

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 301 OF 2011

MBUTHIA MACHARIAPLAINTIFF/APPLICANT

VERSUS

ANNAH NDINGWA MUTUA.....1ST DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS

NAIROBI.....2ND DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 9th April 2014 in which the Plaintiff/Applicant seeks for orders that summary judgment be entered against the Defendants and that the costs of this Application and suit be borne by the Defendants.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Mbuthia Macharia, sworn on 9th April 2014 in which he averred that he met the 1st Defendant as a tenant of his property L.R. No. 209/7963/62 (hereinafter referred to as the “suit property”) and that they became friends. He further averred that the 1st Defendant forged documentations in regard to the suit property and misrepresented herself as his wife to have the suit property transferred to her name. He then averred that upon learning of this, investigations were conducted resulting in criminal proceedings being commenced against her in which judgment was delivered finding her guilty of making a document without authority and also forgery. He further averred that the 1st Defendant has been duly served with court process in this suit but has failed to enter appearance or file a defence. He further stated that he lives in fear that the 1st Defendant may proceed to dispose off the suit property to an innocent purchaser for value. He further stated that he is an old man now aged 93 years with health problems and that he wishes to settle this matter expeditiously so that he can share out his properties among his heirs.

The Application is contested. The 1st Defendant filed her Replying Affidavit sworn on 2nd July 2014 in which she stated that she has been married to the Plaintiff since the year 2000 and lived with him as her husband on the suit property as his second wife. She further disclosed that the Plaintiff lawfully transferred to her the suit property by way of gift. She further averred that on 22nd November 2010, the Plaintiff’s sons Nahashon Kariuki, Nelson Njuguna and Obadiah Mwangi evicted her from the suit property, took all her household goods and the Plaintiff away. She further averred that she was arrested in June 2011 because one of the Plaintiff’s sons, Obadiah Mwangi had reported to the police that she has forged documents of ownership to the suit property and that she was taken to Langata Women’s prison only to be released on 7th May 2012. She further added that the suit property was taken over by the Plaintiff’s son Nahashon Kariuki, who is currently living there and collecting rental income estimated at Kshs. 38,500/- per month. She further added that in spite of being the legal owner of the suit property, she has been unable to access the same and has been forced to live with well-wishers. She also stated that she has difficulties getting the services of an advocate as she is unable to pay for that service. She further added that the Plaintiff transferred to her the suit property voluntarily and requested the court to allow her

to file a defence and for the suit to be allowed to proceed for trial in the usual manner. She therefore sought for this Application to be dismissed.

It is common ground that the legal owner of the suit property is the 1st Defendant. However, this ownership is contested by the Plaintiff on the ground that the 1st Defendant forged the transfer of the title to the suit property into her name. On her part, the 1st Defendant contends that the Plaintiff lawfully transferred to her the suit property by way of a gift. In this Application, the issue that I am required to address is whether I should enter summary judgment against the Defendants as prayed by the Plaintiff. The principles that guide our courts in determining applications of summary judgment are not in dispute. In **Industrial & Commercial Development Corporation v. Daber Enterprises Ltd (2000) 1 EA 75**, the Court of Appeal stated that the purpose of 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 claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. In **Dhanjal Investments Ltd v. Shabaha Investments Ltd Civil Appeal No. 232 of 1997**, the Court of Appeal had earlier stated as follows regarding summary judgment:

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant v. Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs. Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...”

Looking at this particular case, the main issue to determine is the manner in which the 1st Defendant obtained title to the suit property. The allegation that she obtained it by forgery is an issue for determination in this suit. It follows therefore, that this is hardly a plain and obvious case for which summary judgment may be entered. Further, that is a triable issue that should be ventilated at a full trial with the production of evidence and cross-examination. I therefore consider that this suit is not suitable for entry of a summary judgment as prayed by the Plaintiff and proceed to dismiss this Application. Costs shall be in the cause.

I therefore allow the 1st Defendant to file and serve her defence within 30 days from this Ruling.

DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE