



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.10F 2010**

**CLIVE MUTISO..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH NDAMBUKI WAMBUA ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LEAH KAKINDU ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANTHONY KAKINDU ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. By a **Plaint** dated **30.12.09** the Plaintiff/Applicant filed instant suit on 5.1.2010. The service of summons was effected and after the lapse of the prescribed period no defendants filed defence or enter appearance. On 1.2.2010 the Applicant filed motion dated 1.2.2010 under order XXXV Rules 2 and 3 Civil Procedure Rules then in force. The Applicant sought judgment as prayed in the **Plaint**.
2. On Record I find a defence by the 1<sup>st</sup> Defendant filed on 10.2.2010 which has not been expunged from the record. There is also a replying affidavit sworn by the 1<sup>st</sup> Defendant on 25.8.2010 and filed on 10.9.2010. Further the 1<sup>st</sup> Defendant filed a Preliminary Objection dated 20.1.2014 on 21.1.2014. It also emerges that the 2<sup>nd</sup> Defendant filed defence on 18.11.014 together with a replying affidavit she swore on 17.11.2014. The Applicant application is supported by his affidavit sworn on 29<sup>th</sup> January, 2010.
3. The Applicant bases his application on the ground that the Respondent never entered appearance or file defence. He further states that he seeks possession of the suit property which the Defendants have invaded. He also seeks mesne profit damages and costs. On paragraph 13 of the **Plaint**, the Applicant pleads that in June 2009 the Defendants entered suit property destroyed sisal boundary markers, uprooted grass and the 1<sup>st</sup> Defendant commenced construction of a building and other works without the knowledge or permission of the Plaintiff.
4. The Applicant bases his claim on an agreement dated 2.10.1991 between him and a deceased person husband of the 2<sup>nd</sup> Defendant and father of the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant avers in paragraph 6 of the Defence that he owns ¼ acre of parcel 7-133 and the Plaintiff owns 2 acres of the same but not 2¼. The 2<sup>nd</sup> Defendant avers on paragraph 6 of the Defence that she is the sole owner of the suit land and had right to sell to the 1<sup>st</sup> Defendant.
5. Under order XXXV Rules 2 and 3 and particular sub-section 2, the Defendant is required to show either via affidavit or oral evidence or otherwise that he should have leave to defend the suit. The material before court and an Applicant Admission, the Defendants and especially Defendant No.1 is in the occupation of the part of the suit property. The Applicant has not disclosed whether he occupies in the affidavit or not he seeks possession.
6. The 2<sup>nd</sup> Defendant avers that she is the owner and had right to sell the same to the 1<sup>st</sup> Defendant. The circumstances of this case demands that the parties be heard fully on merit to determine the truth of the matter. The court is inclined taking into account that this is a land matter to grant Respondents leave to defend to make a fair determination of the matter. The court thus declines to grant summary judgment and makes the following orders:

1. The Defendants to file and serve all their papers within 30 days.
2. The Applicant is at liberty to file further documents within 21 days of service.
3. Directions to be heard within 60 days.

Orders accordingly. Parties at liberty to take date for directions as directed.

**Signed and Delivered at Machakos, this 30<sup>th</sup> day of January, 2015.**

**CHARLES KARIUKI**

**JUDGE**