



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.124 OF 2007

JAMES K. NDERITU.....1ST PLAINTIFF
MARGARET W. NDERITU.....2ND PLAINTIFF

VERSUS

**RICHARD NJOBA T/A THEMIS
INVESTMENTS LTD.....**

.....DEFENDANT

R U L I N G

1. The plaintiffs James K. Nderitu and Margaret W. Nderitu have filed a preliminary objection to the defendant's application dated 28th May, 2007 on the following grounds:
 - (i) No summary judgment can issue on a claim of the nature in this suit under Order XXXV of the Civil Procedure Rules and to that extent the motion is incompetent and does not lie at all in law.
 - (ii) A counter-claim is inseparable from the main suit unless it is strictly and distinctly for a specific liquidated claim without other prayers.
 - (iii) This suit raises serious triable issues both on the main suit and the counter-claim on the issue of ownership of LR No.209/12155 and the boundary/beacons with LR No.209/12154 and both issues cannot be determined by summary procedure/judgment on affidavits.
 - (iv) The application is therefore incurably defective and should be struck out with costs to the plaintiffs and the suit to proceed for full hearing.
2. In support of the preliminary objection, Mr. Kopere who appeared for the plaintiffs argued that, Order XXXV of the Civil Procedure Rules is clear on the circumstances in which summary procedure may apply. He submitted that the defence and counterclaim filed by the defendant and in respect of which summary judgment is sought is a counterclaim for order of joint survey of LR No.209/12154 and LR No.209/12155 and re-establishment of the beacons, an order for eviction, a declaration that plaintiff is a trespasser, and that the purported allotment of LR 209/12155 to the plaintiff is unlawful, illegal and a nullity. These were not orders envisaged for summary judgment under Order XXXV of the Civil

Procedure Rules. Relying on *Titus Muiruri Doge vs Kenya Cannery Ltd [1982-88] 1 KAR 759*. Mr. Kopere submitted that a counter-claim is not severable from the defence.

3. In opposition to the preliminary objection, Mr. Kariuki who appeared for the defence argued that the application for summary judgment was well grounded under Order XXXV Rules 1, 2 and 3 of the Civil Procedure Rules. Relying on *Mukisa Biscuit Manufacturers Company Ltd vs West End Distributors Ltd [1969] 1 EA 696*, Mr. Kariuki maintained that the facts on the pleadings were substantially in dispute and therefore a preliminary objection could not properly lie. It was argued that the claim in the counter-claim was distinct from that in the plaint. It was pointed out that the defendant's application had an alternative prayer for eviction in respect of LR 2109/121/54 to which the plaintiff has not laid any claim. It was argued that a counter-claim is a distinct claim which can proceed to hearing even if the main claim is stayed.

4. I have given due consideration to the preliminary objection as well as the submissions made by counsel. I do note that the defendant's counterclaim includes an order for joint survey of LR No.209/12154 and LR No.209/12155 and re-establishment of the beacons to these properties. This means that the defendant admits that there is need to establish the boundaries of the two properties. The defendant's counterclaim is anchored on trespass and encroachment.

5. Although summary judgment under Order XXXV of the Civil Procedure Rules is available for recovery of land against a trespasser, the defendant's counterclaim and the plaintiff's main suit cannot be separated as the two claims are dependent on the establishment of the beacons in respect of the two suit properties so as to determine the issue of encroachment and trespass. This is a matter which cannot be determined summarily.

6. For the above reasons, I uphold the preliminary objection and strike out the application dated 28th May, 2007.

Dated and delivered this 11th day of February, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiffs absent
Gathaara for the defendant
B. Kosgei - Court clerk