



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 201 OF 2018**

**(FORMERLY MILIMANI ELC.NO.1053 OF 2015)**

**HERMAN NJOROGI KAMAU.....PLAINTIFF/APPLICANT**

**VERSUS**

**ANDREW KAMAU KURIA.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion** Application dated **6<sup>th</sup> August 2018**, by the Plaintiff/Applicant seeking for orders that;

- 1. That Summary Judgment be and is hereby entered in favour of the Plaintiff against the Defendant as prayed in the Plaintiff.***
- 2. That the Defendant do pay the cost of this Application and the entire suit.***

The suit is premised on the grounds that the Plaintiff is the lawful registered owner of **L.R No.Ndumberi/Riabai/2928, 2930 and 2931**, and the suit hinges on the Defendant's trespass on the suit properties without any consent or his permission. He further averred that the Defendant had not filed any defence three years after service of the pleadings on him despite personal Court appearances and subsequent representation by Counsel on record.

In his **Supporting Affidavit** the Plaintiff averred that this Court directed for service of pleadings upon the Defendant by way of substituted service and on the **25<sup>th</sup> of November 2015**, the said advertisement was placed in the **Daily Nation Newspaper** and a **Return of Service** duly filed.

He further averred that thereafter, the parties made subsequent court attendance leading to the court orders made on the **19<sup>th</sup> September 2017**. That further the defendant appointed counsel to act for him and that it has been three years since he filed the suit and the defendant has not filed a defence. He therefore averred that the Defendant's failure to file a defence is a clog to the finalization of the suit and as he is the Lawful owner of the suit property and as the Defendant has trespassed on his property, that it continues to be a threat on the enjoyment of his rights.

The Application is opposed and the Defendant filed a **Replying Affidavit** and averred that the suit relates to **LR. Riabai/1911**, which belongs to the Estate of **Fredrick Polarth K.Kubai**, his grandfather. He averred that his father was a son to the deceased thus lawfully entitled to the properties of his Estate. He further averred that one **Florence Mumbi Kubai**, who is the Administrator of the Estate of his late father granted him power of attorney to sue and commence any suit on her behalf which includes his entitlement on the Estate of his late grandfather, He further contended that his Uncle one **Gedion Blacklaw Kubai**, unlawfully sold the suit property to the Applicant and was charged for forgery of the title to the suit property and was subsequently found guilty. The Honourable Court found that since the title was obtained through fraud could not be released to him and therefore released it to the Land Registrar for cancellation and when he filed an Application for release of the title, the same was allowed

and the title deed was re-issued in the name of **Fredrick Polwarth K. Kubai**. He further averred that despite the fact that Court issued Grant of Letters of Administration, and confirmed it, the Court restrained the Personal representatives from acting on the Certificate of confirmation of grant to give room for hearing of the **Succession Cause No.1940 of 1996**.

It was his contention that the Applicant's acquisition of the suit property was unlawful as at the time of his acquisition of the suit property the Estate of the said Fredrick had not been distributed and the suit property was still in his name and that the time of his purchase the orders of the Court was still in force and they had not been set aside or appealed against.

He alleged that Summary Judgment is an equitable remedy and one who wishes to obtain it must come to Court with clean hands and that the Applicant is misleading the Court by concealing material fact. He further averred that he has been advised by his Advocates that the instant suit is not a proper suit for award of Summary Judgment under the provisions of **Order 36 of the Civil Procedure Rules** as the said provision envisages entry of Summary Judgment where the claim is for a liquidated demand without interest or where 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 .

He therefore averred that since the Applicants claim do not fall under the said provision of Order 36, as he seeks for permanent injunction, the Court cannot avail the same to him and the only cause of action is to set down the suit for hearing and abide by the outcome of the hearing.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The Court has further considered the pleadings in general and the annexures thereto and finds as follows:-

It is not in doubt that the Plaintiff/Applicant herein filed this suit as against the Defendant/Respondent and sought to serve the Defendant/ Respondent by way of advertisement in the Daily Newspaper which was allowed and the Defendant Entered Appearance and consequently various Applications were heard and determined. Though the Defendant entered Appearance, he did not file any Defence.

It is evident that Summary Judgment can only be applied where the Defendant has entered appearance but has not filed a Defence. **Order 36 Rule (1) of the Civil Procedure Rules is the procedural law for Summary Judgment and it provides that;**

*“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 amount claimed, or for recovery of the land and rent or mesne profits”.*

The foregoing provisions of law are to the effect that summary procedure is available where the Judgment sought is with regard to a liquidated sum and recovery of land and further that the same is also available where the Defendant has entered appearance and not filed a Defence or where the Defence filed does not disclose any triable issues.

A look at the Plaint that is before Court is clear that the Plaintiff seeks for a permanent injunction, a declaration that he is the owner of the suit property, general damages that have not been quantified and costs and interest of the suit. As per the provisions of **Order 36**, it is clear that when a party seeks for Summary Judgment the same should relate to liquidated sum and recovery of land where the defendant has entered appearance but not filed a defence. From the prayers sought, it is clear that this suit does not relate to a liquidated amount and the Plaintiff needs to call in evidence for him to prove his case and the

same must therefore be done through formal proof.

In his instant case, from the **Replying Affidavit** of the Defendant, it is clear that the matter before Court is not plain and obvious as the Plaintiff will have to prove certain facts and therefore this Court finds and holds that this case is not one wherein the Court can grant a Summary Judgment as various issues have been raised. See the case of **ICDC ....Vs...Daber Enterprises Ltd (2000) 1 EA75**, where the Court of Appeal stated that:

*“The purpose of the proceedings in an application for Summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim. 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. ”*

It is also clear that a Court will not grant summary Judgment if there is defence on record that raises triable issues. See the case of **Dhanjal Investments Ltd ...Vs... Shabaha Investments Ltd, Civil Appeal No.232 of 1997**, where the Court of Appeal stated as follows regarding summary Judgment:

*“The law on Summary Judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant –v- Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd –v- Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without condition....”*

In this instant suit there is no defence on record that this Court can look at to enable it come to a conclusion. However this Court will recognise that there is an Application on record that was filed after this instant Application was set down for Ruling that has attached a Defence. However Courts have also recognised that in the absence of a Statement of Defence, the Court can look at the Affidavit in opposition to be able to determine whether there is a triable issue. See the case of **Job Kilach ...vs... Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono, Civil Appeal No.94 of 2006[2015] eKLR** where the Court of Appeal held that:

*“Summary Judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in Laljit/a Vakkep Building Contractors v. Casousel Ltd. [1989] KLR. 386, in which the predecessors of this Court held that:*

*“Summary Judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist.”*

*An application for Summary Judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence rises no triable issues, and is a mere sham. In the authority of Continental Butchery Limited v Nthiwa [1978] KLR (Civil Appeal No. 35 of 1977) Madan JA set out the scope of the court’s power to grant summary Judgment as follows:*

*“With a view to eliminate delay 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 from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.”*

*The principles upon which a court may grant Summary Judgment are therefore well settled. They have been the subject of various decisions of this Court, such as that of Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 where the following passage appears:*

*“However, we have accepted that the application that was before the learned Judge was an application for Summary Judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a Judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend.”*

*10. before the grant of Summary Judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for Summary Judgment or in any other manner.”*

This Court has carefully gone through the **Replying Affidavit** of the Defendant/Respondent and noted that he has alleged that there may have been fraud as by the time the Applicant was acquiring the suit land in question, the Court had made a decision stopping any transaction on the same. As to whether or not the Defendant/Respondent has **locus** to agitate this matter remains an issue for trial and therefore becomes a triable issue that this Court must consider.

Having now carefully read and considered the instant application, the **Replying Affidavit** thereto, the annexures and the written submissions by the parties, this Court finds that the prayers sought by the Plaintiff/ Applicant in his Complaint requires interrogation and that the suit is not one that can be termed as plain and simple. Further that the Affidavit by the Defendant/Respondent in regard to this Application raises triable issues and therefore the claim for Summary Judgment is not tenable and therefore not merited.

The upshot of the forgoing is that the **Notice of Motion** Application dated **6<sup>th</sup> of August 2018**, is not merited and the same is dismissed entirely with costs of this Application being in the cause.

Let the matter be set down for hearing and the same be heard on merit.

It is so ordered.

***Dated, Signed and Delivered at Thika this 1<sup>st</sup> day of November, 2019.***

**L. GACHERU**

**JUDGE**

**1/11/2019**

In the presence of

No appearance for the Plaintiff/Applicant

M/S Mbirwe holding brief for Mr. Kamau for Defendants/Respondents

Jackline - Court Assistant

**L. GACHERU**

**JUDGE**

**1/11/2019**