

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 31 OF 2002.

JOHN ARTHUR KABIRO MUNGA ::::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

SAMUEL NGANGA MUNGA)

NEHEMIAH MWAURA MUNGA) ::::::::::::::::::::::::::::::: DEFENDANTS.

RULING.

The applicant in the application dated 10/3/2004 is the plaintiff in the main suit. The 2 respondents are the joint defendants. He has filed this application under OXXXV Rule 1 (1) (b) Civil Procedure Rules and sections 3 & 3A of the Civil Procedure Act. He is seeking orders that;

(1) "Summary judgment be entered against the two defendants as prayed in the plaint, and each defendant to hand over vacant possession and transfer to the plaintiff the 12 acres held by each of them and the same being L.R. No. 555 8/2 and failing which they be evicted and the Deputy Registrar do execute the said transfers."

(2) That the defences on record by struck out. He is also asking for the costs of the suit and the application. The application is based on the grounds enumerated on the face of the application and by the supporting affidavits of the applicant sworn on 10/3/2004 and on 11/11/2004. The same is opposed by the 1st Respondent vide his replying affidavit sworn on 14/9/2004. Both parties have attached several annexures to their affidavits. I have gone through them. I have considered the contents of these affidavits and the oral addresses to court by both counsels. I have also considered the law applicable in this matter.

Order XXXV r. (1) (1) provides as follows

(1) In all suits where a plaintiff seeks judgment for:-

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord or 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, the plaintiff may apply for judgment for the amount claimed or for the recovery of the land and rent or mesne profits."

Although counsel for the respondent did not raise this issue, my finding is that this provision of the law cannot be applied to the present situation.. Reason being that firstly the defendant are not the plaintiff's tenants and secondly, they are not trespassers perse on the land the plaintiff is claiming from them.

On that ground alone, this application should fail. I will nonetheless wish to point out that where the plaintiff or defendant raises even a semblance of triable issues, he must not be denied his day in court. The court's discretion to strike out pleadings – as prayed for in prayer 2 of this application must not be exercised very liberally. If there is a sufficient substratum of fact in the offending pleading – in this case the respondents' defences, then the defence should not be struck out. In my considered view, there are issues, which the defendants have raised which need to be ventilated in court. They may not necessarily

be right – but they are arguable. This being a land matter, a fortiori, the defendants ought to be heard. I consequently hold that this is not a good case for summary judgment. The application dated 10/3/2004 is hereby dismissed with costs to the respondents.

Orders accordingly.

WANJIRU KARANJA.

AG. JUDGE.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13 DAY OF APRIL, 2005 IN THE PRESENCE OF:-