



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC 36 OF 2015

LOMOLO (1962) LIMITEDPLAINTIFF

VERSUS

SHADRACK K KIMOSE & 147 OTHERS.....DEFENDANTS

RULING

(Application for summary judgment; plaintiff being owner of certain land and claiming that defendants are trespassers; defendants having filed suit before claiming the same land but having failed in their suits; no defence filed; no replying affidavit or grounds of opposition filed to oppose the motion; defendants not providing any reasons why they should be given leave to defend; application allowed)

1. The application before me is that dated 3 December 2015 filed by the plaintiff. It is an application seeking summary judgment against the defendants jointly and severally.
2. The suit itself was commenced by way of plaint filed on 9 February 2015. It is pleaded that the plaintiff is the registered owner of the land parcel LR No.10939 situated in Mogotio in Nakuru. It is pleaded that the defendants are small scale farmers in the area surrounding the plaintiff's land and that the plaintiff in good faith has allowed the defendants to graze in the area of its land which is not under cultivation. The plaintiff, it is pleaded, also allowed the defendants to build temporary structures on the hilly areas of the land. This kindness, it is said, has been extended over a long period of time. It is averred that the defendants, acting on very misplaced advice from third parties claimed the land by way of adverse possession and filed the suit Nakuru HCCC No. 152 of 2006 (OS). The suit was heard and dismissed. The defendants then filed another suit, being Nakuru HCCC No. 98 of 2013 which suit was declared res judicata and dismissed. Upon conclusion of the two suits, the relationship of the parties soured and the plaintiff declared the defendants trespassers and ordered them to vacate. The defendants, it is pleaded, have however refused to comply. It is pleaded that on two occasions, the defendants have invaded the plaintiff's farm and caused mayhem. They injured the workers and attempted to burn one of the director's house and factory. They were however repulsed by the plaintiff's employees and police. It is averred that the defendants have no legitimate reason to be on the plaintiff's property and should be evicted. In the suit, the plaintiff has asked for orders of eviction and costs of the suit.
3. A memorandum of appearance was filed but no defence has been filed.
4. The supporting affidavit to the application has more or less elaborated the pleadings set out in the plaint. It is the view of the applicant that the defendants cannot lodge any defence which may be considered on merits.

5. No replying affidavit or grounds of opposition were filed to oppose the motion. Neither did counsel for the defendants make any submissions at the hearing of the application.

6. I have considered the matter. This is an application for summary judgment. Summary judgment is canvassed in Order 36 of the Civil Procedure Rules. Rules 1 and 2 provide as follows :-

Order 36 Rule 1 (1) In all suits where a plaintiff seeks judgment for—

a. a liquidated demand with or without interest; or

b. the recovery of land, with or without a claim for 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 judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

2. The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

3. Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

Defendant may show cause [Order 36, rule 2.]

The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

7. The suit herein is for recovery of land. No defence has been filed and therefore the plaintiff is perfectly entitled to seek summary judgment. The defendants, under Order 36 Rule 2, can show either by affidavit or oral evidence, or otherwise, that they should have leave to defend. However, as I mentioned earlier, the defendants have filed nothing to oppose the motion and their counsel did not make any submissions to show cause why the defendants should be given leave to defend.

8. I have seen that the defendants had two suits against the plaintiff vide which they attempted to claim ownership of the land. They lost the two suits. If they had any right to the plaintiff's land, then that would have been upheld in the two suits that they had. I really do not see any basis for them to continue being on the plaintiff's land.

9. I therefore allow this application for summary judgment. I direct the defendants to vacate the suit property within 14 days of service of this order and/or decree. In the event that they do not vacate, an order of eviction may issue.

10. The plaintiff shall also have costs of this suit.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 17th day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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In presence of :-

Mr. B.N. Kipkoech holding brief for Mr. Githui for plaintiff/applicant.

No appearance on part of M/s Ikua Mwangi & Co for defendants/respondents.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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