



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**LAND CASE NO 72 OF 2016.**

**CECILIA ATIENO ODENYO.....PLAINTIFF**

**VERSUS**

**DOMINIQUE DUBOST.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 3<sup>rd</sup> June, 2016. It is brought under Order 36 Rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act, and all other enabling provisions of the law.

2. It seeks orders that;

**a) Spent.**

**b) That summary judgment be entered for the Plaintiff/Applicant against the Defendant as prayed in the plaint or in the alternative judgment on admission be entered as prayed for in the plaint.**

**c) That the court do grant any order it deems necessary and fit to grant to meet the needs of justice.**

**d) That the costs of the Application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph (i-vii) I do not need to reproduce them here.

4. The application is supported by the affidavit of Cecilia Atieno Adenyo, the Plaintiff/Applicant herein sworn on the 3<sup>rd</sup> June, 2016.

5. The application is opposed. There is a replying affidavit sworn by Dominique Dubost, the Defendant/Respondent herein sworn on the 27<sup>th</sup> September, 2016. The Defendant/Respondent has also filed grounds of opposition dated 27<sup>th</sup> September, 2016.

6. It is the Plaintiff/Applicants case that the defence raises no triable issue as the suit property is registered in the joint names of the Plaintiff and the Defendant.

They have relied on the case of *Malardy –versus- Slatem (1890) 24 QBD 504.*

7. Further that the Plaintiff has been the registered owner since 2004. The Defendant is estopped from raising any complaint with regard to the ownership of the suit property. They have relied on the case of *Kenya Roads Board –versus- National Bank of Kenya Limited (2012) eKLR.*

8. It is the Defendant's/Respondent's case that the defence and counterclaim raises triable issues. That the application is frivolous, vexatious and abuse of the court process. That this application was filed after the Defendant had filed his statement of defence and counterclaim.

9. Further that Order 36 Rule 1 (b) provides for a situation where the Defendant has entered appearance but has not filed a defence.

Order 36 rule 1 (b) of the Civil Procedure Rules cannot apply. They have relied on the case of *Ali Omar & Ahmed Omar (suing as administrators and beneficiaries of the Estate of Omar Khamis (Deceased) –versus- Kaushumu Wambui (2017) eKLR* where the Honourable Judge made reference to *Orbit Chemical Industries Limited –versus- Mytrade Limited & Another Milimani HCCC No. 631*

of 1998.

They also relied on;

Mugambi –versus- Gatururu (1967) EA 196.

Glory Nkuene Rufus & Another –versus- George Kirima Mugambi (2015) eKLR.

10. That the Honourable Court ought not to condemn the Defendant unheard. The statement of defence and counterclaim raises triable issues which ought to be ventilated during the hearing. The Defendant is the owner of **LR. NO. MN/1/3596** which he bought without the assistance of the Plaintiff in spite of the fact that it was registered in the joint names of the Plaintiff and the Defendant. The Defendant is a stranger to the registration particulars of the property known as **LR. NO. MN/1/5797**.

11. They have relied on the case of Gupta –versus- Continental Builders Limited (1976-80) KLR 809 where it was observed that;

**“A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing.”**

The particulars of the irregularities of registration raised on the counterclaim ought to be ventilated in a full hearing by way of oral and documentary evidence.

12. I have considered the pleadings, the notice of motion and the supporting affidavit and the annexures. I have also considered the grounds of opposition and the replying affidavit. I have considered the written submissions of counsel and the authorities cited.

The issues for determination are;

**i) Whether or not the Plaintiff/Applicant’s application is merited.**

**ii) Who should bear costs?**

13. I have gone through the relevant provisions of law. Order 36 rule (1) states;

**“In all suits where a Plaintiff seeks judgments for -**

**a) a liquidated demand with or without interest: or**

**b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the Defendant has appeared but not filed a defence the Plaintiff may apply for judgement for the amount claimed, or part thereof, and interest for recovery of the land and rent or mesne profits.”**

14. I have considered the above provision and come to the conclusion that summary judgment can only issue where the Defendant has not filed a defence. The evidential value of a defence can only be established during the hearing and determination of the suit.

The statement of defence and counterclaim is dated 4<sup>th</sup> May, 2016 and filed in court on 5<sup>th</sup> May, 2016. The notice of motion is dated 3<sup>rd</sup> June, 2016 and filed in court on 10<sup>th</sup> June, 2016. It is clear that the same was filed after the Defendant filed his statement of defence and counterclaim.

Order 36 rule (1) of the Civil Procedure Rules would therefore not apply in the present case.

15. In the plaint dated 12<sup>th</sup> April, 2016 the Plaintiff seeks;

**a) Sub-division of property known as LR. NO. 5797/1/MN into two equal parts and issuance of separate titles.**

**b) A declaration that the Plaintiff is entitled to a half share of the property known as LR. NO. 5797/1/MN.**

**c) The valuation of the property known as LR. NO. 5797/1/MN and order that the proceeds be shared equally.**

**d) Costs and interest.**

**e) Any other relief this court may think fit and just.”**

16. In paragraph 6, 10 and 11 of the statement of defence and counterclaim, the Defendant states that he is the owner of **LR. NO. 3596/1/MN**. Clearly this is a different parcel of land from **LR. NO. 5797/1/1MN** which the Defendant does not know.

17. I have gone through the particulars of irregularities of registration set out in the counterclaim. It is not in doubt that these are serious issues which need to be ventilated during a full hearing.

I find that the statement of defence and counterclaim raises triable issues. In the case of *Mercy Karimi Njeru & Another –versus- Kisima Real Estate Limited (2015) eKLR* the Honourable Judge cited the decision of the Court of Appeal in *Job Kilach –versus- Nation Media Group Limited & 2 Others (2015) eKLR* where it was held that;

**“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. A bonafide triable issue in any other matter raised by the Defendant that would require further interrogation by the court during a full trial.”**

18. I am guided by the above authority in finding that the Defendant’s statement of defence and counterclaim raises triable issues which ought to be ventilated during a full hearing.

Allowing this application would amount to condemning the Defendant/Respondent unheard.

19. I have gone through the statement of defence and counterclaim. Nowhere does the Defendant admit the Plaintiff’s claim. The prayer for judgment on admission also fails.

20. All in all I find that this is a matter that ought to go to full hearing.

I find that the application lacks merit and the same is dismissed with costs to the Defendant/Respondent.

**It is ordered.**

**Dated, Signed and Delivered at Mombasa on the 10<sup>th</sup> day of April 2018.**

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**L. KOMINGOI**

**JUDGE**

**10/4/2018.**

**Mr. Gichaha:** I seek a date for pretrial.

**Court:** For pretrial before the Deputy Registrar on 27<sup>th</sup> April, 2018.

**L. KOMINGOI**

**JUDGE**

**10/4/2018.**