



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.134 OF 2019**

**KISHUSHE RANCHING COOP. SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**NEWTON KIFUSO.....DEFENDANT**

**RULING**

1. The application for determination is the notice of motion dated 27<sup>th</sup> September, 2019 by the plaintiff/applicant seeking for orders that the court be pleased to enter summary judgment for vacant possession in favour of the plaintiff as against the defendant and an order for the costs of the application. The application is brought under Order 36 Rule 1 (b) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and is premised on the grounds that the defendant having been served with plaint and summons in a suit for trespass has entered appearance thereby rendering this application possible; that in so far as relates to the claim for vacant possession/ejectment from the suit land there is no defence thereto; that there are no triable issues relative to the claim for vacant possession; and that the legal grounds raised by the defendant vide a preliminary objection are such as place before court no factual issues that would warrant the question of vacant possession going to trial. That at any rate preliminary objection cannot turn on matters of fact mooted by a defendant save where such matters are admitted or common between the parties.

2. The application is supported by the affidavit of Ellistone Mbela sworn on 27<sup>th</sup> September, 2019. The affidavit deposes that the plaintiff is the registered proprietor of the suit property and has annexed the copy of title and search. That the defendant has without colour of right entered upon the land and began constructing a house thereon. A copy of a survey report prepared by surveyor commissioned by the plaintiff has been annexed. It is averred that the plaintiff is entitled to the order for possession sought herein. The plaintiff believes that there is no defence to this action insofar as relates to the matter of vacant possession and that there are no triable issues that should warrant this suit going to trial on the question of possession.

3. Mr. Mwakisha, learned counsel for the plaintiff submitted that in response to the plaint and summons to enter appearance, the defendant duly entered appearance and, in addition, filed a notice of preliminary objection. That had a defence been filed, then recourse for relief on motion would have been left to Order 2 Rule 15 and the striking out of such defence as being either frivolous, scandalous or vexatious, an abuse of the court process or as disclosing no reasonable defence. However, there being no statement of defence filed, and the plaintiff considering that there would be no triable issues in the nature of factual disputes calling for determination of any factual matters upon a fully hearing, this application was brought.

4. The plaintiff's counsel submitted that Order 36 under which the application is brought is intended to afford a quick and efficacious remedy to a plaintiff with a claim to which there is no reasonable or bona fide defence and where such possible defence would raise no triable issues as would call for full trial. The plaintiff's counsel submitted that the defendant, with the aid of his counsel, has endeavoured to try and set up such matters as may pass for triable issues, and cited Madan, CJ when he remarked in **Continental Butchery Limited –v- Nthiwa (1978) eKLR**, the contest to conjure up such triable issues is sometimes a battle royale, sometimes a Shabby Skirmish, and that “there is no limit to the ingenuity of defendants in offering new material to slip out of summary procedure; there is also no limit to the acumen of judges to deal with the legal jumble”. Mr. Mwakisha submitted that while the rule (order 36 Rule 1) provides for what is a quick relief as was held in **Gichiem Construction Company –v- Amalgamated Trades & Services citing Zola –v- Ralli Bros (1969) EA 691**, the court considering a motion for summary judgment is nonetheless obliged to consider all material that has been placed at its disposal in determining whether there are any bona fide triable issues that should abide a full trial, but only where such issues exist should a defendant be allowed to defend. The plaintiff's counsel also cited the words of Jessel, **MR in Jacobs –v- Booths Distillery Company, 85 LT Reports at 262** cited with approval in the above decision, to the effect that when the judge is satisfied that not only is there no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff. He also referred to the decision in **Sadolin Paints Ltd-v- Wali Mohamed & Co.(1972) EA 395**, where Miller, J (as he then was) held *inter alia* that where there are no facts from which it could be seen that a defendant had any defence it would be proper to enter judgment on motion. As well, it was there held that summary judgment in respect of a claim for possession is a common thing. It is the plaintiff's submission that what the defendant herein moots as triable issues are in fact red herrings with no relevance to the issues in contest between the parties. That there is nothing fit for trial at a full hearing.

5. The application is opposed by the defendant through a replying affidavit sworn on 26<sup>th</sup> November, 2019 in which he deposes that the application is utterly mistaken, legally untenable, made in bad faith and an abuse of the court process for reason that there is a preliminary objection that seeks to stay this case or dismiss it with costs. The defendant contends that the plaintiff has not ratified the decision to institute these proceedings in an Annual General Meeting. The defendant avers that in the year 2001, a portion of the land having been held under Trust Land regime, was lawfully declared an adjudication section by the District Adjudication Officer and a portion of Land Reference Number 28984 measuring approximately 1900 acres was to be allotted to members of the community and the residents of Kishushe Adjudication section allowed to occupy and enjoy full benefit of the land. That in the year 2003, a survey of land adjacent to the land was conducted by the plaintiff and an anomaly was identified which caused the District Adjudication Officer at Wundanyi and to the District Surveyor to withdraw the survey plan, but the same was not withdrawn and a subsequent survey was conducted to correct the discrepancies only to fraudulently further encroach on the adjudication section. It is the defendant's contention that the plaintiff's title encroaches on the Adjudication Section and was issued fraudulently. The defendant also referred to a task force set up by the Minister for Mining and a Public Inquiry by the Kenya National Commission of Human Rights as well as a remuneration by the National Land Commission that the title to the property be revoked. The defendant avers that the legality of the plaintiff's title over the land is subject to active litigation in **Mombasa ELC Petition No. 26 of 2019**, adding that a recent search indicted there is a court order dated 9<sup>th</sup> October, 2015 in **Mombasa ELC 260 of 2015** registered on the encumbrance section of the property. The defendant argues that he has a defence to the suit and that there are triable issues under this claim.

6. The defendant's counsel submitted that the defendant's preliminary objection should be determined first. They relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd (1969)EA 696** and **Wavinya Ndeti -v- Independent Electoral & Boundaries Commission (IEBC) & 4 Others (2014)eKLR**. The defendant's counsel submitted that the preliminary objection is tenable since it is on points of law. The defendant further submitted that the suit herein is *sub judice* due to existence of Petition ELC 26 of 2019 and cited the provisions of Section 6 of the Civil Procedure Act and Section 19 (2) of the Environment and Land Court Act and relied on the case of **Muturi Investments Ltd -v- NBK (2006)eKLR; Barclays Bank of Kenya Ltd -v- Elizabeth Agidza & 2 Others (2012)eKLR; Thiba Min. Hydro Co. Ltd -v- Josphat Karu Ndwiga (2013) eKLR and Cecilio Murango Mwenda & 6 Others -v- Isaac Kimathi Ikunga (2019)eKLR**. The defendant submitted that summary judgment is a drastic remedy to grant, and relied on the case of **Shah-v- Padamshi (1984)KLR 531; Ahmednassir Abdikadir & Company Advocates -v-National Bank of Kenya Limited (2007)eKLR and Isaac Awoudno -v- Surgipharm Limited & Another (2011)eKLR**. The defendant's counsel urged the court to apply the test in **Lalji t/a Vakkep Building Contractors -v- Carousel Limited (1989)eKLR** that if a triable issue is found to have been raised, or if an issue is arguable, summary judgment should not be entered. The defendant also relied on the case of **Ternic Enterprises Limited -v- Waterfront Outlets Limited (2018)eKLR** and submitted that an order for summary judgment cannot issue in this case.

7. I have considered all the issues raised in the application. The principles which guide the courts in determining an application for summary judgment are well settled. In the case of **Gupta -v- Continental Builders Ltd (1978)KLR 83**, the Court of Appeal stated:

*“If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it as much as it is against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issue sought to be allowed to go to trial as sham or bogus defence ought to be rejected peremptorily.”*

8. In the case of **Continental Butchery Ltd -v- Nthiwa (supra)**, it was stated:

*“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure by Order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case which the court feels justified in thinking that the defences raised are a sham.”*

9. From the above, the principles applicable in an application for summary judgment are that where there are no triable issues raised or where the issues raised are a sham, the court will grant an application for summary judgment to eliminate delays in the administration of justice. It is the application of these principles in the present case that will determine the outcome of the plaintiff's application herein.

10. In the plaint, the plaintiff avers that it is the registered proprietor of the suit property, LR 28984. The plaintiff avers that the defendant has without its authority and/or consent entered into a portion of the said land and began constructing thereon a residence. The plaintiff avers that the said entry upon the suit land by the defendant is unlawful and constitutes actionable trespass. The plaintiff prays for an order that the defendant vacates and/or delivers up possession, injunction and damages for trespass.

11. The defendant in answer to the plaintiff's claim has filed a notice of preliminary objection dated 19<sup>th</sup> August, 2019 alleging that the suit is bad in law as it offends the mandatory provisions of Section 19 (2) of the Environment and Land Court Act and that it violates the provisions of Section 6 of the Civil Procedure Act. It is the defendant's contention that the suit is *sub judice* owing to the pendency before this court of **ELC Petition NO.26 of 2019**. The defendant has also filed (out of time and without leave of court) a statement of defence dated 19<sup>th</sup> August, 2019 and filed on 6<sup>th</sup> March, 2019 in which he avers, inter alia that his occupation and use of the said portion of land is valid and legal, having purchased the same from a resident of Kishushe Adjudication Section. The defendant further states that there are a number of suits touching on the plaintiff's interest in the suit property, including **Mombasa ELC 260 of 2015** and **Mombasa ELC Petition No. 26 of 2019**.

12. In this case, the plaintiff has placed before court a copy of title showing that the plaintiff is the registered proprietor of the suit property. Section 26 of the Land Registration Act provides that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as evidence that the person named therein is the proprietor, subject to the encumbrances, easements, restrictions and conditions endorsed in the certificate and the title shall not be subject to challenge, except on (a) grounds of fraud or misrepresentation to which the person is proved to be a party, or (b), where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. One of the grounds raised by the defendant in the preliminary objection filed is that the suit offends the provisions of Section 19 (2) of the Environment and Land Court. This section relates to the latitude given to the court not to be bound by the procedure laid out in the Civil Procedure Act and to be guided by the principles of Natural Justice. I agree with the plaintiff's submissions that an application for summary judgment in no way curtails a defendant's rights to the protection envisaged by Section 19 (2). Rather, all that such an application does is to provide the court with occasion to look at the issues raised and determine whether they should go to full trial, thereby complementing the provisions of section 1A and 1B of the Civil Procedure Act which in the overall seek to enhance the good administration of justice. The defendant has also raised the issue that the suit offends Section 6 of the Civil Procedure Act and therefore *sub-judice*. This section bars a court from proceeding with any suit where the issues are substantially the same as those in the prior suit. Whereas the defendant has invoked Section 6 of the Civil Procedure Act, the defendant has not shown that there is another suit between him and the plaintiff. From the material on record, the defendant does not appear as a party in either **ELC 260 of 2014** and **ELC Petition 26 of 2019**. It is therefore clear that the principle of *sub-judice* is inapplicable in this case.

14. Moreover, the key issues to determine in this suit are whether the plaintiff is the registered proprietor and whether the defendant is in possession and occupation of the land in circumstances not consistent with the plaintiff's right or interest over the said land. The plaintiff has exhibited title confirming that it is the registered proprietor of the suit land. The defendant does not dispute being in occupation of the suit land without the plaintiff's permission. Taking all the averments put forth by the parties herein, and carefully applying thereto the applicable law, it is clear, and I so find, that there cannot be said to be triable issues entitling the defendant leave to defend thereby unnecessarily taking up more of the court's time, for there is no discernible defence to the plaintiff's claim. Having considered the pleadings and the evidence on record, I do find that the notice of motion dated 27<sup>th</sup> September, 2019 is merited and the same is hereby allowed as prayed. The defendant shall within 60 days of the date of this ruling vacate and/or deliver up possession of that portion of LR 28984 in his occupation, in default, the plaintiff shall be at liberty to evict the defendant, and eviction orders to issue. Costs of the application are awarded to the plaintiff.

15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY DUE TO COVID-19 PANDEMIC THIS 2ND DAY OF MARCH, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**