



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 231 of 2006

ZACHARIUS MWERI BAYAAPPELLANT

AND

MOHAMED SHEIKH ABUBAKARRESPONDENT

(An appeal from a ruling and order of the High Court of Kenya at Mombasa (Maraga, J.) dated 23rd July, 2004

in

H.C.C.C. NO. 7 OF 2004)

JUDGMENT OF THE COURT

The appeal before us arises from the decision of the superior court (Maraga J) in which the learned Judge allowed an application made by the respondent herein for summary judgment in a dispute relating to land.

The respondent, **Mohamed Sheikh Abubakar** (Mohamed) went before the superior court on 14th January, 2004 and filed **HCCC No. 7 of 2004** against the appellant here, **Zacheus Mweri Baya** (Baya). He pleaded that he was the registered owner of all that piece of land known as **plot No. 5054/1463** in Kilifi (the disputed land), and that at a time unspecified, Baya trespassed on the disputed land, constructed a building thereon and occupied it. He then sued Baya before the Chief Magistrate's Court in Mombasa **CMCC No. 1432 of 1998** for eviction but, before the suit was finalised, Baya went to the Commissioner of Lands and obtained a letter of allotment for the portion he was occupying. Mohamed went to the superior court and filed a judicial review application seeking to have the letter of allotment quashed and the portion reallocated to him. That was **H.C. Misc. Civil Application No. 293 of 2001**. The orders were granted and the letter of allotment given to Baya was cancelled. Despite those developments Baya still refused to move out of the portion of the disputed land and was benefiting from occupation of the land and other buildings made thereon which he rented out, hence **HCCC No. 7 of 2004**.

Baya filed a defence to that suit denying that Mohamed was the lawful owner of all the disputed land as alleged. He asserted that he had bought a portion of the disputed land in 1996 from the original lawful owner who had occupied it since 1924. That was long before Mohamed laid any claim to it. He then moved in peacefully and openly took possession and started developing it by construction of a permanent house. Baya admitted that he was sued for trespass before the Chief Magistrate's Court in **CMCC 1432/98** but averred that the decision in that case was in his favour as it was ordered that the portion he occupied lawfully belonged to him. He pleaded, in those circumstances, that the subsequent suit filed by Mohamed was *res judicata*. He further denied that he had any knowledge of, and did not participate in any judicial review application in which Mohamed obtained orders quashing the allocation of the portion of the disputed land to him. He was therefore not a trespasser and had not benefited from the land by renting it out and therefore no *mesne profits* were due to Mohamed. Finally, Baya pleaded

fraud, in that Mohamed purported to obtain Title to the disputed land without his consent or knowledge, although Baya was in occupation of a portion of it.

Before the suit was set down for hearing to determine the apparent issues joined in those pleadings, Mohamed took out a notice of motion under **Order 35 rules 1 and 2** of the Civil Procedure Rules and prayed for summary judgment. The basis of the application was that he was the registered owner of the disputed land but Baya had trespassed on it. He swore an affidavit exhibiting an application he made in 1993 to the Commissioner of Lands for allocation of an industrial plot in Kilifi town for purposes of maize milling; a response made in 1996 that the plot had been identified; a letter of allotment of unsurveyed plot measuring 0.4 hectares with effect from 1st November, 1996 which he accepted; a surveyor's beacon certificate dated 7th March, 1997; a deed plan dated 28th April, 1998; a Certificate of Title under the Registration of Titles Act registered on 24th January, 2000; and the proceedings, rulings and consequential orders in CMCC 1432/98 and H.C.Misc. Appl. No. 293 of 2001. On the strength of that affidavit, he swore that there was no reasonable defence to the suit and therefore no reason for a full trial.

As required under **Order 35 rule 2**, it was Baya's obligation to show either by an affidavit or by oral evidence or otherwise that he should have leave to defend the suit. He did so by filing an affidavit in reply in which he reiterated that he was in occupation of a portion of the disputed land by right; that he had constructed permanent buildings thereon since September, 1996; that upon being sued for trespass in 1998 he sought the advice of the Commissioner of Lands and was lawfully allocated a portion of 0.16 Hectares out of the disputed land; that Civil Suit No. 1432/98 was decided in his favour and confirmation was made that he was the lawful owner of that portion; that the Title obtained during the pendency of CMCC 1432/98 was fraudulent since Mohamed knew of his presence on the land; that he had no knowledge, since he was not served with any pleadings or court orders, that Mohamed had instituted judicial review proceedings in Misc. App. 293/01, and that in any event, such orders never affected the lawful orders emanating from CMCC 1432/98; that the suit was *res judicata* as there was no appeal against the orders issued in CMCC 1432/98; and that in all the circumstances the suit was not suitable for summary procedure and ought to be heard on merits.

Upon examination of the material on record and upon consideration of submissions of counsel on both sides, the learned Judge formed the view that the Title of Mohamed was indefeasible under **section 23** of the Registration of Titles Act ("the Act") and that there was no fraud committed in obtaining the title. He stated:

"So as matters stand now the plaintiff has title to the suit piece land and the defendant has none. The defendant's claim to the land is based on the said letter of allotment which has been cancelled since the 14th February, 2003. The judgment of the Senior Principal Magistrate in CMCC No. 1432 of 1998 was also based on that letter of allotment.

I have perused the defence and in particular paragraph 15 thereof in which it is alleged that the plaintiff fraudulently obtained title to the piece of land without the consent of the defendant who is the rightful owner of the portion. I am satisfied that it does not raise any triable issues. The defendant is not the rightful owner of the portion. His purported purchase of that portion from one Jackson Nzaro does not avail him as Nzaro was not the owner of the land he purported to sell to him.

For these reasons I am satisfied that the defence herein is a sham and does not raise any triable issues."

Aggrieved by that decision Baya comes before us and has laid out 15 grounds of appeal in his memorandum. Those grounds were, however, argued in 4 tranches by learned counsel for him, Mr. Mwakireti, who appeared with Mr. Asige. It was Mr. Mwakireti's view that the learned Judge failed to identify four triable issues raised in the defence filed by Baya and in his affidavit in reply to the motion. The issues were as follows:

- 1) *Whether the Title held by Mohamed upon which the motion was based and decided, was obtained by fraud.*
- 2) *Whether by virtue of CMCC 1432/98 which was previously instituted and determined between the same parties on the same subject matter, the latter suit was res judicata.*
- 3) *Whether Baya was served with any pleadings or other court orders obtained by Mohammed in H.C. Misc. Application No. 293/01.*
- 4) *Whether the disputed land was Trust Land held for the benefit of Kilifi residents in general or unalienated Government land under the Government Lands Act.*

On the first issue, Mr. Mwakireti submitted that the learned Judge erred in law in dismissing summarily the pleading on fraud in paragraph 15 of the defence without considering the definition of “fraud” under the Act. Under the Act, “*Fraud*” is defined as follows:

“fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration;”

It was only through evidence tested in cross-examination that Baya would prove the particulars of fraud and that Mohammed was aware of his unregistered interest in the disputed land which he sought to defeat by obtaining registration. In his view, that issue alone was sufficient to entitle Baya to defend the suit since fraud, under **section 23** of the Act, is sufficient to impeach the Title. Furthermore, he submitted, the learned Judge did not consider the other three issues. The issue of *res judicata* was merely glossed over without making a decision on it. It did not matter in law, he submitted, that the decision in the earlier suit was erroneous so long as all the factors envisaged under **section 7** of the Civil Procedure Act obtained. In this case, Mohamed did not appeal against the decision of the Chief Magistrate and the binding effect of the decision could not therefore be ignored. On the issue of non-service of pleadings in the judicial review application, Mr. Mwakireti submitted that this too was relevant but no opportunity was given to the appellant to prove it. Finally, Mr. Mwakireti submitted that it was paramount to determine the nature of the disputed land in view of the pleading that the land was lawfully owned by a resident of Kilifi district from time immemorial and the resident, who sold the land to Baya, passed good Title. For those reasons, he concluded, the matter was not fit for summary judgment.

In response to those submissions learned counsel for Mohamed, Mr. Wameyo, submitted that there was no case made out on “fraud” which was capable of going to full trial. In his view, **section 23** of the Act should be read together with **sections 60** and **61** of the Act which provide for the procedure to be followed where fraud is alleged. That procedure was not invoked in this case and there is no counterclaim. In that case, he submitted, the court could not make any finding on fraud as it was not a valid issue for determination. As to whether the disputed land was Trust land or Government land, Mr. Wameyo submitted that that was a non-issue, since the appellant himself treated it as Government land and applied to the Commissioner of Lands for allocation of the land and a letter of allotment was issued by the Commissioner of Lands before it was subsequently cancelled on orders of the court. With regard to *res judicata*, Mr. Wameyo submitted that the principle under **section 7** of the Civil Procedure Act would only apply where the court in the earlier decision had jurisdiction. In this case, the property was registered under the Registration of Titles Act which defines court as “*the High Court*” and therefore the earlier decision may be safely ignored. Finally, Mr. Wameyo submitted that the judicial review proceedings were never challenged in the same proceedings or elsewhere and it was too late therefore to cry foul. The Title upon which the decision of the superior court was predicated was issued to the respondent and there was no triable issue raised before that court. The appeal therefore ought to be dismissed in its entirety.

We have fully considered the grounds laid out in the appeal and the submissions of both counsel which we are grateful for. The principles upon which an application for summary judgment under **Order 35 rules 1** and **2** of the Civil Procedure Rules (the Rules) ought to be considered are fairly well settled and were fully appreciated by the learned Judge of the superior court when he stated in part: **“In an application for summary judgment if the plaintiff’s claim is undoubtedly clear and the defence is a mere sham or is a spurious one, then the order will be granted. If on the other hand the defendant has an arguable defence, never mind the likelihood of its success, or if it discloses a trial issue, then he must have leave to defend. Support for this view and the general principles applicable to applications for summary judgment under Order 35 Rules 1 and 2 was succinctly brought out by the observations by the late Justice Madan in Continental Butchery Ltd. vs. Samson Musila Nthiwa Civil Appeal No. 35 of 1997 where he said: -**

“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enforcement of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by Order 35 subject to there being no bona fide triable issue which would entitle a defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham. This would be in accord with the well known words of Jessel, M.R. and Lord Chancellor (Halsbury) spoken respectively in Anglo Italian

Bank Vs. Wells 38 L.T. at page 210 and Jacobs Vs. Booths Distillery Company 85 L.T. at page 262 as follows: -

'Jessel M.R.' 'where the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff. Lord Halsbury – 'People do not seem to understand that the effect of O.XXV (the equivalent of O.XXXV) is that upon the allegation of one side or other a man is not to be permitted to defend himself in a court that his rights are not to be litigated at all.'

The same principles had been echoed by Newbold P of the former Court of Appeal for Eastern Africa in Zola & Another vs. Ralli Brothers Ltd. & Another [1969] E.A. 691 at page 694 where he stated:

"Order 35 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant."

We might add that the jurisdiction, though available to the court, is sparingly exercised and only in the clearest of cases. In Lalji t/a Vakkep Building Contractors v Carousel Limited [1989] KLR 386 at page 393, this Court stated:

"The importance of order 35 was again recently reaffirmed by this Court in the case of Baldey Raj Aggarwal v Kamal Kishore Aggarwal (Nairobi civil appeal No. 48 of 1985. The Court said:

"This Court will resist with as much fortitude as it can command any attempt to weaken the effect of order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to Court is deprived of an opportunity to put it forward. It is our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits."

Summary judgment is a draconian measure and should be given in only the clearest of cases. And a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial."

Indeed the stream of authority from numerous decisions of this Court on applications under **Order 35** favours the general principle that all that a defendant has to show is that there is a triable issue of fact or law. Leave will then normally be given unconditionally except where a Judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose terms and conditions in lieu of rejecting the entire defence. We appreciate that the learned Judge was exercising judicial discretion on the material before him and therefore, ordinarily, this Court would be slow to interfere unless, as stated in Shah v Mbogo (1968) EA 93, it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

The learned Judge granted the application for summary judgment on the basis that the entire defence and in particular, paragraph 15 thereof did not raise any triable issue. Nothing was said about the affidavit in reply to the application although all that material as well as the defence ought to have been examined. The existence of a previous suit between the parties on the same subject matter was also alluded to without examining the issue of *res judicata* which was raised before him. *Res judicata* raises both matters of fact and law and we think it was necessary to interrogate the existence of the earlier suit which was filed on the basis that the Chief Magistrate had jurisdiction and which appears to have determined a similar issue as pleaded in the subsequent suit. The earlier decision may well have been a valid or erroneous one, but that is not the test for *res judicata*. As Mulla correctly observed in the **Code of Civil Procedure, 16th Edition** on Indian provisions in *pari materia* with **section 7** of the Civil Procedure Act:

"The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit. Moreover, public policy requires that there should be an end of litigation. The question whether the decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata,

otherwise, every decision would be impugned as erroneous and there would be no finality.”

In our view, the issue of *res judicata* was relevant and ought to have been decided on the basis of the facts as they would emerge at the trial.

More importantly the issue of fraud was expressly raised. **Section 23** of the Act does not insulate the Title holder from fraud as defined (*supra*) under the Act if it is proved that he was party to it. We do not, with respect accept the submission of Mr. Wameyo, that **sections 60** and **61** of the Act set up the only recourse for an aggrieved party to rectify the Title, nor do we think the absence of a counterclaim deprives a defendant of a defence under the section.

One bona fide triable issue is sufficient to entitle the defendant to unconditional leave to defend. We have said enough to satisfy ourselves that the issue of fraud was ripe for adjudication after admission of oral evidence tested in cross-examination and we think the learned Judge erred in law and in fact in giving it short shrift. On that issue alone we would allow this appeal. We say nothing more about the other issues raised before us or any others which may arise at the trial.

We order that the appeal be and is hereby allowed. The orders of the superior court granting summary judgment on the respondent’s motion dated 2nd April, 2004 are hereby set aside. We substitute therefor an order dismissing the notice of motion. The costs of this appeal and of the dismissed motion shall be borne by the respondent.

Dated and delivered at Mombasa this 12th day of March, 2010.

P.K. TUNOI

.....
JUDGE OF APPEAL

E.O. O’KUBASU

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR