



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**ELC CIVIL CASE NO.53 OF 2010**

**GLADYS KOSKEY (Suing as the Administrator of the estate of  
ELIJAH KIMALEL KOSKEI- deceased .....PLAINTIFF/ APPLICANT**

**VERSUS**

**BENJAMIN MUTAI.....DEFENDANT/RESPONDENT**

**RULING**

1. By a notice of motion dated 17th December, 2012 brought under Sections 1A, 1B, 3A of the Civil Procedure Act and Orders 36 Rule 1(1), Order 40 rule 10, Order 51 Rule 1 of the Civil Procedure Rules section 13 and 19 of the Environment and Land Act and Article 159 of the Constitution, 2010 and all enabling provisions of the law. 2. The applicant (Gladys Koskey) seeks summary judgment against the respondent, Benjamin Mutai, as prayed for in the plaint dated 11th August, 2010.

3. The application is premised on the grounds summarised as follows;

- (a) The plaintiff is the residuary legatee and proprietor of Land reference number 21880 (I.R.N. 6155) as per certificate of conformation of grant dated 3rd August 2009, holds an absolute title to the suit land and continues to pay rates and statutory dues to the town Council of Litein
- (b) The defendant has encroached on the suit property, tampered with beacons, erected developments including a petrol station, without any colour of right or title documents, and refused to render vacant possession
- (c) These actions by the respondent are ill motivated, illegal, deceitful and are causing the plaintiff severe loss and damage
- (d) That the defence filed by the defendant is a sham, fill of mere denials and does not disclose any reasonable cause or make reference to any ownership records.

4. The application is supported by the affidavit of the applicant sworn on 17<sup>th</sup> December, 2012. In this affidavit the applicant has basically reiterated the contentions in the grounds on the face of the application, as listed above.

5. In opposition to the motion, the respondent filed a replying affidavit dated 27<sup>th</sup> May, 2013. He depones that he was allotted plot No. 260 Kapkatet Market by the County Council of Litein and has exhibited

numerous documents as proof of ownership.

6. On 23<sup>rd</sup> September, 2013 this court directed that the application herein be disposed of by way of written submissions. Consequently, counsel for the applicant filed their submissions which I have read and considered but counsel for the respondent filed their written submissions on 25<sup>th</sup> February, 2014 way past the time granted by court and after the ruling date had already been given. I will not consider these submissions because they have been filed without leave of the court and also because there is no evidence of service that the same had been served upon the applicants to give them an opportunity to respond.

7. **Order 36 Rule 1 b of Civil Procedure Rules**, addresses summary dismissal. it provides;

**“(1.) In all suits where a plaintiff seeks a judgment for:**

**(a).....**

**(b) 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 defence the plaintiff may apply for judgment for the amount claimed or part thereof and interest, or for the recovery of the land and rent or mesne profits.”**

8. Before I analyse the facts in this case I would like to state the Law on the matter as I understand it.

In an application for summary judgement if the plaintiff's claim is undoubtedly clear and the defence is a sham or is a spurious one, the order will be granted. If on the other hand the defendant has an arguable defense, never mind the likelihood of its success, or if it discloses a triable issue, then he must be granted leave to defend. Support of this view and the general principles applicable to applications for summary judgements under order 36 Rule 1 was succinctly brought out by the observations by the late **Justice Madan** in *Continental Butcher 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.”

These same principles apply to a claim for land but must be exercised with care.

9. In his replying affidavit the respondent has exhibited among other documents an allotment letter for plot number 260 at Kapkatet market dated 20<sup>th</sup> July, 2003 plot rates payment and approved plans for the filling station standing thereon. The plaintiff on the other hand has exhibited a title for L.R. No. 21880 Measuring 0.1497 Hectares. Both parties lay claim to this parcel of land. In my view this is not a matter that can be determined summarily. The defendant has raised a triable issue relating to ownership. He has exhibited Documents on the same. He must be given an opportunity to defend this suit so that the triable issues raised may be determined during trial by production of documents and calling of witnesses.

10. For the above reasons I find the notice of motion dated 17th December, 2012 without merit and I dismiss it with costs. I also direct that the parties set down the matter for hearing on a priority basis.

**Dated, signed and delivered in open Court at Kericho this 27th day of March 2014.**

**L N WAITHAKA**

**JUDGE**

**Present**

Mr Rombo for the plaintiff/Applicant

Mr Meli holding brief for Mr Bitok for the Defendant/Respondent

**L N WAITHAKA**

**JUDGE**