



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 89 OF 2008

JOHANNA ZOUARI GEISSBULHER.....PLAINTIFF/RESPONDENT

=VERSUS=

VIOLA FEDERIGO.....1ST DEFENDANT

LUIGI FREGUGLIA.....2ND DEFENDANT/APPLICANT

R U L I N G

Introduction

1. Before me is the 2nd Defendant's Application dated 30th March 2012 and filed pursuant to the provisions of Order 2 Rule 15(1) (d) of the Civil Procedure Rules. The Application is seeking for the following reliefs.

(a) That this Honourable court be pleased to strike out the Plaint herein for being otherwise an abuse of the process of the court.

(b) That the Honourable court do issue orders of eviction against the Plaintiff, her agents, servants or anyone claiming under her from CR 40813 (sub division number 966 (Original number 955/7)).

(c) That the costs of the Application and the whole suit be paid to the 2nd Defendant.

2. The Application is premised on the grounds that the 2nd Defendant is the absolute registered owner of CR40813 (sub-division 966) Watamu; that the Plaintiff's occupation of the Suit property is without any colour of right, unlawful and criminal trespass and that there was no privity of contract between the 2nd Defendant and the Plaintiff.

The 2nd Defendant's/Applicant's case:

3. According to the 2nd Defendant's Supporting Affidavit sworn on 30th March 2012, he entered into a sale agreement with the 1st Defendant whereof he purchased the suit property. He paid the purchase price and a transfer of the property in his favour was effected on 24th October, 2008.

4. The 2nd Defendant has further deponed that when he went to take over the suit property, he realised that the Plaintiff was in occupation and claimed that he had purchased the same from the 1st Defendant; that the 1st Defendant informed him that although he sold the suit property to the Plaintiff, the Plaintiff had breached the terms of the sale by failing to complete the purchase price and hence opted to sell the same property to 2nd Defendant.
5. The 2nd Defendant finally deponed that there was no privity of contract between him and the Plaintiff and that the suit property lawfully belongs to him and not the Plaintiff.

The Plaintiff's/Respondent's case

6. In response to the Application, the Plaintiff filed Grounds of Opposition dated 18th September 2013.
7. The Plaintiff averred in the said grounds that the 2nd Defendant has not demonstrated that the Plaintiff's claim is incurably defective to the extent that it cannot be cured by amendment; that the Plaintiff has already adduced evidence which evidence remains uncontroverted and that the Plaintiff's continued occupation of the premises is based on a consent which was agreed upon between the parties at the outset of the suit and therefore, the said occupation cannot be said to be unlawful.
8. The parties filed their respective submissions which I have considered.

Analysis and findings:

9. I set out the background of this suit in my Ruling of 11th July 2013. The said background, which I shall repeat in this Ruling is important in determining the current Application.
10. Contemporaneously with the Plaintiff's Application, the Plaintiff filed an Application seeking for interim orders of injunction pending the hearing of the suit. The 1st Defendant filed his Defence and Counterclaim on 18th November 2008. The 2nd Defendant filed his Defence on the same day. The Defendants also filed their respective Replying Affidavits in respect to the Plaintiff's Application seeking for injunctive orders.
11. The record shows that by consent of the parties, the Application for injunctive orders dated 7th November 2008 was abandoned and the status quo was to be maintained.
12. The main suit was set down for hearing on 19th May 2009 when the Plaintiff, PW1 gave her evidence in chief and was cross-examined. The Plaintiff's witness number 2 (PW 2) also gave his evidence in chief and was cross-examined on the same day.
13. The matter was adjourned to 29th September 2009 when Kazungu Anthony Karisa, PW 3 and John Kahindi Kazungu, PW 4 gave their evidence in chief and were cross-examined by the Defendants' advocates. The Plaintiff closed her case on that day.
14. The matter came up for Defence hearing on 2nd December 2009, 19th April 2010, 17th December 2010 and on 20th March 2011 when it was adjourned at the Defendants' instance.
15. The 2nd Defendant now wants the suit to be struck out because he believes that he is the rightful owner of the suit property. However, the Plaintiff has averred in his Amended Plaintiff and in evidence that she purchased from the 1st Defendant the suit property for a valuable consideration of Kshs.1,700,000. This court is therefore supposed to determine who, as between the Plaintiff and the 2nd Defendant, is the owner of the suit property. That is an issue which cannot be determined on an Application as currently filed by the 2nd Defendant.
16. Indeed, it is the Defendants who are supposed to set down the suit for hearing of their respective cases considering that the Plaintiff has also tendered her evidence and called witnesses in support of her case. I therefore do not understand the rationale of the 2nd Defendant in asking for an order of striking out the suit by way of an Application because he believes that he is the lawful owner of the suit property instead of setting the matter down for defence hearing.
17. Consequently, and in view of the ground on the face of the Application, I find and hold that 2nd Defendants' Application dated 30th March 2012 is unmeritorious and I dismiss it with costs to the Plaintiff. This suit should be fixed for defence hearing by either party without any further delay.

Dated and Delivered in Malindi this 14th Day of February, 2014.

O. A. Angote

Judge