

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 694 OF 2017

IRENE MAITHA MBOGO.....PLAINTIFF

=VERSUS=

EDWARD NGIGI MUIGA.....DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 6th August 2018. The application is brought by the plaintiff/applicant who seeks striking out of the defence with costs. The application is expressed to be brought under the provisions of Order 2 Rule 15(1) (a) of the Civil Procedure Rules.

2. The respondent who was duly served with the application neither filed grounds of opposition nor replying affidavit. The applicant contends that she is the registered owner of the suit property and that at the time of purchase of the suit property she was not aware of the respondent's interest in the same; that she came to know that the respondent had filed ELC No.328 of 2011 (*Edward Ngigi Muigai Vs Johnson Ochieng'Ager*) who had obtained injunctive orders in his favour but that he did not register the order against the title. The applicant therefore contends that she is an innocent purchaser for value without notice of any defect in the title.

3. In an application under order 2 Rule 15(1) (a), no evidence is required. The applicant has however annexed a supporting affidavit which is contrary to the Rules of Civil Procedure. I have perused the pleadings herein. The Respondent has indicated that he had entered into a sale agreement with one Johnson Ochieng Ager who put him in possession of the suit property. As at the time the applicant purchased the same property, he was already in possession and is the one in possession. If this be true and given that the respondent had filed a suit against the said Johnson Ochieng Ager, there is need for this suit to go to full hearing so that it can be known how this may have happened.

4. This is a case in which the drastic step of striking out a defence cannot be taken. The defence on record has triable issues and triable issues do not mean a case which will finally succeed. I therefore dismiss the applicant's application with no order as to costs as there was no reply or grounds of opposition filed against it.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 28th day of March 2019.

E.O.OBAGA

JUDGE

In the presence of:-

Mr. Njagi for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE