



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

CIVIL CASE NO.20 OF 2012

TOM JILLYANUS AKUN.....PLAINTIFF

VERSUS

BETHESEBA MORA alias BAHATI MUAH.....1ST DEFENDANT

ODHIAMBO RAMOGI.....2ND DEFENDANT

OCHIENG NYIBULE.....3RD DEFENDANT

ABUDI OSEWE ARINGO.....4TH DEFENDANT

JOHN OWUOR.....5TH DEFENDANT

RULING

1. **Tom Jillyanus Akun**, the Plaintiff, filed the notice of motion dated 5th December 2015 seeking to have the defence filed by **Odhiambo Ramogi**, the 2nd Defendant, on 19th April 2013 struck out and that judgment be entered against him. The Plaintiff also prays for summary judgment against **Bethseba Mora** alias **Bahati Muah**, **Ochieng Nyibule**, **Abudi Osewe Aringo** and **John Owuor**, hereinafter referred to as 1st, 3rd, 4th and 5th Defendants respectively. The Plaintiff also prays for costs. The application is based on the seven grounds on the notice of motion and is supported by the affidavit of **Tom Jillyanus Akun**, sworn on the 7th December 2015.

2. The application was served on the 2nd Defendant but no replying papers have been filed.

3. The application came up for hearing on the 19th May 2016 when counsel for the Plaintiff moved the court for the orders sought.

4. The following are the issues for the courts determination;

a) Whether the defence filed by the 2nd Defendant discloses any triable issues and if not, whether it should be struck out and interlocutory judgment entered.

b) Whether interlocutory judgment should be entered against the 1st, 3rd to 5th defendants

c) Who pays the costs of the application?

5. The court has carefully considered the grounds on the notice of motion, the Plaintiff's affidavit

evidence, the pleadings filed, the court record, counsel's oral submissions and come to the following conclusions;

a) That the Plaintiff's case is that he became the registered proprietor of the **South Sakwa/Barkowino/4785** on 17th October 2011. That the Defendants unlawfully moved onto the land and built structures on it without his permission and therefore should be evicted.

b) That the initial plaint dated 5th July 2012, and filed on 23rd July 2012 was filed about eight months after the Plaintiff became the registered proprietor of the said land. That the plaint and the supporting affidavit to the notice of motion subject matter of this ruling do not disclose the date, month or year that the Defendants moved onto the said plot and or erected their structures.

c) That the initial plaint had **Nyibule Omulo and Tom Aringo** as the 3rd and 4th Defendants respectively. That the Plaintiff then filed the amended plaint dated 14th February 2013 introducing **Ochieng Nyibule and Abudi Osewe Aringo** as the new 3rd and 4th Defendants respectively.

d) That interlocutory judgment against the 3rd and 4th Defendants was applied for and entered on the 11th April 2013 pending formal proof which is yet to take place. There is therefore no purpose to be served by entering another interlocutory judgment. The Plaintiff should set down the suit for hearing.

e) That the interlocutory judgment against 1st Defendant was applied for and entered on 23rd July 2013 pending formal proof. The formal proof is yet to take place.

f) That on 20th February 2014, learned counsel for the Plaintiff applied to withdraw the case against the 5th Defendant for reasons that no interlocutory judgment had been entered against him. The application was allowed and that order has not been reviewed. The court cannot therefore enter interlocutory judgment against the 5th Defendant as prayed in prayer 3 as there is no case pending against him.

g) That the 2nd Defendant filed the defence dated 4th September 2012, and an amended defence dated 19th April 2013, in which he among others disputes the ownership by the Plaintiff over the suit land. He also disputes the existence of the suit land alleging that it has been subdivided into other parcels and that the title the Plaintiff holds is a forgery. The 2nd defendant also averred that there exists a pending suit being **Bondo PMCC No.69 of 2007** and at paragraph 11 of the defence gives notice that he will be seeking to have the suit struck out. The 2nd Defendant also takes issue on the amendment to the plaint on the basis that it was filed without leave and gives notice that he would be asking for it to be struck out. The foregoing outline of the defence shows that the 2nd Defendant defence is not vague or evasive as the Plaintiff alleges. It takes issue with the Plaintiff claim on specific areas. That the court finds that the statement of defence filed by the 2nd Defendant raises triable issues that can only be answered through the hearing of the case.

h) That the plaintiff should meet his own costs on the application.

6. That the notice of motion dated 5th December 2015 is therefore without merit and is dismissed. The Plaintiff will bear his own costs in the application in any event.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 6TH DAY OF JULY 2016

In presence of;

Plaintiff Present

Defendants Present

Counsel Mr Arikho for Odeny for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

6/7/2016

6th July 2016

S.M. Kibunja J

Oyugi Court Assistant

Plaintiff present

Mr Arikho for Odeny for Plaintiff/Applicant

Court: Ruling delivered in open court in presence of the Plaintiff and Mr Arikho for Odeny for Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

6/7/2016