedient conclusion of the matter.

(d) Legally the chief's letter cannot be used to defeat title of a person who has been registered as the proprietor of land.

(e) The defence on record is frivolous, vexatious and scandalous; that it is entirely made up of generalized statements that amount to mere denials.

(f) It is a sham and raises no triable issues at all.

The application is opposed, but before I go to the gist of the objections, I think it is important that I lay the background of this suit.

The first plaintiff is mother to the 2nd to 6th plaintiffs and also mother to the defendant. She is wife of one Kipsoi arap Torongei (deceased) who died in the year 1989. It is pleaded that Kipsoi was the first registered proprietor of the land parcel Kericho/Kipsonoi/63 (the suit land). It is averred that in the year 1994, the defendant fraudulently caused the suit land to be registered in his name. Inter alia, it is stated that the defendant registered the suit land into his name without first obtaining a grant of letters of administration and without disclosing the interest of the plaintiffs. It is averred that his registration is meant to deny the plaintiffs their inheritance. In the suit, the plaintiffs want the defendant's title cancelled.

The defendant entered appearance and filed defence. It is a defence of utmost brevity in which he has basically denied the contents of the plaint.

Through an application dated 17 December 2013, the plaintiff sought to amend their plaint. Not much changed from the original pleadings, the only significant matter being that the 1st plaintiff is now deceased. The plaintiffs also sought orders to have the title deed revert to the name of Kipsoi arap Torongei. The defendant did not file an amended defence to the amended plaint.

In his replying affidavit, the defendant has inter alia averred that his registration as proprietor was consensual and that none of the plaintiffs save for the 6th defendant has disowned the transfer. He has also raised issue that the supporting affidavit to the application, which has been sworn by the 6th plaintiff, has been sworn without the authority of the other plaintiffs and he annexed two affidavits sworn by the 2nd and 5th plaintiffs disowning the suit.

I have considered the matter alongside the submissions of Mr. Matwere for the plaintiffs and Mr. Miruka for the defendant. Mr. Matwere argued that it is clear that the defendant's title was procured illegally and ought to be cancelled pursuant to the provisions of Section 26 of the Land Registration Act, 2012. Mr. Miruka on the other hand inter alia submitted that the defendant has a defence on record and the orders sought are drastic and should not be granted.

The application before me seeks the striking out of the defence and for summary judgment to be entered for the plaintiffs. It will be noted that among the grounds raised, is that no defence to the amended plaint has been filed. It is true that an amended plaint was filed and in the order allowing the amended plaint, the defendant was granted time to amend his defence. No amended defence was filed. But does this mean that there is no defence on record? I do not think so. When an amended plaint is served upon a party who has already filed a defence, the defendant is not obliged to amend his defence. He can of course choose to amend his defence, but if he does not do so, it will be deemed that he is standing by his earlier defence.

Order 8 , which deals with amendments, is not explicit on this, where the amendment is made with leave; but it will be seen that Order 8 Rule 1, which deals with amendment of pleadings without leave, does give the other party discretion to amend defence. The provision is drawn as follows :-

Amendment of pleading without leave [Order 8, rule 1.]

- (1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.*
- (2) Where an amended plaint is served on a defendant—*
 - (a) if he has already filed a defence, the defendant may amend his defence; and*
 - (b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.*

It will be noted from **Order 8 Rule 1(2) (a)** that where an amended plaint is served, the defendant *may* amend his defence. The word used is "may" which means that it is not mandatory for one to amend his defence.

Order 8 Rule 1 of course deals with amendments that do not seek the leave of the court, but I believe that the same ought to apply even where the amendment is made with leave. The defendant must be given discretion either to amend his defence on record or abide by it. If he does not file an amended defence, it does not mean that he has no defence on record; it only means that he stands by the defence earlier filed, and has not seen the necessity of amending it.

That is the import I will give in the circumstances of this case. The defendant has a defence on record.

The substantive prayer is for me to strike out the defence and enter summary judgment. The application as drawn has cited Order 34 Rules 1 and 2. But order 34 cannot apply in the circumstances, for Order 34 deals with matters of interpleader, not matters of summary judgment or striking out of defence. Summary procedure is covered by Order 36 of the Civil Procedure Rules, and Rules 1 and 2 thereof are drawn as follows :-

Summary judgment [Order 36, rule 1.]

- (1) In all suits where a plaintiff seeks judgment for—*
 - (a) a liquidated demand with or without interest; or*
 - (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 quit or been forfeited for non-payment of rent or for breach of 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 judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
- (2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.*
- (3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.*

2. Defendant may show cause [Order 36, rule 2.]

The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave

to defend the suit.

It will be seen from a reading of the provisions of Order 36 Rule 1, that an application for summary judgment can only be entertained where the defendant has entered appearance but has not filed defence. In our case, there is a defence on record. Clearly, I am barred by law from entertaining the application for summary judgment. I am aware that the plaintiffs also want the defence struck out for being a sham, but I hesitate to do so, as the defendant deserves a hearing on merits. The plaintiffs also need to provide evidence to prove their case. I consider it immaterial in the circumstances herein, to deal with the issue of whether or not the affidavit, which supports this application, is properly on record.

The end result is that I find no merit in this application, and I hereby dismiss it with costs.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 30th DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:

Mr. E.M.Orina holding brief for Mr. Matwere for Plaintiff/Applicants

N/A for Mr. Enock Miruka for Defendant/Respondent

Court assistant- Mr. Kenei