



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 44 OF 2017

(FORMERLY MACHAKOS ELC NO. 241 OF 2015)

NASON MWEMA NZIMBI.....PLAINTIFF/APPLICANT

VERSUS

KIIO NDETEI.....1ST DEFENDANT/RESPONDENT

KINGOA NDETEI.....2ND DEFENDANT/RESPONDENT

KYENGO MUINDI NDETEI.....3RD DEFENDANT /RESPONDENT

RULING

1) On the **6th September, 2016** , the plaintiff /Applicant filed the notice of motion application dated **2nd September, 2016** seeking the following orders:-

1. That summary judgment be entered in favor of the plaintiff against the Defendants as prayed in the plaint dated and filed on 4th December, 2015.

2. That the costs of this application and the suit be borne by the Defendants.

2) The application is predicated on the grounds on its face and is supported by the affidavit of **Nason Mwema Nzimbi**, the Applicant herein, sworn on the **2nd September, 2016**.

3) The application is opposed by **Kiio Ndetei** the first Defendant/Respondent sworn on the **22nd May, 2017** and filed in court on the **23rd May, 2017**.

4) The application is expressed to be brought under **Order 36 rule (1) 1, b, 2,3** of the Civil Procedure Rules, Sections **1A** and **3A** of the Civil Procedure Act and other enabling provisions of the law .

5) The Applicant has deponed in paragraph **2** of his affidavit that he filed this suit against the Defendants claiming for judgment against the Defendants jointly and severally as pleaded in sub-paragraphs (i) to (v) of the plaint. He goes on to deponed in paragraph **3** that on **30th December, 2015** , the Defendants filed a memorandum of appearance through the firm of **Paul Kisongoa and Company Advocates** but since then, they have failed to file their defence. He has deponed in paragraphs **4, 5, 6, 8, 9** and **10** that he is the registered proprietor of the suit property, **Makueni/Kivani/1082** having been so registered since **10th August, 2005**. He says that the said title has never been challenged by any party at all since **2005** and the same being a first registration, the Defendants have no identifiable effect or claim whatsoever on the suit property or any part thereof and he believes it is sole reason why they have failed to file their defence. He goes on to deponed that he believes that the issues pertinent to this suit can be determined without the necessity of a full trial.

6) On the other hand the first Respondent has deponed in paragraphs **2** and **3** of his replying affidavit that when he perused the court file after his replying advocate was served with an undated notice of motion, he realized that the application in the court file was also undated. He goes on to deponed in paragraph **5** of his replying affidavit that his failure to file defence was neither deliberate nor intentional since he and other Defendants were pursuing the proceedings of other pending matters touching on the suit property being **Machakos HCCC no. 225/2008, HCCC no. 225 /2005** and **Nairobi HCCC No.1452/1987** annexed to the replying affidavit as **KMN2(a)** to **(e)** He further depones in paragraph **8** that he has a good defence which raises plausible and/or triable issues which ought to be canvassed on merit.

7) By consent dated **30th May, 2017** parties agreed to dispose off the application by way of written submissions.

8) The plaintiff's counsel cited order **36 Rule 1(1) (b)** of the Civil Procedure Rules that provides for summary judgment against a trespasser to land who has appeared but not filed defence. The counsel cited the cases of **Lomolo (1962) Limited Vs Shadrack K. Kimose & 147 others [2016] eKLR and Pauline Arepel Cheptalam Vs Ziporah Chepoche paw Kanyongo & Another [2017] eKLR**, where the Defendants entered appearance but failed to file their respective defences to claims for recovery of land. Summary judgment was entered in the two applications filed by the plaintiffs therein. The counsel went on to submit that the Defendant/Respondent herein has conceded in his replying affidavit that he did not file his defence. The counsel pointed out that the Respondent has not and has never at any given time sought extension of time within which to file his defence and neither has he sought leave to do so. He went on to submit that the Respondents have brought extraneous issues of having been tracing some other court files of which he has not demonstrated that there were some difficulties in tracing the said files and besides parties to the alleged other suits are not the same as the parties herein.

9) Regarding the issue of undated notice of motion, the Applicant's counsel submitted that such errors are procedural technicality which are curable under Article **159(2)** of the Constitution and urged the court to enter judgment for the plaintiff since the Defendants have no legal interest in the land whatsoever. The counsel went on to submit that the annexed draft defence by the first Defendant does not add any probative value to this case since the Defendants are purporting to introduce it without seeking leave and without seeking for extension of time to file it. The counsel termed the purported defence as sham as it does not raise bonafide triable issues. He opined that the purported defence is a ploy to delay the cause of justice.

10) On his part, the counsel for the Respondents submitted that failure to file defence was neither deliberate nor intentional since the Respondents were pursuing the proceedings in other pending matter touching on the suit property the matters being **Machakos HCCC No. 225/08, HCC 225/08 and HCCC No. 1425/87** as deponed in paragraph 5 of the replying affidavit.

11) The counsel further submitted that failure to file defence is a procedural technicality which is curable under Article **159(2) (d)** of the Constitution and cited the case of **Shabbir Ali Jusab Vs Annar Osman Gamrai & another [2013] eKLR**.

12) The counsel went on to submit that the threshold for seeking summary judgement is so high that any attempt and/or effort to whittle away or down that standard should not be entertained. Regarding the issue of costs, the counsel cited the case of **Mercy Karimi Njeru & another Vs Kisima, Real Estate Limited [2015] eKLR** and Section **27(1)** of the Civil Procedure Act and pointed out that the Applicant has not demonstrated sufficient reason to warrant costs.

13) From the foregoing, my finding is as follows: -

i. The plaint herein was filed on the **4th December, 2015**. The Defendants entered appearance on the **21st December, 2015** through **Paul Kisongo and Company Advocates**. Subsequently thereafter the Defendants did not file defence so much so that on the **23rd June, 2016** the plaintiff requested for judgment under order **10 Rule 4** of the Civil Procedure Rules. This being a claim for recovery of land, judgement could not be entered for the plaintiff and against the Defendants. The matter ought to have instead been listed down for formal proof upon which judgment for the plaintiff could have been entered. Whether or not the Defendants were pursuing proceedings in other pending matters touching on the suit property, there is no reason why they could not have filed their defence. The annexed draft defence annexed to the Defendants replying affidavit is of no probative value since as correctly observed by the plaintiff's counsel, the same is not accompanied by an application for leave to file it out of time. I will not venture to determine whether or not it is a sham as alleged by the Applicant's counsel.

ii. I have looked at the notice of motion application which the Respondent s allege that it was undated. The one in the court file is dated **2nd September, 2016** and was filed in court on the **6th September, 2016**. I will so no more on this issue.

iii. I have looked at the authorities referred to me by the counsel for both parties. I wish to fully associate myself with the holdings of **E.O Obaga J** and **Munyao Sila, J** in their respective rulings in the cases of **Pauline Arepel Chaptalem Vs Ziporah Chapoche paw Kanyongo and another [2017] eKLR and Lomolo (1962) Limited Vs Shadrack K. Kimose & 147 other [2016] eKLR** regarding the application for summary judgement.

iv. As earlier on stated in my ruling, the Respondents herein did not file their defence to the plaint dated **4th December, 2015** and filed in court on even date. The reasons they have proffered for their failure to do so are unconvincing. The draft statement of defence annexed to the first Respondents' replying affidavit sworn on **22nd May, 2017** is not accompanied by an application for leave to file it out of time nor did they seek leave before filing the same. The end result is that the notice of motion application dated **2nd September, 2016** and filed in court on **6th September, 2016** has merits. Same is allowed in terms of prayers **1** and **2**. It is so ordered.

Signed, Dated and Delivered this **12th day of November, 2017**

MBOGO C.G

JUDGE