



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 157 OF 2010

DIOCESE OF NYERI TRUSTEES (REGISTERED)

AS A TRUSTEE OF COMPANION OF

LITTLE FLOWER SISTERS..... PLAINTIFF

VERSUS

KATRAM LIMITED.....1ST DEFENDANT

RAHAB MUKIAMA.....2ND DEFENDANT

RULING

By notice of Motion dated 17th November 2011, the Plaintiff/Applicant sought the following orders:-

1. That the Plaintiff be granted to leave to withdraw prayer (c) of the Plaint which is a claim for general damages.
2. That pursuant to the order of the court on 26/8/11 by means of which the Defendants defence was struck out, Judgment be entered for the Plaintiff in terms of prayer (a), (b) and (d) of the Plaint.
3. That costs of this application be provided for.

The application is supported by the grounds appearing on the face of the application as well as the Supporting Affidavit of Father David Mutahi. In it, he stated that by an order of this court of 3/8/10, the Plaintiff's injunction application was allowed as prayed thereby restraining the 1st and 2nd Defendants from trespassing and/or entering into and/or interfering with the Plaintiff's quiet possession of L. R. No. 209/8402/5 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this suit. He also stated that by an order of this court of 26/8/11 the Defendant's Defence was struck out with costs to the Plaintiff. He further stated that all that remains is for the Plaintiff to set down the suit for formal proof in respect of prayer (c) of the Plaint which is a claim for damages. He stated that he was not keen on pursuing the said claim for general damages as it would unnecessarily prolong the proceedings herein.

The application is opposed. The 2nd Defendant filed her Replying Affidavit sworn on 18/4/13 in which she stated that the order sought by the Plaintiff cannot be granted before the case goes for full hearing for the reason that the Plaintiff is seeking a permanent injunction against the Defendants from trespassing onto the Suit Property.

Both Counsels for the Plaintiff and the Defendants made their oral submissions which have been taken into consideration.

The point in dispute is the proper legal procedure by which this suit may be determined in favour of the Plaintiff after the court struck out the Defendant's defence.

Order 10 is instructive on this point. Where a defence has been struck out, the consequences are the same as if there was no defence filed at all. Order 10 Rule 10 provides that the provisions of Rule 4 to 9 shall apply where there is no defence. Rule 4 allows for interlocutory judgment to be entered in cases where the plaintiff makes a liquidated demand only. In the instant case, the Plaintiff had made not only a liquidated demand but also some other claim. In that case, Rule 4 (2) applies. Rule 4 (2) provides that where the plaintiff makes a liquidated demand together with some other claim, the court shall enter judgment for the liquidated demand but the award of costs shall await judgment upon such other claim. Clearly, in the instant suit, the Plaintiff has made other claims separate from the claim for general damages. Nowhere does the law allow for judgment to be entered in the interlocutory stage in respect of such other claims such as a claim for a permanent injunction as is the case here.

In this respect therefore, the court finds that the present suit must proceed for formal proof for the Plaintiff/Applicant to obtain judgment in respect of prayer (a), (b) and (d).

In the same breath, I find that the Plaintiff is allowed to withdraw any prayer in the plaint as it wishes. Accordingly, the Plaintiff is hereby allowed to withdraw prayer (c) of the Plaint.

I make no order as to costs.

SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE