



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 271 OF 2011

SUNFLAG PROPERTY INVESTMENT..... PLAINTIFF

VERSUS

KENYA RAILWAYS CO-OPERATION.....DEFENDANT

RULING

The Plaintiff is seeking the following orders in a Notice of Motion dated 13th August 2013:

1. That the Defence and Counterclaim filed by the Defendant herein be struck out.
2. That the Plaintiff is entitled to possession of land known as L.R. No. 25805 (Grant number I.R. 90589) (herein referred to as the suit property), and that the Defendant do put the Plaintiff back in possession of the said land.
3. That the issue of damages for demolition and trespass be deferred to a date to be fixed for formal proof.

The grounds for the Plaintiff's application are that the Defendant unlawfully and unconstitutionally deprived it of the suit property, and that the Defence and Counterclaim filed herein are red herrings meant to delay the trial of this suit. The Plaintiff in its supporting affidavit sworn by its director Mahesh Dixit on 13th August 2012 states that the defence filed herein by the Defendant relates to a parcel of land known as L.R. No. 209/19708 (Grant number 125879) which was granted to it by the President of the Republic of Kenya on 3rd September 2010, whereas the Grant in respect of the suit property, which was purchased by the Plaintiff was issued to one Francis Samoei & 2 others on 27th November 2002 who sold it to Gami Properties Limited on 15th December 2006, who in turn sold it to the Plaintiff for a sum of Kshs.70,000,000/= on 11th June 2009. Further, that a Grant issued in 2010 cannot override the Plaintiffs rights arising from a Grant made in the year 2002.

The Defendant in a replying affidavit sworn on 5th November 2012 by Stanely Gitari, its Senior Legal Officer states that that it owns a big parcel of land measuring approximately 253 acres in the Makadara area popularly known as the Makadara Marshalling Yard, and he gave a detailed account of the history of the allocation and vesting of the said land in the Defendant. Further, that to facilitate management of the Makadara Marshalling Yard, the same was allocated LR. Number 209/211/3 which was later subdivided into seven (7) parcels of land namely, L.R 209/19702, L.R. 209/19703, L.R 209/19704, L.R. 209/19705, L.R. 209/19706, L.R. 209/19707 and L.R 209/19708. The deponent annexed documentation on the vesting documents and sub-division of the said land.

The Defendant further stated that the suit property claimed by Plaintiff is situated inside the Makadara Marshalling Yard and in particular, overlaps the subdivision L.R. No. 209/19708(I.R. NO. 125879)

belonging to the Defendant. Further, that by a letter dated 8th February 2010 issued to the Commissioner of Lands by the Director of Survey of Kenya, the Commissioner of Lands was advised that overlapping surveys had been noted on LR. No. 209/211/3. The Defendant averred that the Director of Survey in the said letter recommended that in order to rectify the anomaly, the Commissioner of Lands needed to recall the titles which had been issued for the overlapping parcels of land for cancellation, and that the Plaintiff's title is one of the titles which were recommended for cancellation by the Director of Survey.

The parties were directed to file written submissions on the Plaintiff's Notice of Motion. The Plaintiff's counsel in submissions dated 7th August 2013 relied on various judicial decisions including that of **Isaac Gathanju & Another v the AG and 6 Others, (2012) eKLR**, **Kuria Greens v Registrar of Titles (2011) e KLR** and **Kamau & Another v The A.G and 5 Others, ELC Suit 976 of 2012**, to argue that due process must be followed before the Plaintiff can be divested of the property it acquired as an innocent purchaser of value. The counsel also argued that the Plaintiff's title remained intact until declared illegal or fraudulently obtained by the Court.

The Defendant's counsel in submissions dated 23rd July 2013 reiterated the history of the allocation of the Makadara Marshalling Yard to the Defendant, and argued that the Defence and Counterclaim filed herein is valid and raises serious triable issues that establish the Defendant's title, and destroy any basis of the Plaintiff's claim to the suit property. He relied on various judicial decisions in this regard, including those in **Intercountries Importers & Exporters v The City Council of Nairobi LLC No. 546, Waruru v Oyatsi (2002) 2 E 664**, and **D.T. Dobie (Kenya) Limited v Joseph Mbaria Muchina, (1982) KLR 1**.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and Defendant. There are two issues for determination. The first issue is whether the Defence and Counterclaim filed herein should be struck out for reasons that it discloses no reasonable cause of action and is scandalous, frivolous and vexatious. The second issue for determination is whether summary judgment should be entered in favour of the Plaintiff.

On the issue of striking out of the Defence and Counterclaim, the applicable law is Order 2 Rule 15 (1) of the Civil Procedure Rules which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

It is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.

The Defendant has in its Defence and Counterclaim set out a detailed basis for its entitlement to the suit property, and also averred that the Plaintiff's title to the suit property is illegal and infringes on the Defendant's property rights. Both the Plaintiff and Defendant have made arguments about their respective claims and entitlements, which are in my view indicative of the triable issues arising from the Defence and Counterclaim. In particular the issues of the existence of two titles with respect to the same parcel of land, and which of the two titles is valid arise and will have to be heard and determined after examination of further evidence at full trial.

On whether summary judgment can issue in favour of the Plaintiff, Order 36 Rules 1 and 2 of the Civil Procedure Rules provide as follows in this regard:

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. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

It was held by the Court of Appeal in this regard in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure. This court cannot likewise ignore the Defence and Counterclaim which is still on record, and will need to consider the triable issues it raises. The Plaintiff's case is therefore not amenable to summary judgment.

The Plaintiff's Notice of Motion dated accordingly fails for the foregoing reasons and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____27th____ day of ____November____, 2013.

P. NYAMWEYA

JUDGE