



REPUBLIC OF KENYA



**KENYA LAW**  
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**Harun v Kalu Works Limited & another (Environment & Land Case  
181 of 2019) [2022] KEELC 13789 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13789 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 181 OF 2019**

**JG KEMEI, J**

**OCTOBER 19, 2022**

**BETWEEN**

**NELSON MUTURI DUMBEIYA HARUN ..... PLAINTIFF**

**AND**

**KALU WORKS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BOOTH EXTRUSIONS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed the originating summons on the December 11, 2019 under order 37 of the [Civil Procedure Rules](#) and sections 1A, 1B, 1C & 3A of the [Civil Procedure Act](#) and section 19 of the [Environment & Land Court Act](#) for the following orders;
  - a. That there be and is hereby issued that the plaintiff is the bonafide owner of LR No 4953/1421 (IR 37819) pursuant to the judgment of the High Court of Kenya in ELC No 937 of 2013 Nairobi (OS) Booth Extrusions Limited Vs Dumbeiya Nelson Muturi Harun delivered on the December 17, 2014 and affirmed on December 1, 2017 by the Court of Appeal in CA No 249 of 2015 Booth Extrusions Limited Dumbeiya Nelson Muturi Harun.
  - b. That the plaintiff Nelson Muturi Dumbeiya Harun be registered as the registered proprietor of LR No 4953/1421 (IR 37819) upon service of this order on the land registrar or the appropriate registry of LR No 4953/1421 (37819).
  - c. That the costs of the originating summons be provided for.
2. The originating summons are anchored on the supporting affidavit of the applicant sworn on the December 10, 2019. He deponed that the 2<sup>nd</sup> defendant instituted a suit in ELC 937 OF 2013 in Nairobi seeking orders for the delivery of the original certificate of title and deed plan for the suit land entrusted to him on the basis of client – advocate relationship. In a judgment delivered on the



December 18, 2014 the court dismissed the application of the 2<sup>nd</sup> defendant and agreed with the plaintiff that the rights of the parties had been settled and that the intention of the parties was that the title was to be converted by the plaintiff in satisfaction of payment of fees due from the 2<sup>nd</sup> defendant, his client.

3. Aggrieved by the said judgment, 2<sup>nd</sup> defendant lodged an appeal which appeal was heard and determined and a judgment delivered on the December 1, 2017 dismissing the 2<sup>nd</sup> defendants appeal with costs. The court went ahead to observe as follows;

' We are of the considered view that no matter how the appellant tries to put it was at fault to frustrate the contract by hatching a facially fraudulent scheme to renege from its explicit commitment to the respondent. This is because it is apparent from the record that it was bound by the contents of the letters and minutes of the meeting. It is clear to us that the respondent and the appellant expected intended and accepted that the title documents to the suit property was to be held and converted by the respondent to settlement of the legal fees owing from the appellant and in accordance with the letters express instructions.'

4. The applicant/ plaintiff deposed that the above words of the Court of Appeal read together with the judgment issued in the High Court settled the rights of the parties to the suit land hence the instant summons seeking the suit property be registered in his name.
5. That the evidence having been tendered before the High Court to the effect that the 2<sup>nd</sup> defendant forwarded to the 1<sup>st</sup> defendant transfer documents which the 1<sup>st</sup> defendant never acted upon the plaintiff is apprehensive that the defendants have no intention of willingly executing the transfer of the suit land in his favour hence the reliefs sought in this suit.
6. That despite service of the summons the defendants failed to file any response to the suit notwithstanding entering appearance on the December 16, 2019 by the firm of Michuki & Michuki Co Advocates and secondly by the law firm of Gathaiya & Associates Advocates on the October 25, 2021.
7. On the June 16, 2022 the plaintiff filed a notice of motion seeking the following orders;
  - a. Spent
  - b. Spent
  - c. The court be pleased to enter summary judgment
  - d. Costs be awarded to the plaintiff.
8. The application is premised on the grounds annexed thereto and the supporting affidavit of the applicant deponed on the June 15, 2022.
9. The deponent stated that the rights of the parties were settled in the ELC Suit No 937 of 2013 which decision was upheld by the Court of Appeal in CA No 249 of 2014. That both courts confirmed that the plaintiff is entitled to the suit property.
10. That the proceedings have been largely unchallenged despite the parties entering appearance but failed to contest the application. The applicant stated that he needed to sell the property to raise funds for his election campaigns in the just ended general elections where he was vying for an electoral position. That the parties failed to agree on a deed of settlement whose terms were contained in unexecuted deed of settlement. That he has secured a purchaser for the suit land who in a letter dated the June 13, 2022 has notified him that he needs the property vested in his name before entering into an agreement.



11. The applicant therefore is seeking an order akin to the vesting of the property to his name on the basis that the suit is uncontested by the respondents.
12. On the July 20, 2022 the plaintiff argued his application in open court and reiterated the contents of his supporting affidavit and the grounds annexed thereto.
13. The single issue for determination is whether the application is merited.
14. The applicant seeks summary judgment of the suit on the grounds that the rights of the parties have been settled by the judgment of the two superior courts. secondly that the defendants despite service have failed to contest the suit.
15. Summary judgment is provided for under order 36 of the Civil Procedure Rules 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. (2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed. (3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days. [Order 36, rule 2]. Defendant may show cause. 2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. [Order 36, rule 3.] Application by government. 3. (1) An application under rule 1 by the government may be verified by an affidavit of the Attorney-General stating that to the best of his knowledge and belief the plaintiff is entitled to the relief claimed and there is no defence to the action. (2) No application under rule 1 shall be made against the government. [Order 36, rule 4]. Time for defence. 4. If a defendant is granted leave to defend he shall file his defence within fourteen days of the grant of leave unless the court otherwise orders. [Order 36, rules.] judgment for part of claim. 5. If it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realised or any part thereof into court, the taxation of costs, or otherwise as the court thinks fit, and the defendant



may be allowed to defend as to the residue of the plaintiff's claim. [Order 36, rule 6]. Procedure where more than one defendant. 6. If it appears to the court that any defendant has a good defence to, or ought to be permitted to defend the suit, and that any other defendant has not a good defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to judgment against the latter and may obtain execution of the decree thereon, without prejudice to his right to proceed with his suit against the former. [Order 36, rule 7.] Leave to defend. 7. Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise, as the court thinks fit. [Order 36, rule 8]. Costs. 8. (1) The costs of and incidental to all applications under this order shall be dealt with by the court on the hearing of the application, and the court shall order by and to whom, and when the same shall be paid, or may reserve them to be dealt with at the trial: Provided that in case no trial afterwards takes place, or no order as to costs is made, the costs are to be costs in the cause. (2) If the plaintiff makes an application under this order where the case is not within the order, or where the plaintiff in the opinion of the court, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff. [Order 36, rule 9.] Forms 9. Form Nos 24 and 25 of appendix A, adapted to circumstances, shall be utilised for the respective purposes for which they are designed. [Order 36, rule 10.] Setting aside of judgment. 10. Any judgment, given against any party who did not attend at the hearing of an application under this order, may, on application be set aside or varied on such terms as are just.'

16. Summary judgment contemplates a situation where a case is determined by the court without going to full trial.

17. The principles which guide the courts in determining an application for summary judgment are well settled. The Court of Appeal in the case of [Harit Sheth T/A Harit Sheth Advocates v Sharma Charania \[2014\] eKLR](#) posited as follows:

' 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.'

18. In the case of [Johnstone Amulioto Ayub v Peter Mwangi Njuguna \[2013\] eKLR](#) the court noted that;

' It will be discerned from the above provision that summary procedure is only available in three types of cases. The first is where the suit is for a liquidated demand. The second is an



action by a landlord to recover land from a tenant and the third is an action to recover land from a trespasser. The court has no jurisdiction to entertain an application for summary judgment save for these three situations.'

19. In the case of *National Industrial Credit Bank Limited v Raphael Obonyo Okello [2000]* the court held that it is well settled that the procedure for summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the defendant is truly and justly indebted to the plaintiff and there are no bonafide triable issues raised by the proposed defence or the defence already filed.
20. The import of all the case law and precedent considered is that for summary judgment to issue the following ingredients must be present; a liquidated claim with or without interest; recovery of land from a tenant with or without rent or mesne profits; in plain clear and obvious cases; where there is a mere denial by the defendant with no defence;
21. In this case the applicant is relying on the decision of the court in ELC No 937 of 2013 as affirmed in the Court of Appeal No 249 of 2015 where the courts were unanimous that the intention of the parties was that the title of the suit property held by the applicant was to be converted by the plaintiff in satisfaction and settlement of the legal fees owing from the defendants/respondents to the applicant and in accordance with the letters and instructions expressed thereto. It is to be noted that the applicant did not file a counterclaim in the ELC 937 of 2013 seeking transfer of the suit to his name and perhaps informs why he has filed this suit before the court.
22. That said, the applicant has drawn the attention of this court to a draft settlement agreement which he informed the court was discussed and agreed with the respondents only for the respondents to fail to execute. In the draft deed of settlement the parties agreed to sell the property and share the proceeds 50%; 50%. The applicant has not explained the rationale of the draft agreement seeing that the court did not pronounce itself on any mode of sharing of the proceeds of the sale of the land, if any, between the parties. is this a departure from the judgment? This creates doubt in my mind as to the clear intentions of the parties and whether the whole property was to be converted for settlement of the fees or a part of it. I say no more.
23. I wish to borrow the dictum as set out in the case of *Postal Corporation of Kenya & Anor v Aineah Likumba Asienya & 11 others CA No 275 of 2014* where the court held that:

' Summary judgment can only be resorted to in the clearest of cases. If a respondent shows a bona fide triable issue he must be allowed to defend the suit without conditions.'
24. Although it is evident that the respondents failed to file any defence or raise any triable issues, it is my respectful view that this case is neither plain, clear and or obvious to warrant the issuance of summary judgment.
25. At what point should summary judgment be sought? It is trite that the filing of a memorandum of appearance by the defendants is a precondition for the plaintiff to file an application for summary judgment. In the case of *Challenger Trade Finance Segregated Portfolio of the South Africa SPC v Danish Brewing Company EA Limited & 2 others [2020] eKLR* the court stated this with respect to a case where the defendant has failed to enter appearance and or file defence within the stipulated time;

' If the summons are served and the defendant fails to enter appearance and or file defence within the time prescribed, then the plaintiff will be at liberty to apply for default judgment thus rendering the application for summary judgment otiose.'



26. In this case the suit was filed on the December 11, 2019 and the respondents entered appearance on the December 16, 2019 through the law firm of Michuki & Michuki Co Advocates and later the firm of Gathaiya Associates on the October 25, 2021. It is borne of the record that the respondents were served with summons and have failed to file a statement of defence notwithstanding entering appearance. I have a lot of difficulty with the route being propositioned by the applicant in seeking to actualise the judgment in his favour. I would be slow in granting it on the grounds alluded to above that the case is not plain clear and obvious to warrant allowing the application.
27. The other reason I would be slow to grant the application can be gleaned from order 36 rule 1 (b) which is that summary judgment for the recovery of land can only lie by a landlord against a tenant and/or a trespasser. The provisions do not include an execution of a judgment which sanctioned a conversion of title held by an advocate against a former client in satisfaction of legal fees as the case here.
28. Lastly the legal burden of proof is not lessened in any way even in uncontested suits. In as much the motion is unopposed, I find that in the circumstances of this case, it does not lie within the legal criteria for granting summary judgment as demonstrated above.
29. In the end the application is unmerited and it is dismissed with no orders as to costs.
30. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF OCTOBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**Plaintiff – present**

**Defendant 1 & 2 – Absent**

**Court Assistant – Phyllis Mwangi**

