



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 65 OF 2007

1. **MATHENGE MULONZYA**
2. **KIKAA MULONZYA**
3. **KASINA MULONZYA**
4. **JOHN MATHENGE** **APPELLANTS**

VERSUS

TIKU KITHEKA **RESPONDENT**

(Being an appeal from the Ruling of the Senior Resident Magistrate Hon Richard Odenyo (S.R.M) in Senior Resident Magistrate Civil Case No. 164 of 2005)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Respondent, **Tiku Kitheka**, filed this suit on 14/12/2005 claiming Ksh.15,000/= from the 1st Respondent, **Mathenge Mulonzya**, 2nd Respondent **Kikaa Mulonzya**, 3rd Respondent, **Kasina Mulonzya** and 4th Respondent, **John Mathenge**. The claim was denied by the Respondents as per the statement of defence filed in court on 20/1/06.
2. The Respondent subsequently filed the application dated 6/12/2006 under **Order XXXV Rule 1 (a)** and **Order XXII Rule 6** of the **Civil Procedure Rules** seeking orders that judgment be entered in favour of the Plaintiff/Appellant against the Defendants/Respondents. The application was objected to as per the replying affidavit sworn by the Defendants/Respondents on 16/1/2007.
3. On 20/2/2007, the Defendants/Respondents filed the application dated 16/2/2007 seeking a stay of the suit pending the determination of **PMCC 741/2005, Machakos**.
4. The application dated 6/12/2006 was heard and a ruling delivered on 21/3/07 allowing the entry of judgment. It is the said application which is the subject matter of this appeal.
5. The grounds of appeal can be summarized as follows:-
 - v. **The defence raised serious triable issues.**
 - v. **The pleadings had already been closed and the suit listed for trial severally.**
 - v. **There was already on record an application filed by the Defendants for stay of trial pending the determination of PMCC 741/2005 at Machakos in which the ownership of the suitland was directly in issue.**
 - v. **The alleged trespass could not be actionable before the ownership of the land had been established.**
 - vi. **The trial magistrate misdirected himself by treating the claim of Kshs.15,000/= as liquidated.**

- v. **The trial magistrate erred in treating the case before him and the case before the Machakos Law Courts as different.**
6. During the hearing of the appeal, **Mr Murithi** learned counsel for the Appellants relied on written submissions which I have duly considered. The Respondents did not attend court for the hearing of the appeal nor file any written submissions though served.
 7. Summary judgment can be entered, *inter alia*, where there is a liquidated demand with or without interest unless the Defendant shows he should have leave to defend (**See Gurbaksh Singh & Sons –vs- Njiri Emporium Ltd 1985 1 KLR**).
 8. The plaint herein described the Plaintiff’s claim against the Defendants as **“for the sum of Kshs.15,000/= being the cost of damage and destruction occasioned..”** The plaint further stated **“the Defendants promised in writing to make good the claim herein by paying the Plaintiff the sum of Kshs.15,000/=”**. My view of these pleadings is that the Plaintiff was not a liquidated sum as the stated figure of Kshs.15,000/= is pegged to a disputed promise.
 9. The defence in answer to the claim stated, *inter alia* that **“the Defendants aver that the alleged promise in writing was signed through coercion, threats and intimidation...”** The defence further stated that the Plaintiff was not the owner of the land where the property was alleged to have been destroyed. It was also averred in the defence that the suit No. **741/2005** pending at the **CM’s Court at Machakos** sought the eviction of the Plaintiff from the land. These averments in the defence raised triable issues.
 10. Having re-evaluated the application, I am persuaded that the appeal has merits and is allowed. Since the main suit is still pending, costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **12th** day of **March 2014**.

B. THURANIRA JADEN

JUDGE