



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 156 of 2013

PETER KAMAU NJAU.....PLAINTIFF/APPLICANT

=VERSUS=

EMMANUEL CHARO TINGA.....DEFENDANT/RESPONDENT

R U L I N G

1. What is before me is the Plaintiff's Application dated 12th March, 2014 seeking for the following orders;-
 - (a) **That this Honourable Court be pleased to strike out the Defendant's Defence and counter-claim filed on 19th February, 2014 and judgment be entered as prayed in the plaint.**
 - (b) **Costs of this application be provided for.**
2. The Application is premised on the grounds that the Defendant's Defence does not raise any triable issues; that the Defence and Counter-claim was filed out of time without the leave of the court and that the Defence and Counter-claim is a sham meant to delay the fair trial of the action herein.
3. According to the Plaintiff, the Defendant filed his Defence and Counter-claim on 19th February, 2014 which was six months after the date that he was served with summons to enter Appearance; that it is trite law that a Defence must be filed within 14 days from the date of service of the summons and that in any event the Defendant's Defence and Counter-claim is a sham and does not raise any triable issue.
4. In response, the Defendant deponed that he filed his Defence on the 19th February, 2014; that under Order 10 Rules 4, 9 and 10 of the Civil Procedure Rules, he is allowed to file his Defence and Counter-claim any time before judgement has been entered and that the Plaintiff is relying on procedural technicalities to have his Defence and Counter-claim struck out.
5. The Defendant finally deponed that his Defence and Counter-claim raise triable issues because he is the beneficial owner of plot number Kilifi/Jimba 135.
6. The Plaintiff's advocate submitted that the Plaintiff is the registered owner of the suit property; that the Respondent has not challenged his title in his Defence and that the Defendant has not also claimed for adverse possession. Consequently, it was submitted, the Defendant's Defence and Counter-claim is a sham and that the same was filed out of time. Counsel relied on several authorities which I have considered.
7. The Defendant's advocate submitted that the Defence and Counter-claim raises triable issues; that

the Defendant has a beneficial interest in plot number Kilifi/Jimba 135 having been a squatter on the land from the year 1996 and that he was recognized as a squatter by the Kilifi Jimba Settlement Scheme Local. Counsel relied on the provisions of Order 10 Rules 4, 9 and 10 of the Civil Procedure Rules and submitted that a Defendant can file a Defence and Counter-claim at any time before the entry of judgement.

Analysis and findings:

8. The Plaintiff's claim is that he is the registered proprietor of parcel of land number Kilifi/Jimba/1223 and 1224 which he claims the Defendant has encroached onto. The Plaintiff annexed on his Supporting Affidavit the Title Deed for Kilifi/Jimba/135 which was subsequently sub-divided to form the suit property. The copies of the mutations forms have also been annexed on the Supplementary Affidavit.
9. On the other hand, the Defendant has stated in his Defence that he has been squatting on parcel of land number Kilifi/Jimba/135 since 1996 and that he was identified as a squatter by the Kilifi Jimba Settlement Scheme Local Land Committee in 1997; that he has built on the suit property permanent structures and that he is the beneficial owner of the suit property.
10. In the Counter-claim the Defendant is claiming for a declaration that he is the true owner of the suit property.
11. The Defendant has further averred that plot number Kilifi/Jimba 135 was illegally sub-divided into several plots.
12. This court dealt with the issue of what would happen in a situation where a Defendant files his Defence out of time in **Malindi H.C.C.C No. 28 of 2012; The Chairman of Sir Ali Bin Salim & another Vs. Francis Bahati & Others**. I shall reproduce my opinion in that in this particular matter.
13. Order 7 Rule 1 of the Civil Procedure Rules provides that where a Defendant has been served with Summons to appear, he shall, unless some other or further order be made by the court, file his Defence within fourteen days after he has entered an appearance in the suit. The Rule does not state what would happen where a Defence is filed outside the stipulated period of 14 days.
14. Order 10 of the Civil Procedure Rules provides for consequences of non-appearance and or default of Defence. In my view, the consequences of what would happen to a party who does not file his Defence within 14 days in unliquidated claim like the current one should have been provided for under that this Order.
15. Order 10 Rules 2 of the Civil Procedure Rules provides that where any Defendant fails to appear and the Plaintiff wishes to proceed against such Defendant, he shall file an affidavit of service. On the other hand Rule 4 provides that where a Plaintiff makes a liquidated demand only and the Defendant fails to appear, the court shall, on request enter judgment against the Defendant for the sum claimed. There is no corresponding Rule to deal with unliquidated claims, especially in matters dealing with recovery of land, which provides for entry of judgment in default of a Defence, thus giving a Defendant room to file his Defence before the matter proceeds for hearing.
16. An omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rule does not expressly provide so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.
17. The court ought to look at the issues raised in a holistic manner before making a decision as to whether it can strike out a pleading which has been filed contrary to the provisions of the Rules.
18. I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules.
19. The approach by the court should therefore not to strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the Civil Procedure Rules and Article 159 of the Constitution. This is the position that the Court of Appeal (with Kiage J.A. dissenting) took in the case of **NICHOLAS KINTO ARAP KORIR SALAT - Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS & OTHERS (2013) e KLR** where the court stated as follows:

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

20. Earlier on, Justice Ringera in **Welcome Properties Vs Karuga (2001) KLR 402** in his usual clarity held as follows:

“I am in agreement with the main thrust of Mr. K’Owade’s submissions that a procedural defect does not oust the jurisdiction of the court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings. In the instant case, the Respondents do not complain of any prejudice or injustice.”

21. In view of the above holdings by the courts, which I am in agreement with, and considering that the Plaintiffs have not shown the injustice or prejudice they will suffer because of the filing of the Defence outside the prescribed period, I find and hold that the Plaintiff’s argument that the Defence and Counter claim should be struck out because it was filed out of time is unmeritorious.

22. The law relating to the striking out of a claim because the claim does not raise a triable issue is now settled. In the case of **Dhanjal Investments Limited -Vs Shabaha Investments Limited**, the Court of Appeal held as follows:

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnial Restaurnat -Vs- Devshi & Co. (1952) E.A.C.A. 77 and followed in the case of Sonza Fiquerido & Co. Ltd. -Vs- Mooring Hotel Limited (1952) EA 425 that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

23. In the case of **Shah Vs Padamshi (1984) KLR 531**, Madan J.A held as follows:

“Except in the clearest of cases, it is inadvisable for the court to prefer one affidavit to another in order to grant summary judgment. Summary judgment is a drastic remedy to grant, for whereat in it is a denial to the Respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the Defendant is unlikely to succeed at trial. The court must not attempt to anticipate that the Defendant will not succeed at the trial.”

24. In **Giciem Construction Company Vs. Amalgamated Trades & Services, (1983) KLR 156**, Chesoni, Ag J.A, as he was then stated as follows:

“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that he has no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to Judgment...”

25. The Defendant has averred in his Defence that the title documents that the Plaintiff is holding

- were issued to him illegally and that he is the one who is in occupation of the suit property.
26. The burden of proving that the title documents which are in possession of the Plaintiff were validly issued lies with the Plaintiff. Indeed, it is the Plaintiff who is supposed to prove on a balance of probability how the title in respect plot number 135 was issued to Joed Ngaruiya and Lilian Wairimu Ngaruiya before the same was subdivided and transferred to him.
27. Where a title document is challenged, it is upon the person with the title document who is supposed to prove how he acquired it. The Plaintiff cannot go around that burden by seeking to have the Defendant's Defence struck out. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

28. The validity or otherwise of the Plaintiff's titles in a piece of land which is said to be a settlement scheme viz-a-viz the Defendant's claim over the suit property as a squatter is a triable issue which can only be determined after a full trial. The Defence cannot therefore be said to be a sham.
29. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's Application dated 12th March, 2014 with costs.

Dated and delivered in Malindi this **25th** day of **July**, 2014.

O. A. Angote

Judge