



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 164 OF 2004**

**HARRISON MWANGI ..... PLAINTIFF**

**VERSUS**

**ESTHER WAMBUI NJENGA ..... DEFENDANT**

**RULING**

By his Notice of Motion of the 29th March, 2005 the Applicant/Plaintiff applies for summary Judgment against the Respondent /Defendant in terms of prayer a (ii) of the amended Plaintiff and that the Defence filed herein be struck out.

The Application is based on the following grounds: -

- (a) The Plaintiff is the 1st registered owner of the suit land;
- (b) The Defendant is a trespasser on the suit land
- (c) The Defendant has no good defence on the Plaintiffs said claim
- (d) The Plaintiff is suffering great loss being denied use of his plot
- (e) The Plaintiff risks losing the suit land for failure to develop.

The Application is supported by the Applicant's affidavit sworn on the 24.3.2005.

Annexed to the affidavit is a letter of Allotment dated the 11.3.1994 in favour of the Applicant and which relates to a piece of land measuring 0.396 hectares (approximately). Also annexed is a certificate of lease dated the 3.2.2000 in favour of the Applicant and a lease also in favour of the Applicant issued by the Government for a term of 99 years from the 1.4.1994. All of the documents relate to the suit premises, which is known as Naivasha/Municipality Block 5/234. The area of the land comprised in the Certificate of Lease 0.2390 of a hectares or thereabouts.

The order sought in prayer a (ii) of the amended plaintiff is that: -

“(ii). An order of eviction of the Defendant from title No. Naivasha/Municipality/Block 5/234”

The Applicant says he has an indefeasible title under section 143 of the Registered Land Act. **Mr. Gichigi relied on the case of Obiero Versus Opiyo & Others 1972 (E.A) page 228 and Kimotho versus Mugo H.C.A No.53 of 1995.** The Respondent opposed the application on the grounds set out in

Grounds of Objections dated 27.4.2005 and a Replying Affidavit sworn by the Respondent on the 27.4.2005.

Mr. Mundia for the Respondent referred to HCCC No.639 of 1995 in which Mr. Justice Rimita dismissed a claim by the present Applicant, (the Plaintiff in that case) against the Respondents (the Defendant in that case) holding that the suit premises was the property of the Respondent herein. The property was L.R. 1144/11/1 now Naivasha/Municipality Block 5/234.

In the Replying Affidavit there are allegations that the said Certificate of Lease was issued on the strength of a forged consent order and the same is the subject matter of an identical case, which is pending.

The Respondent also depones that the matters in dispute in this suit are resjudicata having been decided in HCCC No.639 of 1995.

There are certain unsatisfactory factors in this suit; -

1. There appears to have been three cases between the parties namely this suit, HCCC No.639 of 1995 and HCCC No.373 of 2000 at Nakuru.
2. The files for these three cases are muddled together so that it is difficult to see what was done in each suit.
3. That it appears that the parties by consent entered into a Consent Order on the 9.2.2004 in HCCC No.373 of 2000 at Nakuru transferring that case and HCCC No.373 of 2000 to the High Court at Nairobi.
4. That this present suit was filed on or about September 2004. I say that because I can find neither the Original Plaintiff in the file nor any Defence to it assuming that a Defence was filed.

From this it is apparent that there is confusion, which makes it difficult to determine what the exact position is.

I can see no reason in fact why this suit was filed in Nairobi and the other two suits transferred to Nairobi when the suit premises and the parties are all in Nakuru.

With regard to this present application the Respondent has not exhibited the Judgment on which she relies nor is there any evidence of the forged court document on which she relies.

However, there is a ruling in the file in HCCC No.639 of 1995 of Rimita Judge of the 14.2.2000 in which he refers to his Judgment in that case, which I have referred to above.

I accept that the Applicant appears to have a title, which under section 28 of the Registered Land Act. Act gives him an indefeasible title.

Having said that, the matters seem to have been determined in favour of the Respondent by Rimita J., HCCC No.639 of 1995.

Mr. Gichigi says that decision was based on the Letter of Allotment only and that the Certificate of Lease has not been produced before the court. That may or may not be so but nevertheless the matter appears to have been resolved in that case as the correct description of the suit premises is referred to namely; Naivasha Municipality Block 5/234.

I do not think this is a proper case for summary Judgment as it is not clear what the real status of the suit premises is. In the Letter of Allotment the hectarage granted to the Applicant appears larger than in the Certificate of title and lease. Also until evidence is adduced is it not possible to say with certainty

what part of the land if any the Respondent occupies.

Taking all these matters into account I dismiss this application with costs to the Respondent and further order that all three files be put into proper order and that all three suits be transferred to Nakuru High Court for hearing (in so far as they still alive) at Nakuru.

**Dated and delivered at Nairobi this 18th day of July 2005**

**P.J. RANSLEY**

**JUDGE**