



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

CIVIL CASE NO.107 OF 2008

JACINTA WAIRIMU

MUBARI.....PLAINTIFF

VERSUS

KAGAU KIGERA.....1ST
DEFENDANT

WANJIRA MBOGO.....2ND
DEFENDANT

J U D G M E N T

1. By a notice of motion dated 25th June, 2010, Jacinta Wairimu Mubari whois the plaintiff in this case seeks summary judgment to be entered in her favour as prayed in the plaint. The plaintiff who is the registered owner of property known as Kabare/Nyangati/3159, is aggrieved by the defendants' action of trespassing onto the plaintiff's property and building structures thereon with the intention of illegally dispossessing the plaintiff. The plaintiff therefore filed a plaint seeking judgment against the defendants jointly and severally for:

- (a) An order requiring the defendants to forthwith remove themselves, their properties, servants and agents from the plaintiff's property
- (b) An injunction restraining the defendants by themselves, their servants and agents from entering or remaining in or committing acts of waste on the plaintiff's piece of land.
- (c) General damages and costs of the suit.

2. In their defence filed on 19th August 2008, the defendants denied the plaintiff's claim contending that they were only constructing on Jua Kali Plots which were demarcated and allocated by the Municipal Council of Kerugoya Kutus.

3. The plaintiff has now moved the court under the former Order XXXV Rule 1(1)(b) of the Civil Procedure Rules. The plaintiff prays for summary judgment maintaining that the defendants have no title or claim to the plaintiff's land and that the defence filed is bogus, vague evasive and a bare denial.

4. In his written submissions, Counsel for the plaintiff has argued that the defendants have not annexed any affidavit from Kerugoya/Kutus Municipal Council to confirm the alleged allocation, nor have they shown any connection between the plaintiff's freehold title and the alleged Jua Kali titles.

5. The defendants have responded to the application through a replying affidavit sworn by the 2nd defendant in which she reiterates that they were allocated Plot No.96 Kutus by the Municipal Council. In his written submissions counsel for the defendant argued that there was need for the suit to go to hearing so that the issue whether the plot allocated to the defendants is on land parcel No.Kabare/Nyangati/3159 can be resolved. Counsel further argued that it would be necessary to join Kerugoya/Kutus Municipal Council as a party to the suit.

6. I have carefully considered the application and the submissions made. Order 36 Rule 1 of the Civil Procedure Rules 2010 states as follows:

“1.(1) In all suits where a plaintiff seeks judgment for –

(a) A liquidated demand with or without interest; or

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

Where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

7. In this case the defendants have filed a defence. Although essentially the defendants do not appear to dispute the plaintiff's title to Kabare/Nyangati/3159, the defendants are implying that they are constructing on a different land parcel. This land has been identified in the replying affidavit as Jua Kali Plot No.96 Kutus, allegedly allocated to the defendants by Kerugoya/Kutus Municipal Council. Thus the issue of trespass remains one to be determined since there is nothing to demonstrate to this court that the plaintiff's property as revealed in his title covers the land allegedly allocated to the defendants.

8. I come to the conclusion that this is not an appropriate case for summary judgment. Accordingly I direct that parties should comply with the pretrial procedures as provided under Order 11 of the Civil Procedure Rules, 2010 and that the suit shall proceed to full trial.

Signed this 20th day of May 2011.

H. M. OKWENGU

JUDGE

Dated and delivered this 31st day of May 2011

G . DULU

JUDGE

In the presence of: -

.....for the applicant
.....for the respondent
.....Court clerk