



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
LAND AND ENVIRONMENT DIVISION
CIVIL CASE NO.170 OF 2014

JANE NYAMBURA MWANGI PLAINTIFF

VERSUS

BEATRICE MAJYAMBERE DEFENDANT

R U L I N G

1. By a **Motion** dated 11.10.2010 the Plaintiff seeks orders for recovery of ICJD/Kitengela/1760 (suit land) and mesne profit. The Applicant has sworn an affidavit on 5.9.2010 in support of the application. The Respondent has replied to oppose the motion by her affidavit sworn on 6.5.2011. The Applicant case is that the owner of 1760 is Jane Nyambura Mwangi vide copy of title attached and also a search certificate attached to the valuation report to confirm her ownership. The valuation report states that there is a development on plot 1760 and the person in occupation appears to be using plot in conjunction with plot No.1786; The Plaintiff contend that the Respondent occupies an unauthorized double storey residential building erected on suit land 1760. The report by valuer confirm 1760 and 1786 border each other and occupier of 1786 occupies 1760 as well.

2. On her part, the Respondent avers that she resides on parcel No.1786 registered in the names of David Muhihu Murichu and that she is a mere licensee. She only takes care of the land since 1999 when the owner was transferred to Mombasa and later relocated to USA. She avers that the right person to be sued is the owner of land not herself. She claims that a survey report by Mobil Kenya Ltd who has charged the part plot 1786 indicates that there is a major problem as regards boundaries and thus summary judgment not appropriate in the instant application.

3. She further avers that the survey of suit land was not properly done as there are defects in that title deed the parties hold do not conform with the situation on the ground. She annexes a report by **I. N. MWATHANE SURVEYOR** recommending titles held by owners to be surrendered, resurveying done, reallocation be done and fresh titles be issued including for 1760 and 1786 Plots. She avers that her eviction vide the application will not solve the problem as she does not own 1786.

4. Further she avers that as Applicant report and that of the Respondent are diametrically containing opposing views/opinions, the matter ought to go for full trial. After going through the material before the court, the court makes the following findings Orders 36 formerly order 35 invoked stipulated that;

“in a suit where a Plaintiff seeks judgment for:-

Recovery of land, with or without a claim for rent or mesne profits.... Where defendant has appeared but not filed defence the Plaintiff may apply for judgment.... For recovery of land... or mesne profit.”

Order 36 (2) stipulates that the defendant may show either by affidavit or oral evidence or otherwise that he should have leave to defend the suit. The Plaintiff in court seeks eviction and mesne profit.

5. The Respondent reply raises the issues of the structure she occupies ownership. She claims to be a licensee and a caretaker. The plot 1786 is owned by David Muhitu Murichu who has charged the same. The structures and/or development complained of were not undertaken by the Defendant nor do they belong to her. Even if she is to be evicted, the principal who put her in possession to be a caretaker of the premises is yet to be sued. The same structures cannot be removed or the owner's rights be prejudiced without him being accorded a hearing as provided by Article 50(1) of the Constitution of Kenya.

6. The foregoing issues together with the issue of the boundaries for the plots arising from the sub-division from the sub-division of Plot No.332 mother title of the suit land, dictates that the court to direct the suit to go for full trial. Refer to the case of the ATTORNEY GENERAL –VS- EQUIP AGENCIES LTD (2006) eKLR the court held that:

“A case which reveals contentions issues cannot be dismissed by summary judgment Summary judgement....summary judgment is to enable plaintiff obtain a quick judgment where is there is plainly no defence to the claim; when bona fide triable issues exists parties must be allowed to defend that issue without condition.”

The Defendant/Respondent defence raises bona fide triable issues as above stated.

7. The court thus makes the following orders:

1. The Notice of Motion dated 11.10.2010 is dismissed.
2. Costs in the cause.

Dated and Delivered at Machakos, this 6th day of March, 2015.

CHARLES KARIUKI

JUDGE