



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 490 OF 2010

SOPHIE WANJIKU JOHN.....PLAINTIFF

VERSUS

JANE MWIHAKI KIMANI.....DEFENDANT

RULING

The Plaintiff purchased the parcel of land known as Title No. Ndumberi/Riabai/3784 from one Margaret Wanja Korogo. When she went to fence the said parcel of land she found the defendant squatting on her property. She ordered the defendant to vacate but the defendant has refused, neglected and or failed to vacate. Her claim against the defendant is therefore for an order of eviction and vacant possession. She also claims costs of the suit.

Upon service of summons the defendant filed a defence and counterclaim. In the said defence the defendant denied that the plaintiff purchased the said suit property as alleged. It is her defence that she is a beneficial owner of the suit property as she was a beneficiary of the estate of the late Lillian Wanjiku in her will. She also denied that she had been squatting on the plaintiff's land and adds that she has been living on the said parcel of land for over 25 years undisturbed since 1996 cultivating the same and has built a permanent house thereon. It is also her case that there are subsisting equitable interests of hers on the said parcel of land thus she is the rightful owner by virtue of adverse possession. It is further her case that if the plaintiff claims ownership of the said parcel of land, then the same was obtained through fraudulent means and therefore the Title held by the plaintiff is null and void. She then sets out particulars of fraud by the plaintiff and that of negligence also attributable upon the plaintiff.

In the counterclaim she reiterated the contents of her defence and assented her claim based on adverse possession. The plaintiff filed a reply to the defence and defence to counterclaim denying all the averments raised by the defendant. There is now before me an application by way of Notice of Motion under Order 36 rule 1 of the civil procedure rules 2010 Sections 1A, 1B and 3A of the Civil Procedure Act for the substantive order that summary judgment be entered against the defendant for recovery of land against the defendant who is a trespasser and as prayed in the plaint.

Both learned counsel have filed written submissions and cited some authorities which I have read. Order

36 Rule 1 aforesaid will be applicable in the instant case if the defendant had entered an appearance but failed to file a defence. In the instant case there is, as I have noted, a defence and counterclaim. The order sought by the plaintiff may be granted only in the most clear cases where no triable issues exist in the defence raised by the defendant.

Our jurisprudence is awash with authorities asserting that position and this re-emphasizes the position that however weak a party's position may be, summary judgment should not be invoked arbitrarily. See Nairobi **HCCC NO. ELC 1535 of 2007 Board of Trustees African Inland Church versus Timothy Mulehi and 6 others (2008 KLR, Milimani HCC 511 OF 2009 Creative Capital Solutions versus Geospa Drilling Limited & 2 others and Gupta Versus Continental Builders Limited (1978) KLR 83.**

Looking at the defence and counterclaim I have referred to above, there are several triable issues that have been raised. These include whether or not the defendant is a beneficial owner of the estate of the late Lillian Wanjiku, whether or not he has been living on the said parcel of land for over 25 years, whether or not the plaintiff is guilty of fraud and or negligence among others.

Clearly therefore, the defendant is entitled to unconditional leave to defend the suit in view of the foregoing issues and the plaintiff cannot move the court for the order sought because, if allowed, the defendant shall be driven out of the seat of judgment without a hearing. Accordingly, I find that the plaintiffs application by way of Notice of Motion dated 2nd December, 2010 is misconceived and misplaced and should therefore be dismissed with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of May, 2011.

A. MBOGHOLI MSAGHA

JUDGE