



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

ELC NO. 847 OF 2012

NJUGUNA MUCHUNAPLAINTIFF

VERSUS

DIGA WARIO & 17 OTHERS.....DEFENDANTS

RULING

The Plaintiff /Applicant herein **Njuguna Muchuna** has brought this Notice of Motion dated 6/2/2013 against the Defendants herein, seeking for various Orders. The application is brought under **Order 51 Rule 1, Order 13 Rule 2, Order 2 Rule 15 of the Civil Procedure Rules Sections 1A, 1B, and Section 3A of the Civil Procedure Act** and all other enabling provisions of the Law. The applicant has sought for these Orders:-

- i. That Judgement on admission be entered for the Plaintiff/Applicant against the stated Defendants.
- ii. That the Court do strike out the statement of Defence of the stated Defendants.
- (iii) Court do make any such other Order in the interest of Justice.
- (v) Costs of the application be borne by the Defendants.

The application was borne on these grounds that:-

- a. That 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 11th, 14th, 15th, and 17th Defendants have severally and unequivocally admitted in paragraph 3 of their Statement of Defence that, the Plaintiff is the registered owner of land Reference No. 7785/451, Nairobi having been duly registered as such on 21st December, 1995.
- b. That the above stated Defendants have severally and unequivocally admitted in paragraph 2 of their Defence that, they indeed approached the Plaintiff for assistance after being displaced during the construction of the Eastern By-Pass and as such they have no reasonable defence and/or cause of action against the Plaintiff.
- c. That the Defence filed by the above stated Defendants is a mere sham, raises no reasonable Defence and is a gross abuse of the Court process.
- d. That the application shall save on the Court's time and the Defendants stand to suffer no prejudice.

The application was also supported by the supporting affidavit of Njuguna Muchuna. The Notice of Motion was also opposed. One **Diqa Wario**, filed a Replying Affidavit. The parties herein, canvassed this Notice of Motion through written Submissions and highlighted them in Court on 17th June, 2013. The Court has considered the Written Submissions and the pleadings generally. The Court had also considered the relevant law.

Order 13 Rule 2 provides for entry of Judgement on admission; it reads as follows:-

“ Any party may at any stage of a suit where admission of facts has been made , either on the pleadings or otherwise , apply to the Court for such judgement and Order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such Order, or give such judgement , as the Court may think just”.

The applicant has alleged that the Defendants have admitted the facts in paragraph 2 and 3 of their Defence. I have considered the said paragraphs 2 and 3 of the Defence.

In paragraph 2: The Defendant admits having approached the Plaintiff for assistance.

In paragraph 3; The Defendants stated that they are still grateful to the Plaintiff for the assistance. However, they denied that they promised to move out within one month.

In their Defence, the Defendants have admitted that, Plaintiff is the registered owner of the suit premises. However, they have not admitted all the allegations in the Plaintiff. In the case of **Choitram Vs Nazari (1984) KLR 327 at page 33, the Court of Appeal** held that:-

“Admissions have to be plain and obvious, as plain as a pike staff and clearly readable because they may result in a Judgement being entered. The admission must have no room for doubt that the parties passed out of the stage of negotiations into a definite contract”.

The question to ask now, is the admission by the Defendants in paragraph 2 and 3 of their Defence so obvious?. The Defendants only admitted that, Plaintiff is the registered owner of the suit premises and that he offered them assistance. However, they claimed that they entered into a written Agreement and they continue to pay him. That is not an obvious admission.

Again in the case of **Consolidated Bank of Kenya Ltd Vs Mombasa Development Ltd and another Civil Appeal No. 79 of 1995,** it was held that:-

“ A court can only enter judgement on admission when the admission is clear, unambiguous, unequivocal and sufficient i.e admission must be plain and obvious”.

In the instant application the admission alleged by the Plaintiff/Applicant is not clear, sufficient, plain and obvious.

On the striking out, of the pleadings, the principles applicable are well laid out in the case of **D.T Dobie & Co.(k) Ltd Vs Muchina (1982) KLR1 at Page 9 where Madan J** observed that:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage , the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits, without discovery ,without oral evidence tested by cross-examination in the ordinary way”.

The defendants have filed a Defence and alleged that, there is a written agreement which has not expired. The Defence therefore, raises triable issues and the suit should accordingly go for the full trial and be decided on merit.

For the above reasons, the Court finds that the Plaintiff/ Applicant's application dated 6/2/2013 is not merited. The same is dismissed. Costs in the Cause.

It is so ordered.

Dated, Signed and delivered this 26th day of July, 2013.

L N GACHERU

JUDGE

In the Presence of:-

..... **for the Applicant**

.....**for the Defendant**

Anne Court Clerk

L N GACHERU

JUDGE