



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 23 OF 2020**

**MUTISYA MUINDI NZUSYO.....PLAINTIFF**

**VERSUS**

**KINGSTONE K. MULEWA.....DEFENDANT**

**RULING**

1. By this Notice of Motion dated 4<sup>th</sup> March 2020, Mutisya Muindi Nzusyo (the Plaintiff) prays for summary Judgment to be entered for the eviction of the Defendant from the suit property and for an order of a permanent injunction to issue compelling the Defendant to remove all illegal constructions from the suit property.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds: -

***i) That the Plaintiff is the legal owner of Plot No. 54 Ngala Estate Malindi pursuant to a Judgment of the High Court in Succession Cause No. 3 Of 2009; In the Matter of the Estate of Nelson Wambua Masili delivered on 19<sup>th</sup> December 2018;***

***ii) That the Plaintiff has on several occasions demanded vacant possession from the Defendant but he has failed and or neglected to vacate the same;***

***iii) That the Defendant is now an illegal trespasser and/or squatter on the Plaintiff's property and has made it impossible for the Plaintiff to enjoy quiet possession thereon having constructed shanties all over the land; and***

***iv) That the Defendant has full knowledge of the Judgment delivered on 19<sup>th</sup> December 2018 but has refused to comply therewith.***

3. But in his Replying Affidavit filed herein on 13<sup>th</sup> October 2020, Kingstone K. Mulewa (the Defendant) avers that he was aggrieved by the said decision and has since instituted **Civil Appeal No. 7 of 2019** which is now pending hearing and determination by the Court of Appeal. The Defendant further asserts that the application has not been brought in good faith and urges the Court to dismiss the same with costs.

4. I have carefully considered the Plaintiff's application and the response thereto by the Defendant. I have equally considered the submissions and authorities filed herein by the Learned Advocates for the parties.

5. The principles of law that need to be satisfied before a summary Judgment can be entered in any proceedings are now fairly settled. Where the Defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. That was the position taken by the Court of Appeal in **Continental Butchery Limited –vs- Samson Musila Ndura, Civil Appeal No. 35 of 1997** where the Learned Judges stated thus: -

***“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 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 in which the Court feels justified in thinking that the defence raised are a sham...”***

6. In the matter before me, the Defendant is yet to file any statement of defence to the Plaintiff's claim. It is however his case that after Judgment was entered against him in **Malindi High Court Succession Cause No. 3 of 2009; In the Matter of the Estate of Nelson Wambua**

**Masila**, he was aggrieved therewith and that he has since preferred an appeal to the Court of Appeal. In this respect, the Defendant has annexed extracts of certain documents indicating that together with one Margaret K. Wambua, they are the Appellants in **Civil Appeal No. 7 of 2019** filed against the Plaintiff herein and one Beatrice Karata Wambua at the Court of Appeal at Malindi.

7. There was however nothing to show that the Defendant had either obtained an order of stay of execution in the said **Malindi High Court Succession Cause No. 3 of 2009** or at the Court of Appeal where his Appeal remains pending for hearing and determination. That being the case, I did not think the Defendant had any basis to stop the Plaintiff from enjoying the fruits of his Judgment.

8. That is the position in law as provided under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows at sub-Rule 1:-

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”***

9. In the circumstances herein, the Plaintiff has a valid order declaring him to be the proprietor of the suit property. The Defendant has not advanced any justifiable reason why he should not yield the suit premises to the Plaintiff. All that the Defendant is trying to do is to unjustifiably keep the Plaintiff from enjoying the fruits of his Judgment.

10. It follows that I find merit in the Plaintiffs application dated 4<sup>th</sup> March 2020 and I allow the same with costs.

11. The Defendant has 45 days from the date hereof to vacate the suit premises and to remove all constructions therefrom failure to which execution shall forthwith issue against him and the structures removed at his own costs.

12. Orders accordingly.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of September, 2021.**

**J.O. OLOLA**

**JUDGE**