



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 347 OF 2017

TITUS MUTUNGA MAWEU.....PLAINTIFF

VERSUS

ERASTUS MUALUKO SIVALU.....1ST DEFENDANT

ANN NZULA SIVALU.....2ND DEFENDANT

GIDEON NZIOKI.....3RD DEFENDANT

RULING

1) What is before court for ruling is the 2nd and 3rd Defendants/Applicants notice of motion application dated 7th May, 2018 and filed in court on even date for orders that;

1. Spent

2. That the 2nd and 3rd Defendants/Applicants be granted leave to file their memorandum of appearance and defence out of time.

3. That the annexed draft memorandum of appearance, defence and replying affidavits to the notice of motion dated 4/10/2017 be deemed to have been filed within statutory time upon payment of requisite fees.

4. Costs be in the cause.

2) The application is predicated on the grounds on its face and is supported by the affidavit of Ann Nzula Sivalu, the second Defendant/Applicant herein, sworn at Machakos on 7th May, 2018.

3) The Plaintiff/Respondent has opposed the application vide his supporting affidavit sworn at Machakos on the 14th May, 2018 and filed in court on 15th May, 2018.

4) The second Defendant/Applicant has deposed in paragraphs 6 and 7 of her affidavit that they have good defence which raises triable issues as well as a comprehensive replying affidavit to the notice of motion dated 4/10/2017. That the Plaintiff/Respondent will not suffer any prejudice if the application is allowed.

5) Justus M. Mutia, the counsel who has the conduct of the case herein on behalf of the Plaintiff, has deposed in paragraphs 3 and 12 of his replying affidavit that the application is misplaced and an abuse of the court process. That part of the prayer 3 is misplaced and an abuse of the court process. That it is also misplaced since no request for judgement has been made and pretrial conference is yet to be done.

6) By the time of writing this ruling, it is only the counsel for the 2nd and the 3rd Defendants/Applicants who had filed his submissions. The counsel has cited the case of Stephen Wanyoike Kinuthia Vs Cecilia Wambui Kariuki & 2 others [2017] eKLR where Okong'o, J stated thus;

“I have also noted from the plaint filed by the Plaintiff that the reliefs sought against the Defendants would have far reaching consequences upon their livelihood and as such they should be granted an opportunity to put forward whatever defence they have to the claim before the orders sought are granted. Finally there is no evidence that the Plaintiff would suffer any prejudice which cannot be compensated in costs if the Defendants are allowed to defend the suit.”

7) The counsel was of the view that since amongst the prayers sought in the plaint is one of a permanent injunction against the Defendant from entering into and the use of the suit property, the same would have far reaching consequences on them. The counsel went on to submit that the Plaintiff/Respondent is silent on whether he stands to suffer any prejudice should the application be allowed. On my part, I concur with observation of Okong'o, J in the aforementioned case of **Stephen Wainyoka Kinuthia V Cecilia Wambui Kariuki** and hold that the application before me has merits. In the circumstances I will allow the application same and direct the 2nd and the 3rd Defendants/Applicants to file and serve their statement of defence, bundle of documents and witnesses statements as well as replying affidavits to the notice of motion application dated 4th October, 2017 within 21 days from the date hereof. The Plaintiff/Respondent will have cost of the application.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 19TH DAY OF FEBRUARY, 2019

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Olieti holding for Mr. Mutia for the Plaintiff

Mr. Masako holding brief for Mr.Mulei for the 2nd and 3rd Defendant.

Ms Nzioka Court Assistant

MBOGO C.G, JUDGE

19/2/2019