



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC.NO.17 OF 2017**

**KHADIJAH ALI OMAR & AHMED OMAR (Suing as Administrators and Beneficiaries  
of the Estate of Omar Khamis (Deceased).....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KAUSHUMU WAMBUI..... DEFENDANT/RESPONDENT**

**R U L I N G**

The matter for determination is the Plaintiff/Applicants **Notice of Motion** application dated **10<sup>th</sup> June 2016**, which is brought under Order 36 Rule 1(b) of the Civil Procedure Rules and Sections 24, 25 and 26 of the Land Registration Act. In the said application, the Plaintiff/Applicant has sought for an order of Summary Judgement be entered for the Plaintiff against the Defendant as prayed in the Plaint and that the Defendant/Responent should be ordered to give vacant possession of the following suit properties.

**i. LR No.4953/933 IR 33891**

**ii. LR No.4953/202 IR 33948**

**iii. LR No.4953/931 IR 33886**

Further that the cost of the application and main suit be provided for.

The application is based on the grounds stated on the face of the application and the **Supporting Affidavit** of **Ahmed Omar**, one of the Applicant herein.

The Plaintiff's case is that they are the **administrators** of the **Estate of Omar Khamis**, who was the registered owner of the above stated suit properties who had acquired them through the **Succession Cause** for the Estate of **Halima Njeri Omar**. The Applicant have attached **Grant** and certificate of **Confirmation of Grant**. The Plaintiff also averred that during the pendency of the Succession Cause for **Halima Njeri Omar's Estate**, the Defendant herein filed an application for Revocation of Grant claiming that she had interest on the suit properties by virtue of having been married to **Khadija Nyambura Njuguna**, the mother to **Halima Njeri** under the **Kikuyu Customary Woman to Woman Marriage**. However, the Defendant's claim was **dismissed** in **Succession Cause no.1512 of 2006**, and she filed an **Appeal No. Civil appeal No.173 of 2014** which was also **dismissed**. Therefore the Defendant has no claim over the suit property and her occupation of the suit property constitutes trespass and she should therefore give vacant possession to the Plaintiff/Applicant. Plaintiff has averred that the Defendant has no plausible Defence and her proffered defence would only serve to delay the expeditious disposal of this

suit and that Summary Judgement should be entered as prayed.

The Application is vehemently **opposed** and the Defendant has filed her **Replying Affidavit** and stated that **her Defence** and **Counter-claim** raised **triable** issues and she should not be shut from the seat of justice. It was her contention that summary judgement would be unfair and oppressive to her as she is in physical possession of the suit properties since **1972**. She averred that her occupation of the suit property predates the birth of the Applicant herein as she used to live with their grandmother **Khadija Nyambura**, as a wife. She asked the Court not to shove or remove her from the seat of justice through a summary manner which is draconian. She urged the Court to dismiss the instant application.

The application herein was canvassed by way of Written Submissions which this Court has carefully read and considered. The Court has also carefully considered the cited authorities therein and the relevant provisions of law. In determining the application, the Court will reconsider the instant application and the pleadings in general and the Court will be guided by provisions of **Order 36(1)(b)** which provides as follows:-

***“In all suits where a Plaintiff seeks judgement for the recovery of land with or without a claim the 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 or for recovering of the land and rent or mesne profits”.***

It is evident that Order 36 Rules 1 (b) gives the Court discretion to enter Summary Judgement on the instances stated in the said provision of Law. However, the said discretion must be exercised judicially and with greatest care. See the case of **BEA Corp Ltd ..Vs..Shah Govindji Ladha (18 LR K91** where the Court held that:-

***“Summary judgement should be exercised with greatest care”***

The Court has considered the Plaint filed by the Plaintiff herein and it is seeking for order of vacant possession from the Defendant herein. The Plaintiffs are seeking an order of vacant possession from the Defendant as they claim they are entitled to possession of the suit land by virtue of transmission through **Succession Cause no.1460 of 2012**, which was **Succession Cause** on the **Estate of Omar Khamis**, their father. The Defendant has alleged that she has been in occupation of the suit land since **1972** by **virtue** of having been **married** to **Khadija Nyambura**, who initially owned the suit properties. Therefore the Defendant’s term on the suit land has not expired as a tenant or the occupation has not been determined by **Notice to quit** or forfeited for non-payment of rent or breach of covenant. The Plaintiff’s claim therefore does not fall under the category of suits where summary judgement may be applied for. The Plaintiff’s claim is unliquidated claim and therefore does not qualify for summary procedure under Order 36(1)(b).

Further, the application herein may be filed where the Defendant has entered appearance and not filed Defence. In the instant suit, the Defendant filed his **Memorandum of Appearance** on **3<sup>rd</sup> June 2016**. The Defendant was supposed to file his Defence within a period **14 days** after entering appearance. Since the Memorandum of Appearance was filed on **3<sup>rd</sup> June 2016**, then the Defendant was **supposed to file his Defence** by **17<sup>th</sup> June 2016** as per the provisions of Order 7 Rules 1.

However, the Plaintiff filed this application on **14<sup>th</sup> June 2016**, before the period for filing of the Defence had lapsed. Therefore this Court cannot find and hold that the application was filed after the Defendant appeared, but failed to file Defence as provided by the provisions of Order 36 Rule 1(b). However, the Defendant **filed** her **Defence** on **22<sup>nd</sup> June 2016**, albeit **4 days** late.

Though the application was filed before the expiry of the period for filing of Defence had lapsed, the Court has to determine whether the said application is merited or not. Courts have had several occasions to deal with applications for Summary Judgement. In the case of **Orbit Chemical Industries Ltd..Vs..Mytrade Ltd & Another, Milimani HCCC No.631 of 1998**, the Court held that:-

***“The purpose of proceedings in an application for Summary Judgement is to enable a Plaintiff to obtain a quick judgement where there is plainly no defence to the claim and where the Defendant suggested Defence is a point of law and the Court can see at once that the point is misconceived or if arguable, can be shown shortly to be plainly unsustainable, the Plaintiff will be entitled to Judgement”.***

The Plaintiff/Applicant filed the application before the Defendant filed her Defence. She in turn filed **Defence** and **Counterclaim** on **22<sup>nd</sup> June 2016**. The Plaintiff has alleged that the said Defence is irregular and should not be considered. However, in the case of **Mugambi..Vs..Gatururu (1967) EA 196**, the Court held that:-

***“Where a Defence has been filed, the Court cannot ignore it in an application for summary judgement.***

Since the Defendant herein has filed her Defence and Counterclaim, the Court will therefore not ignore it. Even if the same was irregularly filed, the Court still has a duty to consider the same. See the case of **Rajinder Nath Ohiri..Vs.. Pleetah Singh (1950) 24(1) LRK 26**, where the Court held that:-

***“When the Defence is on record, albeit irregularly, the court ought not give judgement without regard to it if it discloses substantial grounds of Defence and should have the case heard on merits”.***

It is trite law that courts have severally held that all that the Defendant has to show in a summary procedure is that there is a triable issue of fact or law and that summary judgement should be exercised with greatest care. See the case of **Five Continents Ltd..Vs..Mpata Investments Ltd, civil Appeal No.306 of 2000(2003 1 EA 1**.

The Defendant herein has filed a Defence and a Counterclaim. She claims she has been in possession of the suit land since the year **1972**. Though the issue of her marriage to **Khadija Nyambura** was settled in **Succession Cause no.1512 of 2006**, she has raised other issues in her Defence and Counterclaim which need to be interrogated by calling of evidence through oral hearing. In the case of **National Industrial Credit Bank Ltd..Vs..Cornel Rasanga Amoth, Nairobi HCCC No.13 of 2000**, the court held that:-

***“The granting of summary judgement is a drastic remedy and should be applied in plain and obvious cases where it can be discovered that the Defendant is bent on delay or some form of mischief but where a Defendant has a stateable and arguable Defence, he must be given an opportunity to state it and argue it before the Court”.***

The Court finds that since the Defendant/Respondent herein has filed a Defence and Counterclaim she should be given an opportunity to state and argue her case before the Court.

Having now carefully considered the instant application dated **10<sup>th</sup> June 2016**, the Court finds that the Plaintiffs case is not one of a liquidated demand or any of the cases referred in Order 36(1)(b) for summary procedure. Further, the Defendant has raised a Defence and Counterclaim which raises some triable issues and she should not be shoved out of the seat of justice in a drastic remedy of summary procedure. Consequently the Court finds that the Plaintiff/Applicant's **Notice of Motion** dated **10<sup>th</sup> June 2016**, is not merited. The same is dismissed entirely with costs being in the cause.

It is so ordered.

Dated, signed and delivered at THIKA this 26<sup>th</sup> day of July 2017.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Tum holding brief for Mr. Mungla for Plaintiff/Applicant

Mr. Kamau holding brief for Mr. Wokabi Mathenge for Defendant/Respondent

Rachael - Court Clerk

**L. GACHERU**

**JUDGE**

Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**26/7/2017**