

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 569 OF 2017

ELIZABETH NJERI MBATIA..... PLAINTIFF

VERSUS

PATRICK KANIARU..... DEFENDANT

RULING

Through the application dated 4/11/2017 brought under Order 36 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e), the Plaintiff seeks leave to enter into the property known as Dagorretti/Riruta/4654 (“the Suit Property”) and eviction orders against the Defendant to vacate the Suit Property forthwith. The application is made on the grounds that the Plaintiff is the registered proprietor of the Suit Property and the Defendant encroached onto the Suit Property in September 2012 following which the Plaintiff proffered criminal charges against the Defendant. The Defendant was found guilty of forcible detainer contrary to Section 91 of the Penal Code. Despite this finding, the Defendant has refused to move out of the Suit Property prompting the Plaintiff to file the instant suit together with the application.

The Plaintiff swore the affidavit in support of the application and annexed a copy of the title deed for the Suit Property which was issued on 22/8/2001. She also annexed a copy of a Judgement in **Kibera Chief Magistrate Court Criminal Case No. 4637 of 2012 – Republic v. Patrick Kaniaru**.

The court has looked at the judgement of the lower court which found that the Defendant was not entitled to have possession of the Suit Property which belonged to the Plaintiff. The court stated that being the legal owner of the Suit Property, the Plaintiff ought to have given her consent for the accused to be on her land.

The Defendant was served with summons to enter appearance together with the plaint and the application dated 4/9/2017 but failed to enter appearance or file a defence. When the matter was fixed for hearing on 14/2/2018, the Plaintiff caused service to be effected on the Defendant who did not attend court.

The court has considered the application. Under order 36 Rule 1(b) a Plaintiff who seeks judgement against a trespasser where the Defendant has appeared but not filed a defence may apply for judgement for the recovery of the land on an application supported by the Plaintiff’s affidavit or some other person who can swear positively to the facts verifying the cause of action. The court has to consider whether a Defendant ought to be permitted to defend the suit. Under Order 36 Rule 8 (2) the court will dismiss the application if in its opinion the Plaintiff knew that the Defendant relied on a contention which would entitle him to unconditional leave to defend.

The Plaintiff relied on the case of **Charles Githinji Muturi v. Julius Nderitu Kabera** Nyeri High Court Civil Appeal No.68 of 1999 where the court stated that the respondent was required to show that the appellant was truly liable for eviction and that the defence did not raise any genuine issues which should go for trial. On his part the appellant was required to show that he should have leave to defend the suit.

In this case the Defendant did not enter appearance or file a defence. There is nothing to show that he should have leave to defend the suit. He was convicted of the offense of forcible detainer by the Magistrates court in relation to the Suit Property herein. There is nothing before the court to support the position that the Defendant ought to have leave to defend this suit.

The court allows the application dated 4/9/2017.

Dated and delivered at Nairobi this 12th day of March 2018.

K. BOR

JUDGE

In the absence of the Plaintiff and the Defendant

In the presence of Mr. V. Owuor- Court Assistant