



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Appeal 122 of 2003**

**QUASAR LTD ..... PLAINTIFF**

**VERSUS**

**YUVENALIS MOTUKA MAGEKA ..... DEFENDANT**

**RULING**

The plaintiff is the registered owner of a parcel of land known as CENTRAL KITUTU DARAJA MBILI/732; hereinafter referred to as the “*the suit land*”. The plaintiff claimed in its plaint that the defendant, without any justifiable cause, occupied the suit land. The defendant had earlier been charged with the offence of forcible detainer contrary to section 91 of the Penal Code in respect of the suit land in the Chief Magistrate’s Court at Kisii, Criminal Case No.1303 of 1995. He was convicted and sentenced to 8 months’ imprisonment. He appealed against the said conviction and sentence in High Court Criminal Appeal no.170 of 1996 at Kisii. The appeal against conviction was dismissed but the sentence was reduced to 3 months’ imprisonment. That notwithstanding, the defendant failed to vacate the suit land.

The plaintiff sought an order of eviction against the defendant from the suit land. The plaintiff further prayed for a permanent injunction to restrain the defendant, his agents and family members from entering upon the suit land, that is, after his eviction.

The defendant filed a statement of defence and denied that the plaintiff was the registered proprietor of the suit land. He alleged that the suit land was family land on which he had established a permanent home and planted crops and if the plaintiff had acquired the land, he did so whilst knowing of the defendant’s interests therein.

The plaintiff filed an application by way of Chamber Summons and urged the court to strike out the defence as it was scandalous, frivolous, vexatious and an abuse of the court process and thereafter enter summary judgment. It was also contended that the defence was calculated to delay the fair and quick trial of the suit.

The application was supported by an affidavit sworn by Zulfikar Jiwa Rajwani, a director of the plaintiff. He annexed to his affidavit a Certificate of Official Search in respect of the suit land. The same clearly showed that the plaintiff was the registered proprietor of the suit land. The proceedings and the judgment in High Court Criminal Appeal No.170 of 1996 at Kisii were also annexed to Mr. Rajwani’s affidavit.

The defendant filed grounds of opposition through his advocates, M/S. G. J. Mainye & Company. He stated, inter alia, that his defence raised triable issues and urged the court not to grant the plaintiff’s application. Thereafter, the plaintiff’s application was set down for hearing on 22<sup>nd</sup> April, 2008. The defendant’s advocate was duly served with a hearing notice but he failed to attend Court to defend the

same.

I have considered the plaint, the defence on record as well as the plaintiff's application and the grounds of opposition thereto. It is not in doubt that the plaintiff is the registered absolute proprietor of the suit land. The rights of such a proprietor are clearly stipulated in the provisions of **sections 27 and 28** of the **Registered Land Act**, Cap 300 Laws of

Kenya. The defendant did not exhibit any document to show that he had any right over the suit land. Moreover, he was charged with forcible detainer of the suit land and was convicted accordingly. That conviction was confirmed on appeal. It was therefore proved beyond any reasonable doubt that he was in unlawful occupation of the plaintiff's property. There was no further appeal to the Court of Appeal.

In the circumstances, I must take it that the defendant is estopped from denying the plaintiff's title over the suit land.

In an application for summary judgment, it is upto the defendant to prove that he should be given leave to defend.

He should do so by showing prima facie existence of triable issues. See **NAIROBI GOLF HOTELS (K) LTD VS BHIMJI SANGHANI BUILDERS CONTRACTORS**, Civil Appeal No.5 of 1995 at Nairobi. The defendant can show by his statement of defence, affidavit, grounds of objection or even orally that there are triable issues. Having perused all the documents on record, I am not convinced that there is any triable issue that has been demonstrated by the defendant.

I am satisfied that the defendant's defence is scandalous, frivolous, vexatious and calculated to delay fair trial of the suit. I strike it out and enter judgment as prayed in the plaint. The defendant shall bear the costs of the suit.

**DATED, SIGNED and DELIVERED at KISII this 16<sup>th</sup> day of May, 2008.**

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Mr. Sagwe H/B for Mr. Soire counsel for the plaintiff

N/A counsel for the defendant

**D. MUSINGA**

JUDGE