REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Case 147 of 2006

NOAH ONYANGO AWAYO …… PLAINTIFF

VERSUS

SYLVANUS O. OTUMBA ……1st DEFENDANT

BENARD N. OTUMBA ……2nd DEFENDANT

RULING

In the plaint originally filed herein on 20th December 2006, and re-filed on the 8th March 2007, the plaintiff Noah Onyango Amwayo prays for judgment against the defendants Sylvanus Otumba and Bernard Otumba for:-

(i) A declaration that land title number KISUMU/KONYA/167 and ½ share of land title number KISUMU/KONYA/166 are owned solely by the plaintiff

(ii) A mandatory injunction restraining the defendants, their servants, or agents or any other person or entity acting under the **defendants instructions or on their behalf from trespassing upon the plaintiff's parcels of land and/or wasting or interfering with land title number KISUMU/KONYA/167 and the plaintiff's ½ share in land title number KISUMU/KONYA/166**

(iii) A temporary injunction restraining the defendants, their servants, or agents or any other person or entity acting under the defendants instructions or on their behalf from trespassing upon the plaintiff's parcels of land and/or wasting or interfering with land title number KISUMU / KONYA/167 and the plaintiff's ½ share in land title number KIUMU/KONYA/166 pending the hearing and determination of this suit.

(iv) General damages for trespass and interest thereon.

(v) Costs of this suit plus interest thereon.

A statement of defence was filed on behalf of both defendants on the 19th January 2007. It's import is to deny that the plaintiff is the first registered proprietor over the material parcels of land and a contention that the creation of the said parcels of land as well as the registration thereof in the name of the plaintiff was fraudulent. The defendants allege that the material parcels of land belong to their father and were created fraudulently in that no sale agreement existed between the plaintiff and their

deceased's father. They therefore counterclaim against the plaintiff and pray for the cancellation of the title deeds and costs of the suit.

The foregoing defence has attracted the present application by the plaintiff dated 25th July 2007 for the orders that:-

(i) The statements of defence be struck out and judgment be entered against the defendants as prayed in the plaint.

(ii) The costs of this application be provided for.

The application is brought under Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules and is made on the basis of the grounds contained in the body of the appropriate chamber summons. The grounds are supported by an affidavit deponed by the defendants on the basis of the facts contained in a replying affidavit deponed by the first defendant dated 13th February 2008.

At the hearing of the application, Mr. Odunga for the plaintiff / applicant argued that the suit land was registered in the names of the plaintiff after he had entered into a sale agreement with one Otumba Asir (presumably the father of the defendant) and even if the registration was acquired by fraud as alleged it is indefeasible on account contrary to section 143 of the RLA. Mr. Odunga further argued that a first registration may only be defeated by way of a trust and no allegation to that affect is contained in the defendant's statement of defence. He contended that the defendants are trespassers and that the action taken by the Land Tribunal respecting the suit land was null and void as it has no jurisdiction to deal with matters relating to land titles.

Mr. Mwamu for the defendants / respondents responded by stating that the application is omnibus in as much as it is brought under Rules 13 (1) (b) (c) and (d) of Order 6 instead of either one of the rules. Nonetheless, he argued that striking out of a suit is discretionary and urged the court to order that the matter do proceed to hearing even on priority basis. He said that the parties herein did subject themselves to the jurisdiction of the land Tribunal which made an award which was filed in this court on the 25th September 2007. He said that the effect of the award was to have the plaintiff's name in the disputed titles cancelled. He said that the decision of the tribunal is still intact and in any event, the defendants do have a counterclaim, which is seriously opposed by the plaintiff. He said that the parties need to be heard and that this is not a clear cut case for an order to strike out the defence. He said that the plaintiff has not shown that he purchased the suit land from the father of the defendants.

Having considered the application in the light of the grounds and arguments in support and of opposition thereof, this court would sate that it is empowered under Order 6 Rule 13 of the Civil Procedure Rules to strike out at any stage of the proceedings any pleading which dismiss no reasonable cause of action or defence or it is scandalous, frivolous, vexatious or it may prejudice embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court.

Upon such striking out, the court may order dismissal of the suit or that judgment be entered accordingly. The power to strike out is however discretionary and as of course, discretion must always be exercised judicially. The power should also be exercised sparingly and cautiously.

The plaintiff claims that the defendants defence is frivolous, vexatious and an abuse of the court process meant to delay the fair disposal of the matter. He implies that the defence is hopeless and unreasonable. However, a reasonable defence means a defence, which stands some chance of success when only the pleadings considered. A defendant should always be permitted to plead a fairly

arguable defence. He is entitled to a reasonable liberal view of his defence as a pleading so that the door of justice is not shut in his face **(See Kenya Commercial Bank Ltd =vs= Karanja [1981] KLR 209).**

The defence herein is a denial that the plaintiff is the first registered proprietor of the disputed parcels of land and a basic contention that the creation and registration of the parcels was fraudulent. These are pertinent and highly arguable issues and more so considering that the dispute had earlier been referred to and adjudicated upon by the Land Tribunal. Whether or not the land tribunal had necessary jurisdiction is a matter which is arguable and triable.

In **[CASSMAN =vs= SACANIA 1982 1 KLR 191)** the Court of Appeal !inter-alia" held that:-

"An issue between the parties to an interlocutory application should not be decided at the application stage unless the material facts are capable of having fully established and the law is capable of being fully argued without the benefit of a trial".

Herein, the material triable facts and the law applicable are incapable of being fully argued without the benefit of a trial. The plaintiff's application is therefore unmerited and is dismissed with costs.

Dated, signed and delivered at Kisumu this 26th day of June 2008.

J. R. KARANJA

JUDGE

JRK/aao