



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ELC. CASE NO 14 OF 2010**  
**MUOROTO THUITA INVESTMENTS**  
**LTD.....PLAINTIFF**

**V E R S U S**

**DAN**

**MATHINI.....DEFENDANT**

**R U L I N G**

It is not in dispute that the Plaintiff is the registered proprietor of parcel L.R. No. 36/VI/259 situate along Juja Road in Nairobi and measuring about 3 acres. It has subdivided the parcel into 42 plots. One of the plots is L.R. 36/VI/422 with a Deed Plan No. 178136 issued on 11<sup>th</sup> November 1993 by the Director of Surveys. It measures 0.0146 Hectares. This is the plot the Plaintiff claims the Defendant, without consent or authority, illegally entered thereon and constructed illegal structures which he has rented to five tenants. The Plaintiff states that the Defendant has no claim to the plot. This suit was filed on 14<sup>th</sup> January 2010 for eviction, demolition of the illegal structures, general damages for trespass and costs.

The Defendant's case is that he owns this plot on which he has erected two rooms. He states that he has occupied this plot for over 20 years after he was allocated the same way the Plaintiff got the parcel. He alleged that he has since acquired title to the plot by adverse possession. Lastly, he claims that the Plaintiff obtained a Deed Plan to the suit property while well aware that it belonged to him.

It is notable that the Plaintiff does not indicate how it got the parcel from which the plot came, and also when it is that the Defendant entered the suit premises.

Following this suit the Defendant filed a suit by way of originating summons against the Plaintiff seeking to be declared to have acquired title to the suit premises by adverse possession. That suit has a hearing date on 21<sup>st</sup> September 2011. It is **HCCC No. 41 of 2011 (O.S)**.

The Plaintiff filed the present motion under Order 35 rule 1(1) (b) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for summary judgment on the grounds that it is the registered

proprietor of the suit land which the Defendant has illegally occupied as he has no claim to the same. When I listened to Mr. Githinji for the Plaintiff, his argument was that the Defendant has no reasonable defence to the claim that should go to hearing. He contended that the Defendant is raising two different defences to the claim: one that he was allocated the suit premises and the other that he has acquired title by adverse possession. The Defendant through M/s Betty Rashid opposed the application on the ground that the defence was reasonable. Counsel submitted that if the application is allowed it would mean that the originating summons would have been determined without it being heard.

I agree that the reasonable step that the Plaintiff should have taken was to have the two suits consolidated as they relate to the same parties who are litigating over the same plot. After such consolidation, the Plaintiff would be at liberty to seek summary judgment, if that is his desire. In the instant case, however, if there is summary judgment granted here there would still be the other suit between them.

Back to the merits of this application. The Defendant has filed a defence to the claim and there is no application to strike out that defence. This has weakened the Plaintiff's application. The purpose of the proceedings in the application for summary judgment is to enable the Plaintiff to obtain a quick judgment where there is mainly no defence to the claim (**Industrial And Commercial Development Corporation –Vs- Daber Enterprises Ltd. [2001] 1EA 75**). Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. Further, a defence on merits does not mean a defence which must succeed; it means an issue that raises a *prima facie* defence and which should go to trial to be adjudicated upon (**Vaiwin Ltd. –Vs- Raskbai Manibhai Patel, Civil Appeal No. 248 of 1999**).

The Plaintiff is the registered proprietor of the suit land and that entitles it to a *prima facie* indefeasible and absolute claim to the land. The Defendant is, however, saying that registration was subject to his claim as he was already in possession. Since then, he says, he has had an uninterrupted occupation for over 20 years. The Defendant is raising a challenge to the registration which has to be heard. One cannot say that the challenge is frivolous, a sham or a waste of time. This is a *prima facie* defence that should go to trial.

In short, I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL 2011**

**O. MUCHELULE**

**J U D G E**