



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**Civil Appeal 63 of 2008**

**ALDO GARVARDI .....PLAINTIFF**  
**VERSUS**  
**PETER NGUNJE .....DEFENDANT**

**R U L I N G**

The application dated 30-01-2009 is made under Order XXXV Rule 1 and 5 and Order XII seeking that summary judgment and/or judgment on admission be entered in favour of the plaintiff against the defendant. It is premised on grounds that:

- 1) The plaintiff is truly registered as the absolute owner of the land known as Gede/Dabaso/484 and so there is no defence to the claim for vacant possession.
- 2) The defendant admits in his defence that plaintiff is indeed the owner of the said Gede/Dabaso/484
- 3) The plaintiff is forthwith entitled to judgment against the defendant.
- 4) The defence is nothing but a sham.

It is supported by the affidavit sworn by the applicant – representative Turini Renato (who has a general power of attorney) in which he deposes that he has a search carried out in early 2008 confirmed that the parcel in question belongs to the applicant/plaintiff (the certificate of search is annexed and marked TR II).

Further that in the statement of defence at paragraph 9, the same is so admitted and so the court should go head and grant orders for vacant possession of the premises known as Gede/Dabaso/484 together with the buildings and improvements erected thereon or order for the eviction of the defendant

(b) Issue a permanent injunction restraining the defendant by himself, his servants, agents and/or employees from trespassing into, possessing and/or occupying the plaintiff's said parcel of land together with the building and improvements erected thereon. It is further deponed that the search certificate amounts to conclusive proof of ownership and that, in conjunction with the defendant's admission under the plaintiff's claim virtually unassailable incontrovertible and indisputable. The application is opposed, and the respondent in a replying affidavit states that the defence raises several triable issues which can only be determined by adducing evidence in court. He deposes that he has not wrongfully, unlawfully, or illegally entered the land, as he did so with permission and has even done some developments and he should not be shut out from being heard. At the hearing, Mr. Mwadilo (for the applicant) submitted that even in the replying affidavit the defendant/respondent does not deny the fact that plaintiff is the registered proprietor and so there can be no triable issues and the provisions of Order XXXV allow a litigant claiming for land and mesne profits to make such application.

In reply, Mr. Lughanje submits that there is no admission to the plaintiff's/applicant's claim and the fact that ownership of the property is admitted to be vested in the plaintiff/applicant does not amount to an admission that respondent is in illegal occupation and should therefore be ordered out – this is in response to paragraph 4 of the plaint which states that respondent illegally entered onto the land and put beams thereon – and that direct response to this is found in paragraph 3 of the defence that respondent had authority from applicant to enter the land. Mr. Lughanje argues that the only way this court can come to a proper conclusion is by hearing the evidence. Respondent is also contesting the competence of the power of attorney. The court has been invited to consider the decision in **Gicien Construction Co. v Amalgamated Traders and Services KLR (1983) pg 157 paragraph 3 and 9** regarding summary judgment and urges the court to find that this is not a case where summary judgment should be entered.

However, Mr. Mwadilo maintains that the issue of whether plaintiff is entitled to the prayers sought is not affected by whether defendant had permission to occupy the land in the first place and that the issue here is not permission, but ownership and a party does not need to prove what has been admitted since the prayer for summary judgment is limited to vacant possession and injunction.

It is his contention that prayer (c) is where the court will consider whether defendant had permission to enter the property and whether applicant is entitled to general damages.

The plaint at paragraph 4 refers to respondent's presence on the suit property as being wrongful, illegal, without any colour of right or justification and that he is trespassing on the land – that is why an injunction is sought, and vacant possession too – the effect of both orders will be to have respondent out of the land. And it is to this that respondent is saying – yes the land belongs to applicant but I am not here illegally or without colour of right – I have permission. That is a triable issue – the court would have to examine NOT the circumstances of ownership (which is not an issue) but the circumstances of how respondent got to occupy and develop that land – that answer is not obtainable by merely recognizing ownership and contrary to what Mr. Mwadilo argues, the crux of this matter – from occupation to trespass, all revolve on the issue of permission – that in my view is a reasonable defence worth taking through the motion of a trial and the cited case of **Gicien (infra)** offers a useful guide.

My finding is that the defence proffered raises a triable issue and I decline to summarily enter judgment. The application herein is dismissed with costs to the respondent.

Delivered and dated this 20<sup>th</sup> day of April 2010 at Malindi.

**H. A. Omondi**

**JUDGE**