



**Gachuki (Suing as legal representative of the Estate of Esther Gachoki Munyua - Deceased) v Ndungu & another (Environment & Land Case E238 of 2021) [2025] KEELC 3199 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3199 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E238 OF 2021**

**AA OMOLLO, J**

**APRIL 3, 2025**

**BETWEEN**

**JANE MUMBI GACHUKI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ESTHER GACHOKI MUNYUA - DECEASED) ..... PLAINTIFF**

**AND**

**BILHA WANJIKU NDUNGU ..... 1<sup>ST</sup> DEFENDANT**

**KURIA GORO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant filed a notice of motion dated 18<sup>th</sup> September 2024 supported by an affidavit sworn by Bilha Wanjiku Ndung'u on the same date seeking for the following orders;
  - a. That this Honourable Court be pleased to enter Summary judgement against Jane Mumbi Gachoki the plaintiff herein as prayed for in the 1<sup>st</sup> Defendants Defence and Counterclaim dated 21<sup>st</sup> March 2022.
  - b. Costs of this suit Application be provided for.
2. The motion was premised on the grounds listed on its face which consists of the prayers sought in the counter-claim. That the Plaintiff did not file any defence to the counterclaim and her suit was struck off by this Court on the 24/7/2024 due to existence of the decree in ELC No. 376 of 2009 which declared the Applicant as the legal owner of the suit property. The Applicant deposes that the Plaintiff continues with the trespass depriving her an income and enjoyment of the fruits of her judgment hence she is entitled to claim mesne profits.



3. She also stated that her Counterclaim on Eviction of the Plaintiff is within the law and can be treated as a separate suit as she is in continued trespass despite notice. That there has been no suit previously against the Plaintiff by the 1<sup>st</sup> Defendant/Applicant.
4. The Plaintiff/Respondent filed grounds of objection dated 18<sup>th</sup> December 2024 stating that the nature of the prayers sought cannot be granted summarily unless after a full hearing. That the failure to file defence to the counterclaim within time was inadvertent but the same has been filed and thus the matter can now be set down for hearing.
5. The Plaintiff contend she is still aggrieved by the striking of her suit on 24<sup>th</sup> July, 2024 without being afforded an opportunity to be heard and has applied for review. She explained that being a beneficiary of the suit property by way of succession from her late mother who was an innocent purchaser for value, she should not be condemned to pay any mesne profits for a property she developed from scratch using her own resources and whose completion is yet to be done.
6. She pleads that the application is incompetent and misconceived as the prayers sought are not liquidated damages for which summary Judgment can be entered thus even if assuming there is no defence to the counterclaim, the matter ought to proceed to formal proof. She espoused that her claim and the 1<sup>st</sup> Defendant counter claim are intertwined through a maze of conflicting facts and legal documents and the issues between them can only be resolved after a full trial and not summarily as envisaged in the application.

#### **Submissions:**

7. Both the 1<sup>st</sup> Defendant/Applicant and the Plaintiff/Respondent filed submissions dated 30<sup>th</sup> January 2025 and 27<sup>th</sup> February 2025 respectively. The Applicant stated that Order 36 Rule 1 of the Civil Procedure Rules outlines the procedure for obtaining a summary judgment in specific types of cases which include claims for a liquidated demand and actions for the recovery of land, either with or without rent or mesne profits, from tenants whose leases have expired, been terminated, or forfeited, when the defendant has appeared but failed to file a defense.
8. The Applicant relied on the case of *Johnstone Amulio Ayub v. Peter Mwangi Njuguna* (2013)Eklr, where the court emphasized that summary judgment is only applicable when there is a clear and indisputable case, such as the recovery of land or a liquidated demand, and no defense is filed. She also cited the case of *Benedette Mwikali Mugambi v. Mark Kazungu Mramba* (2021)Eklr which reiterated that if no bona fide triable issue is raised by the defendant, the court may grant summary judgment.
9. The Plaintiff submitted that in the application, the main issues for determination are whether the court should enter summary judgment as per counterclaim and who should bear the costs of the application. The plaintiff argues that summary judgment should not be granted, as her case raises legitimate triable issues, particularly concerning the ownership of the suit property and the developments made over the years.
10. The plaintiff also emphasizes that summary judgment should only be granted in exceptional cases where the claim is clear and uncontestable, citing the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* (2020)eKLR, which underscored that summary procedures should be applied with caution and only when the facts and law are clear beyond doubt.
11. The plaintiff further contends that the 1<sup>st</sup> defendant's application for summary judgment was made in bad faith and intended to deprive her of the opportunity for a fair trial. She asserts that the court's previous decision to strike out their suit on 24<sup>th</sup> July 2024 without giving them an opportunity to be heard was an error and she has sought a review of the decision.



12. She stresses that the counterclaim raises complex issues, particularly regarding the nature of the prayers sought, such as mesne profits, which should be fully addressed at trial and cannot be determined through summary judgment. In support, she cited the case of Industrial and Commercial Development Corporation v Daber Enterprises Limited (2000) Eklr which emphasized that summary judgment is only appropriate when it is clear that there is no defense to the claim.
13. The plaintiff objects to the claim for mesne profits of Kshs. 50,000 per month by the 1<sup>st</sup> Defendant stating that it was not adequately explained or justified and highlights that mesne profits, defined as the profits received by a tenant in wrongful possession, must be properly pleaded and proven. Citing the case of Sadru Nanji v Al Nashir Dhanji [2020] Eklr, the plaintiff asserts that the defendant has not provided a reasonable basis for the amount of mesne profits claimed and that the claim for mesne profits requires formal proof.

#### **Analysis and Determination:**

14. I have considered all the issues raised in the application by the 1<sup>st</sup> Defendant and the grounds of opposition thereto. The principles which guide the courts in determining an application for summary judgment are provided for under Order 36(1) of the Civil Procedure Rules 2010. It provides that;

“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.”

15. In the locus classicus case of DT Dobie Company (Kenya) Ltd v Muchina (1982) KLR, Madan JA (as he then was) stated as follows:-

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

16. Also, the Court of Appeal in Harit Sheth T/a Harit Sheth Advocates v Sharma Charania [2014] eKLR held that: -

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not 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 (see also *Continental Butchery Ltd v Ndhiwa* (1989) KLR 573.

In *Dhanjal Investment ltd v Shabaha Investments Ltd* Civil Appeal No 232 of 1997, the Court had earlier stated as follows regarding summary judgment.

The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandial Restaurant v Devshi & Company* (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd v Mooring Hotel Ltd.* (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....

Regarding what constitutes triable issues, in *Kenya Trade Combine Ltd v Shah*, Civil Appeal No 193 of 1999, this court states as follows:

In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

17. The Applicant asserted that the Plaintiff's suit having been struck out by this court, summary judgement on her counter claim should be entered. There is no dispute that the Plaintiff's suit was struck out for being an abuse of the court process following a determination on ownership of the current subject matter in ELC case no 376 of 2009. The previous case was commenced by the current 1<sup>st</sup> Defendant as the claimant and as per copy of the judgement rendered on 9<sup>th</sup> March 2017, a declaration was made that the Applicant is the owner of parcel no. B 0816 A, Dandora Phase II. In the said judgement, a claim for mesne profits was refused because it had not been proved.
18. The Respondent argues that summary judgement should not be granted as prayed because she has since filed a defence although done late. Secondly, that the claim is not liquidated so the matter should go to formal proof. The issues to consider on whether to grant summary judgement was discussed by the Court of Appeal in *Harit Sheth T/a Harit Sheth Advocates v Sharma Charania* [2014] Eklr held that: -

“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not 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 (see also *Continental Butchery Ltd v Ndhiwa* (1989) KLR 573.

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19. In this case, the 1<sup>st</sup> Defendant’s counter claim seeks for the following reliefs;
  - a. An order of declaration that Plot No. B0816A Dandora Phase 11 belongs to the 1<sup>st</sup> Defendant
  - b. An order of Eviction of the Plaintiff from Plot No. B0816A Dandora Phase 11.
  - c. An order of Permanent injunction restraining the Plaintiff her agents and or servants from trespassing, entering, collecting rental income, wasting, or in any adverse manner dealing or interfering with Plot No. B0816A Dandora Phase 11.
  - d. Mesne profits of rental income in the sum of Kshs.50,000/= per month from 9.3.2017 till date vacant possession is given plus damages for trespass.
  - e. Costs of this suit.
  - f. Any other further relief this Court may deem fit to grant.
20. The prayers sought under paragraph (a) and (d) in this matter were already dealt with in the judgement rendered in ELC 376 of 2009. It would serve no purpose to take the issue to trial and or make any orders concerning the same. What is remaining of the counter-claim would be the prayer for eviction and the consequent prayer of permanent orders of injunction to issue against the Plaintiff. Are they questions that are so plain and obvious that does not require the matter to go for trial?
21. The Plaintiff/Respondent said that she filed a defence to the counter-claim albeit late. I have gone through the CTS portal where all filings are done but I did not see any statement of defence neither did the plaintiff identify the date of her defence. The claim by the Plaintiff having been struck out, the counter-claim is not contested and the argument that there are triable issues does not lie.
22. On account that the ownership of the suit property had been settled in the previous case ELC 376 of 2009 in favour of the 1<sup>st</sup> Defendant/Applicant and that the Plaintiff’s occupation of the said property is without the consent of the Applicant, I find that this is matter where summary judgement can be entered. Consequently, I grant orders in terms of prayers (b) and (c) of the counter-claim.
23. In conclusion, the application for summary judgement is allowed partially on the following terms;
  - a. The Plaintiff is granted Ninety (90) days from the date of this order to surrender vacant possession of the suit property Plot No. B0816A Dandora Phase 11 to the 1<sup>st</sup> Defendant.
  - b. In default of compliance with (a) above, the 1<sup>st</sup> Defendant be at liberty to evict her using lawful means.
  - c. Once evicted, an order of Permanent injunction restraining the Plaintiff her agents and or servants from trespassing, entering, collecting rental income, wasting, or in any adverse manner dealing or interfering with Plot No. B0816A Dandora Phase 11.
  - d. Costs of this application and the Counter-claim is awarded to the 1<sup>st</sup> Defendant.

**DATED, SIGNED & DELIVERED AT NAIROBI THIS 3<sup>RD</sup> APRIL, 2025**

**A. OMOLLO**

**JUDGE**

