



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 5 OF 2009**

1. **WAMBUI WAGACHA**  
2. **MERCY NJERI NGOIMA** ..... **PLAINTIFFS/APPLICANTS**

**VERSUS**

1. **DOMINIC KINYA NGABA** ..... **DEFENDANTS/RESPONDENTS**

**RULING**

The **Notice of Motion** dated 16/6/09 is brought under **Order XXXV Rules 1 (1) & (2), 5, 8 and 9** of the **Civil Procedure Rules, Sections 3A** of the **Civil Procedure Act, Cap 21, Laws of Kenya** and all other enabling provisions of the law.

The application seeks orders that summary judgment be entered for the Plaintiffs against the Defendant as prayed for by the Plaintiffs in terms of prayer (1) of the plaint.

The application is supported by the affidavit in support sworn by **Wambui Wagacha**. According to the said affidavit, the Applicants are the registered owners of land parcel **NO.2060/70** within the **Mavoko Municipality** while the Respondent is the registered owner of the adjacent plot **No. 20604/71**. The Applicants' complaint is that the Defendant deliberately and unlawfully trespassed into the 2<sup>nd</sup> Applicant's 20604/70 and constructed a house thereon despite being cautioned by the Applicants that he was constructing on their property. The Applicants' contention is that the defence constitutes an admission and therefore summary judgment ought to be entered in their favour.

The application is opposed. The Respondent in his replying affidavit sworn on 7/9/2009 has deponed that his defence raises triable issues and urged the court not to deny him of the opportunity to have the case heard on merits.

It was further contended that there is no certificate of search to confirm whether the Plaintiffs are the current owners of the land in question and further that there is no proof of trespass.

I have considered the application, the reply to the same, the rest of the pleadings and the written submissions filed by **Ms. Mwangi and Wahome Advocates** for the Applicant and **Ms. B. Mbai & Company Advocates** for the Respondent.

The Applicants have exhibited their certificates of title to their respective parcels of land. The Applicants are therefore the registered owners of the plots the subject matter of this suit. Although the Respondent has in his reply stated that no search certificates have been exhibited to show that the Applicants are the current owners, the Respondent has not exhibited any document to prove that the plots in question belong to him. Paragraph No. 3 of the defence denies trespass and claims that the Defendant is the rightful owner of the plots in question. In paragraph No. 4 of the statement of defence, the

Respondent in the alternative expresses willingness to transfer two other plots to the Applicants in exchange with the two plots belonging to the Applicants. The letter exhibited by the Applicants (annexture “**WW III**”) contains an admission of encroachment by the Respondent. The Respondent’s replying affidavit does not specifically deny having written the said letter.

The Respondent plainly has no defence to the claim. The Plaintiff is therefore entitled to a quick judgment. The Respondent has not raised any triable issues or an arguable case.

As stated by the Court of Appeal in **Industrial Commercial Corporation –vs- Daber Enterprises Ltd, C.A. 41 of 2000:-**

**“The purpose of proceeding in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.”**

With the foregoing, I am in agreement with the submissions by the counsel for the Applicants that this is a proper case for entry of summary judgment. Consequently, I allow all the application with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **4<sup>th</sup>** day of **September** 2013.

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**B. THURANIRA JADEN**

**JUDGE**