



**REPUBLIC OF KENYA**

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

**ELC NO. 527 OF 2015**

**ESTHER KATHINI MBUVI.....PLAINTIFF**

**VERSUS**

**MICHAEL MACKENZIE MUSEMBI..... DEFENDANT**

**RULING**

The Plaintiff is the registered owner of all that parcel of land known as **LR Nairobi/Block 93/878** on which she has constructed a house (hereinafter referred to as “**the suit property**”). The Defendant was at all material times the Plaintiff’s tenant on the suit property. The Plaintiff brought this suit against the Defendant on 16<sup>th</sup> June 2015 seeking vacant possession of the suit property and mesne profit at the rate of Kshs.70,000/= per month with effect from 1<sup>st</sup> April 2015 until vacant possession is delivered.

In his plaint dated 15<sup>th</sup> June 2015, the Plaintiff averred that by a written tenancy agreement between the plaintiff and the defendant made in the year 2006, the Plaintiff let the suit property to the Defendant for a period of one year renewable annually until 31<sup>st</sup> March 2015. The Plaintiff averred that after the expiry of the term of said tenancy agreement, she offered to let the suit property to the Defendant for a further term of one (1) year with effect from 1<sup>st</sup> April 2015 at a revised rent of Kshs.70,000/= but the offer was not accepted by the Defendant.

The Plaintiff averred that on 20<sup>th</sup> April 2015, she gave a notice of one (1) month to the Defendant to vacate the suit property and hand over vacant possession thereof but the Defendant refused and/or neglected to comply thereby rendering the filing of this suit necessary.

After the Defendant entered appearance, the Plaintiff brought an application by way of Notice of Motion dated 30<sup>th</sup> July 2015 under Order 36 rule 1 (1) (b) of the Civil Procedure Rules seeking summary judgment against the Defendant. In her affidavit in support of the application, the Plaintiff deposed that the Defendant was her tenant on the suit property until 31<sup>st</sup> May 2015 when a notice to vacate that was served upon him expired. The Plaintiff deposed further that from 1<sup>st</sup> June 2015 the Defendant has been occupying the suit property as trespasser. The Plaintiff deposed that the Defendant has no defence to this suit seeking vacant possession of the suit property. The Plaintiff annexed to her affidavit, a copy of a certificate of lease in respect of the suit property in her name and a copy of a notice to vacate dated 20<sup>th</sup> April 2015 that was addressed to the Defendant by the Plaintiff’s advocates on record.

The application was opposed by the Defendant through a replying affidavit sworn on 27<sup>th</sup> October 2015. The Defendant termed the Plaintiff’s application unmerited, incompetent, bad in law, frivolous and an abuse of the process of the court. The Defendant contended that the application was filed prematurely before he had filed a statement of defence. The Defendant contended that he has a reasonable defence

and counter-claim against the plaintiff which raises several triable issues. The Defendant annexed to his affidavit a draft statement of defence. In his draft statement of defence, the Defendant admitted that he was the Plaintiff's tenant on the suit property initially paying a rent of Kshs.30,000/= which was increased gradually to Kshs.44,000/= per month from June 2014. The Defendant averred that it was a term of the tenancy agreement between the Plaintiff and the Defendant that the leased premises included servant quarters. The Defendant averred that in breach of the said agreement, the Plaintiff allowed her son to occupy one of the servant quarters without the Defendant's permission. The Defendant contended that he is still the Plaintiff's tenant in that he has continued to pay rent to the Plaintiff. The Defendant has also denied that the Plaintiff is entitled to mesne profits.

When the application came up for hearing on 28<sup>th</sup> October 2015, Mr. Ombete appeared for the Plaintiff while Miss Wachira appeared for the Defendant. In his submission, Mr. Ombete reiterated the contents of the Plaintiff's affidavit in support of the application and submitted that the Defendant is a trespasser on the suit property. Mr. Ombete submitted that the Defendant has not denied that he was served with a notice to vacate the suit property. Counsel submitted that the draft defence annexed to the Defendant's affidavit contains irrelevant issues.

In response to the submissions by the Plaintiff's advocate Miss Wachira for the Defendant informed the court that she wished to rely entirely on the defendant's replying affidavit and did not wish to make any submissions.

I have considered the Plaintiff's application together with the affidavit filed by the Defendant in opposition hereto. I have also considered the submissions by the Plaintiff's advocates. The power given to the court to enter summary judgment is meant to enable a plaintiff who has liquidated claim or who seeks the recovery of land with or without rent or mesne profits or a landlord who seeks the recovery of leased premises from a tenant whose tenancy has expired or has been determined by notice to obtain judgment without waiting for the trial of the main suit where the defendant has no defence to the claim.

Once the application has been filed, the onus is on the Defendant to show that he should have leave to defend the suit. The Defendant would be granted leave to defend the suit if he shows that he has a defence to the Plaintiff's claim which raises triable issues. A single triable issue is enough to justify the grant of leave to a defendant to defend a suit. In the present case, the Plaintiff has claimed that the Defendant was at all material times her tenant on the suit property until 31<sup>st</sup> March 2015 when the Defendant's tenancy expired. The Plaintiff has contended that she offered the Defendant a new tenancy at a new rent but the offer was not accepted. The Plaintiff thereafter served the Defendant with a notice to vacate the suit property on or before 1<sup>st</sup> June 2015. The Defendant has refused to vacate the suit property even after the expiry of the said notice.

In his affidavit in opposition to the application the Defendant has not denied that he was the Plaintiff's tenant on the suit property. The defendant has also not denied that his tenancy on the suit property expired on 31<sup>st</sup> March 2015. The Defendant has also not denied that the Plaintiff served her with a notice to quit and vacate the suit property on or before 1<sup>st</sup> June 2015. I am in agreement with the Plaintiff's advocates that the issues raised in the Defendant's replying affidavit and draft statement of defence do not answer the Plaintiff's claim. The onus was upon the Defendant to show cause why he should continue occupying the suit property. In my view no such cause has been shown. The Defendant has not given any justification why he did not vacate the suit property after the expiry of his tenancy on 31<sup>st</sup> March 2015 when he failed to agree to the terms of the new tenancy agreement that was offered by the Plaintiff. He has also not given any justification for his continued occupation of the suit property after the expiry of the notice to quit that was served upon him by the Plaintiff.

I am of the view that the defence that the Defendant intends to put forward against the Plaintiff's claim herein is a sham. The draft defence contains mere denials which do not amount to a defence. The same raises no triable issues at all. I am of the opinion that this is a fit and proper case to enter summary judgment. On the issue of mesne profits, no evidence has been placed before me to justify the sum of Kshs.70,000/= per month that has been claimed by the Plaintiff. I would award the Plaintiff mesne profits

at the rate of kshs.44,000/= per month which is the last rent which the Defendant was paying at the termination of his tenancy.

In conclusion, I hereby allow the Plaintiff's application dated 30<sup>th</sup> July 2015 and enter summary judgment for the Plaintiff against the Defendant for vacant possession of all that parcel of land known as LR No. Nairobi/Block 93/878. The Plaintiff shall also have mesne profits at the rate of Kshs.44,000/= per month with effect from 1<sup>st</sup> April 2015 until vacant possession is given. The Defendant shall vacate and hand over possession of the suit property to the plaintiff within 60 days from the date hereof failure to which the plaintiff shall be at liberty to apply for his forceful eviction. The Plaintiff shall have the costs of the suit.

**Delivered, Dated and Signed at Nairobi this 29<sup>th</sup> day of January, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Ombete for the Plaintiff

Mr. Mwangi for Nyaigwa for the Defendant