



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 150 of 2012

GREEN VALLEY ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

1. **NAISIANOI MPESHE**
2. **LAKATIA MPESHE**
3. **AMOS NKONYOYO MPESHE**
4. **NICHOLAS KUPERE MPESHE**

5. **TUMPEINE MPESHE.....DEFENDANTS**

R U L I N G

A plaint herein was filed on 8th May 2012 by the plaintiff seeking the following orders:-

1. **A declaration that the plaintiff is the legal owner of the parcel of land known as Kajiado/Kitengela/2020.**
2. **An order directed at the defendants, their families, agents, assigns and/or employees to vacate the plaintiff's property known as Kajiado/Kitengela/2020 forthwith.**
3. **Costs of this suit.**

Appearance by the defendants was filed on 29th May 2012. Thereafter, on 22nd June 2012 this present application for summary judgment was filed. By then, defence had not been filed. On 5th July 2012 however, a statement of defence and counterclaim was filed. On 13th July 2012, the defendants filed grounds of opposition to the present application, which are in the following terms:-

1. **THAT the application is misconceived and untenable in law.**
2. **THAT the defendants have a valid and reasonable defence against the plaintiff's claim which raises serious issues of both law and fact meriting determination upon full trial once and for all.**
3. **THAT the application as filed is premature and baseless.**

On the hearing date of this application for summary judgment dated 20th June 2012, **Ms. Kunyanga** for the plaintiff and **Mr Milimo** for the defendants made submissions on their respective clients' position.

In my view, this application for summary judgment cannot be said to be premature, as alleged by the defendants. Appearance was entered on 30th May 2012. However, thereafter defence was not filed. This

application was filed on 22nd June 2012, which was about 23 days after entry of appearance. By that time, defence had not been filed. The defendants should have filed defence within 14 days of entering appearance as required under **Order 7 rule 1** of the **Civil Procedure Rules**, which provides:-

1. Where a defendant has been served with summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered appearance in the suit and serve it upon the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

Since the application was filed after the lapse of 14 days from the entry of appearance, it cannot be said to be premature.

Do I allow the application for summary judgment? I will not. This is because both the **Civil Procedure Act (Cap 21)** under **section 1A**, and the **Constitution of Kenya 2010**, under **Article 159 (2) (d)** require that courts administer substantive justice, expeditiously and at an affordable cost. I have to state that if the late filing of the defence herein requires leave of the court, the defendants have to seek such leave from the court hereafter. Otherwise the defence filed could stand for nothing.

As for the application for summary judgment herein, the fact that the law and the Constitution encourage courts to administer substantive justice, and the fact that my perusal of the defence and counterclaim shows that it raises substantial issues for decision, has persuaded me not to allow the application for summary judgment. Granting summary judgment, at this stage in my view, will not be in the interests of substantive justice. The costs of the application will nonetheless be to the plaintiff. I assess throw away costs of the application at Kshs.4,000/=.

Consequently, I dismiss the Notice of Motion application dated 20th June 2012. However, I award costs of the application assessed at Kshs.4,000/=, to the plaintiff/applicant against the defendants, jointly and severally.

Dated and delivered at Machakos this **30th** day of **November** 2012.

George Dulu

Judge

In the presence of:

Ms. Atina holding brief for Mr Oluoch for the Plaintiff/Applicant

N/A for Defendant/Respondent

Nyalo – Court clerk