



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO,(P), GATEMBU & M'INOTI, J.J.A

CIVIL APPEAL NO. 316 OF 2017

BETWEEN

KHADIJAH ALI OMAR & AHMED UMAR

(Suing as the administrators and beneficiaries of the estate of Omar Khamis deceased).....**APPELLANTS**

AND

KAUSHUMU WAMBUI.....**RESPONDENT**

(Being an appeal from the Ruling and Order of the Environment and Land Court at Thika given on 26th July, 2017 (Gacheru, J)

in

ENVIRONMENT & LAND COURT CASE NO. 17 OF 2017)

JUDGMENT OF THE COURT

1. This is an appeal from a ruling of the High Court (L. Gacheru, J) delivered on 26th July 2017 dismissing the appellants' application for summary judgment on two grounds. First, that the appellants' claim does not fall under the category of suits where summary judgment may be granted. Secondly, that the respondent demonstrated that there are triable issues for the trial court.

Background

2. Based on the pleadings before the lower court, the dispute between the parties is over the properties known as L.R.No. 4953/933, 4953/202 and 4953/931 (the properties). It is asserted that the properties were originally owned by Khadija Nyambura Njuguna upon whose death they devolved to her daughter Halima Njeri. Halima Njeri was the second wife of Omar Khamis, deceased. She died in 2005 whereupon, pursuant to Succession Cause No. 1512 of 2006, the properties were transferred to Omar Khamis, deceased. Omar Khamis died in 2010 after which the appellants were appointed as the administrators of his estate in Succession Cause No. 1460 of 2012 and the properties transferred to them.

3. The appellants state that during the pendency of Succession Cause No. 1512 of 2006, the respondent tried, unsuccessfully, to assert a claim over the properties on the basis that she was married to Khadija Nyambura Njuguna, the mother of Halima Njeri, under the Kikuyu customary law concept of woman to woman marriage; that despite her claims to the properties having been rejected, she had refused to vacate the properties and had continued to trespass on the same thereby depriving the appellants of the use and enjoyment of the same. Accordingly, the appellants sought judgment against the respondent for an order of vacant possession.

5. In her defence, the respondent maintained that she was a co-wife to the original owner of the properties, Khadija Nyambura Njuguna, with whom she had contracted a woman to woman marriage. She stated that she lived with Khadija Nyambura Njuguna on the properties as a married couple since 1972. She counterclaimed for judgment against the appellants for a declaration that she has a beneficial interest in the properties. She also alluded to a claim to the properties founded on adverse possession.

5. It is against that background, that the appellants filed a notice of motion for summary judgment resulting in the impugned ruling.

The appeal and submissions

6. In their memorandum of appeal, the appellants complain that the Judge failed to appreciate that their claim fell within the ambit of Order 36 of the Civil Procedure Rules; that the Judge failed to appreciate that the basis upon which the respondent was asserting a claim to the properties had already been rejected in previous proceedings; and that the Judge erred in concluding that there were triable issues for determination.

7. During the hearing of the appeal, the parties were represented by learned counsel. Mr. P. Mungla appeared for the appellants while Mr. Wokabi Mathenge appeared for the respondent. They relied entirely on their respective written submissions.

8. For the appellants, it was submitted that the learned judge erred in her interpretation of Order 36 Rule 1 (1)(b) of the Civil Procedure Rules; that the appellants' application for summary judgment was competent as their claim against the respondent, being a claim for recovery of land from a trespasser, was properly before the court; that the only conceivable triable issue raised by the respondent was an issue that had already been determined in previous proceedings and was therefore *res judicata*; that the respondent's claim to entitlement to the property under the doctrine of adverse possession was not maintainable as her occupation and possession of the suit properties was with consent and could not therefore be adverse to the owner.

9. In opposition to the appeal, it was argued for the respondent that the Judge properly exercised her discretion in dismissing the motion for summary judgment; that having filed a defence to the appellants' suit, a motion for summary judgment could not be entertained under Order 36 Rule 1(1)(b); and that the appellants would have an opportunity to make out their case, if any, during the trial. Citing this court's decision in Zacharias Mwireri Baya v Mohammed Sheikh Abubaka [2010] eKLR it was submitted that summary judgment is a draconian measure to be used only in the clearest cases.

10. It was further submitted for the respondent that one triable issue is sufficient to entitle a defendant unconditional leave to defend the suit. In that regard, reference was made to Kenindia Assurance Co. Ltd v Commercial Bank of Africa & 2 others (2006) 2 KLR 280 and also the case of Attorney General v Equip Agencies Ltd (2006) 1 KLR 10.

Analysis and determination

11. We have considered the appeal and the submissions. The grant or refusal of summary judgment entails exercise of discretion by the court. The circumstances in which this Court may interfere with the exercise of discretion by the lower court are limited. As stated in Mbogo and Another vs. Shah [1968] EA 93:

"...this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The question we need to address in this appeal is whether the impugned decision is clearly wrong on account of misdirection by the learned Judge with regard to the application of the legal principles regarding summary judgment. The object behind the provisions for summary judgment in the civil procedure rules was explained by the Court in Attorney General v Equip Agencies Ltd (supra) as follows:

"The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim... The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable... A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition."

13. Rule 2 of Order 36 of the Civil Procedure Rules provides that "*the defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.*" All the respondent was required to do in order to earn leave to defend the suit and surmount the application for summary judgment was to demonstrate to the court below that there was a bona fide triable issue.

14. In Kenindia Assurance co. Ltd vs Commercial Bank of Africa Ltd & 2 others (Nbi C.A. Civil Appeal No.11 of 2000) this Court stated that summary judgment is a procedure to be resorted to in the clearest of cases. If a defendant shows a bona fide triable issue, he must be allowed to unconditionally defend the action. See Dhanjal Investments Ltd vs Shabaha Inv. Ltd. Civil appeal No. 232 of 1997, (unreported); Provincial Insurance Company of East Africa Limited (now known as UAP Provincial Insurance Limited) v Lenny M. Kivuti (Civil Appeal No. 216 of 1996) (unreported).

15. In her replying affidavit in opposition to the appellants' application, the respondent deposed:

"(a) THAT in rendering a summary judgment against me it would be unfair and oppressive since I will be shut out from adducing evidence whereas I have laid a claim to the suit properties having been in both physical possession as well as actual and constructive since 1972.

(b) THAT my occupation, collection of rent and usage of the suit properties for a long period of time has been open, continuous and well known to the applicant/plaintiff whereas I have claim an interest in them consequently I cannot be reduced to a trespasser.

(c) THAT my stay on the suit properties pre-dates the birth of the applicant/plaintiff since I once lived with her grandmother Khadija Nyambura as a wife. Further any intent or averments of eviction is misguided and misplaced.

(d) THAT any intent to forcefully evict me or deny me a claim to the suit properties would amount condemning me unheard and irregular both in law and fact. It is also illegal, as such the court cannot sanction an illegality whereas a question on my interest to the suit properties has not been addressed or determined on merit.”

16. In our view, the matters raised by the respondent in that affidavit as well as in her defence and counterclaim are not matters that could be resolved summarily on the basis of contested affidavit evidence.

17. We agree entirely with the learned Judge that by her pleadings and affidavit, the respondent demonstrated that she has raised issues “*which need to be interrogated by calling of evidence through oral hearing.*” We are therefore satisfied that the learned Judge properly exercised her discretion in rejecting the summary judgment application and we do not have any basis for interfering with her decision.

18. The appeal has no merit and we accordingly dismiss it with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of May, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR