



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI.

ELC CASE NO. 66 OF 2013

JOSEPH KIBII MARTIM.....PLAINTIFF

VERSUS

ELIZABETH N NJAAGA.....DEFENDANT

RULING:

The applicant herein brought two applications against the defendant seeking for various orders:-

The first Notice of Motion is dated 10th January , 2013 brought under **Section 1A, 1B, and 3A of the Civil procedure Act, order 9 Rule 2(2) 9a) of the Civil Procedure Rules 2010** and all other enabling provision of the law.

The applicant sought for these orders:- that the Court to grant approval for Joseph Kibii Maritim , the plaintiff herein to prosecute the present suit on behalf of Alice Wairimu and Tim William Wallace under a Power of Attorney and for costs of the application .

The application was premised on the grounds set on the face of the application notably that:-

- i. The property the subject of the present suit is registered in the names of Alice Wairimu and Tom William Wallace (the grantors’).
- ii. Both grantors are residing and working for gain in the United Kingdom and have no immediate intentions of travelling to and/or migrating back to Kenya.
- iii. That Joseph Kibii Maritim (the proposed plaintiff) is a Property Manager and/or agent working under a Company known as **Neo-Westend Ltd** which has all along managed the suit premises on behalf of the grantors and is well conversant with all the facts relating to the suit.
- iv. The grantors wish to have the proposed Plaintiff prosecute the suit on their behalf and have in that regard donated to him a power of Attorney to that effect.
- v. That the proposed Plaintiff is well conversant with the facts of the case and it is impractical for the grantors to travel back and forth to Kenya with the sole objective of prosecuting the suit.

The application was also supported by the supporting Affidavit of **Joseph Kibii Maritim**. The application was not opposed. The applicant stated the application is a requirement under Order 9 Rule 2(a) which makes the approval of the Court a requirement where a party sues through Power of Attorney.

Order 9 Rule 2(a) reads as follows:-

“ the recognised agents of parties by whom such appearances , application and acts may be made or done are:- subject to approval by the Court in any particular suit persons holding power of attorney authorizing them to make such appearances and applications and do such acts

on behalf of parties”.

The applicant has come to Court for such approval and I find no reason to decline to grant it. The Court consequently allows the applicant Notice of motion dated 10/1/2013. Costs in the cause.

The Second Notice of Motion is dated 12th February, 2013 brought under order 36 rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act and all enabling provision of the Law. It is also brought by the Plaintiff, **Joseph Kibii Maritim** for Orders that the Court do enter Summary Judgement against the Defendant for:-

- a. Recovery/Vacant possession of the suit premises otherwise known as unit C6 Palm Valley Flats, erected on LR No. 330/669.
- b. Special damages in the sum of Kshs.112, 111/80 together with mense profits at the rate of Kshs. 70,000/= per month from 1st April, 202 until payment in full and for costs of the application.

The application was supported by the Affidavit of Joseph Kibii Maritim and upon the grounds on the face of the application notably that:-

- a. The Plaintiff seeks Judgement against the Defendant for recovery of land with a claim for rent arrears and mense profits on account of expiry of term of tenancy and /or breach of covenant.
- b. That Defendant has no conceivable defence to the claim that would warrant a full trial and the only just, expeditious and affordable manner to resolve the present dispute is through summary procedure.

The Defendant opposed the application and filed his Replying Affidavit on 22/4/2013. She averred that she filed her Defence and that the application lacks merit and she has continued to make good her monthly rent payments as required by the agreement.

The parties herein, canvassed the application orally in Court. The applicant abandoned prayer No.2. The Court is only left to deal with prayer No.1. Order No. 36 rule 1(1) b of the Civil procedure Rules provides as follows:-

“in all suits where a Plaintiff seeks judgement for: the 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 tenancy or against a trespasser, where the Defendant has appeared but not filed a Defence, the Plaintiff may apply for judgement for the amount claimed or part thereof and interest or for recovery of the land and rent or mesne profits”.

The purpose and objective of Order 36 Rule 19a) 9b) is to enable a Plaintiff who has a plain and obvious case to which a defendant cannot possibly raise a bonafide Defence to obtain Summary Judgement and in that way save on the delay and expense that would ordinarily follow if Defendant was allowed to Defend the claim.

The said application under Order 36 Rule 1 is to be filed upon the Defendant entering appearance but before the Defendant has filed the Defence. In the instant suit, the Defendant entered appearance on 31st January, 2013. The applicant filed the instant application on 13/2/2013. That was before the Defendant filed her Defence. The Defendant filed her Defence on 14/2/2013. However, under Rule 1, the Defendant can only file a Defence with the leave of Court after application for Summary Judgement has been filed.

There is no doubt that the Defendant herein entered into a Tenancy Agreement with the grantors herein. There is no doubt that the Defendant breached the said Tenancy Agreement and both parties had a suit at the Rent Restriction Tribunal. Defendant in her oral submissions told the Court that she is a pastor and she pays her rent by faith.

The applicant submitted that though the Tenancy Agreement was extended for a further one year, after it expired in the year 2011; the Defendant fell into habit of falling into rent arrears and paying in instalments. That the Plaintiff issued termination Notice but Defendant failed to vacate the suit premises. The applicant has now come to Court to seek for instant orders of vacant possession.

Defendant on her part alleged that she has been paying rent on a month to month basis. She also admitted that her cheque bounced once. She also told the Court that she has not refused to vacate but she had not been given notice to vacate by the Plaintiff.

I have examined the pleadings and the annexures thereon and there is no doubt that the Defendant had breached the terms of the Tenancy Agreement. The agreement also expired and she was given notice to vacate. The Plaintiff contended that the Defendant has continued to be in unlawful occupation of the suit premises, apartment No. Co.6 Palm Valley Flats. The Defendant should therefore, give vacant possession of the suit premises since she is in default of payment of rent and has been given notice to quit.

I am guided by the case of **Nairobi Golf Hotels Ltd Vs Bhunji Sanghani Builders Contractors, Civil Appeal No. 5 of 1997**, where it was held that:-

“In an application for summary judgement, the duty is cast on the Defendant to prove that he should be given leave to defend but his duty is limited to showing prima facie existence of triable issues or arguable case”.

The Defendant herein, has failed to discharge her duty and the Court holds that the Plaintiff is in order in seeking to recover vacant possession of the suit premises under summary procedure pursuant to the provisions of Order 36 Rule 1(1) b and I do not consider the Defendant herein has an arguable case. For the above reasons, the Court enters Summary judgement against the Defendant in terms of prayers no.1 of the Notice of Motion dated 13/2/2013.

The Defendant filed her Defence after the application for Summary Judgement was filed. She did so without leave of the Court and did not bother to convince court why she should be given leave to defend and therefore, file her Defence. The said Defence has therefore been filed without leave of the Court and the same is expunged from the Court’s records.

Having now entered Summary Judgement in terms of prayers No.1 of the Notice of Motion ,dated 13/2/2013 , i.e. the Defendant to grant vacant possession of the suit premises to the Plaintiff and having expunged the Defendant’s Defence from the Court’s records, the Court Orders the remaining prayer to be canvassed in Court through Formal Proof.

The costs of the application be in the cause. It is so orders.

Dated, Signed and delivered at Nairobi this 19TH of July, 2013.

L .N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant/Applicant

Anne: Court Clerk

L .N. GACHERU

JUDGE