



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 596 OF 2011**

**TERESIA WANJIRU GICHANE.....PLAINTIFF**

**VERSUS**

**DAVID MUGAI ..... 1<sup>ST</sup> DEFENDANT**

**TOWN COUNCIL OF KIKUYU.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Plaintiff's Notice of Motion dated 13<sup>th</sup> May 2014 in which she seeks for this court to enter summary judgment against the 1<sup>st</sup> Defendant as per the Plaint with costs of the suit and this Application being awarded to her.

The Application is premised on the grounds appearing on its face together with the Plaintiff's Supporting Affidavit sworn on 9<sup>th</sup> May 2014 in which she averred that she is the registered proprietor of the parcel of land known as Dagoretti/Kinoo/4646 (hereinafter referred to as the "suit property"). She produced a copy of her title deed. She further averred that the 1<sup>st</sup> Defendant approached the 2<sup>nd</sup> Defendant claiming that she had denied him access to a road that he claimed passed through the suit property. She further stated that upon receiving a notice from the 2<sup>nd</sup> Defendant to this effect, she filed a case in Kikuyu Law Courts being PMCC No. 59 of 2010 which suit was struck out as the court indicated that it had no jurisdiction to deal with the matter. She averred that she subsequently filed this suit in which the 1<sup>st</sup> Defendant, though having been served, did not enter appearance or file a defence. She averred that the 2<sup>nd</sup> Defendant entered appearance and filed a defence. She added that the 2<sup>nd</sup> Defendant, who had accused her of obstructing the 1<sup>st</sup> Defendant by closing an access road, withdrew their claim against her and a consent was recorded between her and the 2<sup>nd</sup> Defendant to the following effect:

***"That the suit herein be and is hereby marked as settled as against the 2<sup>nd</sup> defendant in the following terms;***

***That the Town Council of Kikuyu (2<sup>nd</sup> defendant) shall not either by itself, its servants, employees and/or agents enter upon, encroach, interfere with beacons or cut an access road or in any other way interfere with the plaintiff's ownership and quiet possession of LR No Dagoretti/Kinoo/4646 otherwise than in accordance with the provisions of the Local***

***Government Act Cap 265 Laws of Kenya”***

She averred that the 1<sup>st</sup> Defendant, though having been served with the pleadings in this matter, appears not to have any intentions of entering appearance or defending this suit. She stated that she continues to live in fear of harassment and threats of the 1<sup>st</sup> Defendant demolishing structures that she has put up on the suit property. She further disclosed that on diverse dates she has hired workers to put up a fence but the 1<sup>st</sup> Defendant has pulled it down and chased her workers from the site, causing her to suffer as she cannot enjoy the quiet possession of the suit property. On those grounds, she sought for summary judgment be entered against the 1<sup>st</sup> Defendant as prayed in the Plaintiff.

The issue I am called upon to determine is whether or not to enter summary judgment in this suit against the 1<sup>st</sup> Defendant as prayed in the Plaintiff. The Plaintiff has brought this Application under Order 36 of the Civil Procedure Rules, 2010 which deals with summary procedure. Rule 1(1)(b) of Order 36 provides as follows:

***“In all suits where a plaintiff seeks judgment for-***

***the recovery of land, with or without a claim for rent or mesne profits, ... against a trespasser, where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for ... recovery of the land and rent or mesne profits.”***

I must point out that summary judgment can only be applied for in instances where the defendant has entered appearance as indicated in the underlined portion of Rule 1(1) of Order 36 of the Civil Procedure Rules, 2010 above.

Further, the principles which guide our courts in determining applications for summary judgement are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION versus DABER ENTERPRISES LTD (2000) 1 EA 75, the Court of Appeal stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. (See also CONTINENTAL BUTCHERY LTD V NDHIWA, (1989) KLR 573).

Further, In DHANJAL INVESTMENTS LTD versus SHABAHA INVESTMENTS LTD Civil Appeal No. 232 of 1997, the Court of Appeal had earlier stated as follows regarding summary judgment:

***“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant vs Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...”***

As these principles go to demonstrate, summary procedure is only available where there is appearance by the defendant. The issue then becomes that the defendant has failed to file a defence or having filed one, it discloses no triable issue. In the instant suit, however, where the 1<sup>st</sup> Defendant, though having been served, has not entered appearance or defence, the appropriate action by the Plaintiff would be to seek for interlocutory judgment within the provisions of Order 10 of the Civil Procedure Rules, 2010 and for the Plaintiff to proceed with formal proof. As such an application is not before court, I find that this Application lacks merit and do hereby proceed to dismiss it.

Costs shall be in the cause.

It is so ordered.

**DELIVERED, SIGNED AND DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF APRIL 2017.**

**MARY M. GITUMBI**

**JUDGE**