



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**HCC No. 331 OF 2011**

**NAKURU JOY TECK ENTERPRISES .....PLAINTIFF**

**VERSUS**

**RAPHAEL K. KORIR ..... DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 13<sup>th</sup> December 2011, an application pursuant to which the plaintiff seeks summary judgment in the nature of an order that the defendant, his agents or servants be evicted from land parcel number Njoro/Ngata Block2/3251 and for mesne profits at KShs 30,000 from 26<sup>th</sup> October 2011 until the date of eviction. The plaintiff also seeks costs. The application is supported by an affidavit sworn by Benjamin Kisoi Sila, a director of the plaintiff company.
2. The defendant opposed the application through a replying affidavit sworn by himself.
3. The application was heard by way of written submissions. The plaintiff/applicant filed submissions on 24<sup>th</sup> August 2018 while the respondent filed submissions on 11<sup>th</sup> October 2018.
4. The plaintiff's case is that it is the registered proprietor of land parcel number Njoro/Ngata Block2/3251 (the suit property) having purchased it on 10<sup>th</sup> October 2011 and subsequently being issued with a title deed in respect thereof on 24<sup>th</sup> October 2011. It exhibited a copy of the sale agreement and the title deed. It added that the defendant has been occupying the suit property without the plaintiff's permission and that he has refused to vacate despite being asked to do so.
5. The defendant's case on the other hand is that the plaintiff is not entitled to summary judgment since his defence raises triable issues and that mesne profits are special damages which must be proven at a hearing.
6. I have carefully considered the application, the affidavits filed and the submissions. The applicant seeks summary judgment. It is settled law that a defendant who demonstrates even a single triable issue should be given an opportunity to defend the claim. A triable issue does not mean one that will be upheld at the trial. Reiterating the foregoing, the Court of Appeal stated in **Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR** as follows:

*The application was principally brought under Order 36 Rule 1(1) (a) and (2) of the Civil Procedure Code and what we are called upon to determine is whether the application for summary judgment met the threshold and whether the defence set up by the respondent in the affidavit raised triable issue(s). A preliminary finding of triable issues made at an interlocutory stage does not at all guarantee that the respondent will succeed after trial, just that the courts and the law have set very stringent measures to ensure every litigant is given an opportunity to ventilate their case. See the case of; **Isaac Awuondo V Surgipharm Limited & Another[2011] eKLR** the Court of Appeal had to reiterate the following principles in **Moi University V Vishva Builders Limited** - Civil Appeal No. 296 of 2004 (unreported) this Court said:-*

*“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see **H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89**. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in **Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75** at P. 76 Duffus P. said:-*

*“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”*

7. I have perused the defence filed herein by the defendant. While not denying that the plaintiff is the registered proprietor of the suit property, the defendant contends that the registration was procured fraudulently and that it is therefore illegal and ought to be cancelled. Regarding the sale that preceded the said registration, the defendant has termed it null and void for inter alia, want of consent of the land control board. Even though the defendant has not filed any counterclaim so as to seek cancellation of the plaintiff's title, I remind myself that a triable issue need not be one that will succeed at trial. I am therefore satisfied that the issues of alleged fraud and alleged nullity of the sale agreement are triable issues. The defendant should thus be given his day in court.

8. In the end, Notice of Motion dated 13<sup>th</sup> December 2011 is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of May 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kahiga for the plaintiff/applicant

Mr Karanja Mbugua for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi