



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 329 OF 2016

JOHN THEURI MATHENGE1ST PLAINTIFF

IRENE W. THEURI MATHENGE 2ND PLAINTIFF

VERSUS

PHILOMENA WANGUI GITHEGI DEFENDANT

RULING

(An application for judgment in default of appearance and defence; the suit being a claim for inter alia a declaration that plaintiffs are the rightful and legal owners of one acre to be excised from the suit property; held that the nature of the claim is such that it requires a hearing on the merits; application dismissed)

1. This ruling is in respect of plaintiffs' Notice of Motion dated 6th March 2017. The application is brought under Order 10 Rules 2 and 10 of the Civil Procedure Rules. The plaintiffs seek the following orders:

1. THAT the honorable court be pleased to enter judgment for the plaintiffs herein as the defendant has failed, refused, and/or neglected to enter appearance and file a statement of defence in this suit

2. THAT arising from prayer (1) above or otherwise as the court may direct, judgment in default of appearance be entered against the defendant/respondent as prayed in the plaint with costs to the plaintiffs.

3. THAT costs of this application be awarded to the plaintiffs.

2. The application is supported by an affidavit sworn by Peter Chege, the plaintiffs' advocate. Mr. Chege deposes that despite being served with summons to enter appearance, the defendant has so far failed to enter appearance. The plaintiffs therefore pray that the orders sought be granted.

3. This suit was commenced by way of plaint dated 12th August 2016 in which the plaintiffs seek judgment against the defendant as follows:

a. A declaration that the plaintiffs are the rightful and legal owners of one (1) acre to be excised (sic) from all that parcel of land known as of all that parcel of land known as LR No.9242/5.

b. A declaration that the defendant is in breach of the agreement dated 22nd October 2014.

c. An order of specific performance compelling the defendant to convey an original title document for one (1) acre of land from LR No. 9242/5 and in the alternative the Deputy Registrar be allowed to execute transfer documents in favour of the plaintiffs.

d. A perpetual injunction (pending the hearing and determination of this suit a temporary injunction) restraining defendant either by herself, servants or agents from trespassing, interfering, alienating, disposing, advertising for sale, occupying, constructing and or dealing in any other way whatsoever with one (1) acre of land exercised (sic) from all that parcel of land known as LR No. 9242/5.

e. General damages for breach of contract.

f. Costs and interest of this suit.

I have considered the application, the supporting affidavit and submissions of counsel. In view of the nature of the claim and the prayers sought in the plaint, it would be futile and inappropriate to enter interlocutory judgment as sought. The nature of the plaintiff's claim is such that it requires a hearing on the merits. The suit should therefore be listed for hearing. In the circumstances, Notice of Motion dated 6th March 2017 is dismissed. Costs in the cause. I will give directions to facilitate disposal of the suit upon delivery of this ruling.

Dated, signed and delivered in open court at Nakuru this 15th day of June 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Chege for the plaintiffs

No appearance for the defendant

Court Assistant: Gichaba