



REPUBLIC OF KENYA



KENYA LAW
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**Kalii v Masika & 11 others (Environment & Land Case 42 of 2017)
[2024] KEELC 999 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 42 OF 2017
TW MURIGI, J
FEBRUARY 21, 2024**

BETWEEN

PHILIP EDWARD KIOKO KALII PLAINTIFF

AND

TITUS MASIKA 1ST DEFENDANT

PETER PATEL MWANIA 2ND DEFENDANT

MUENDO MASIKA 3RD DEFENDANT

CHRISTOPHER KOMBO MASILA 4TH DEFENDANT

PAUL MASILA MASIKA 5TH DEFENDANT

SERAH MUTISO 6TH DEFENDANT

JAMES MAUNDU MAKOLE 7TH DEFENDANT

ESTHER ELVINAH 8TH DEFENDANT

MBENEKA MASILA 9TH DEFENDANT

CHRISTINE MORAA 10TH DEFENDANT

**DEPT OF LANDS, MINING AND PHYSICAL PLANNING OF COUNTY
GOVERNMENT OF MAKUENI 11TH DEFENDANT**

**LAND SURVEYOR COUNTY GOVERNMENT OF MAKUENI 12TH
DEFENDANT**



RULING

1. By a Notice of Motion dated 9th December, 2021 brought under Section 3A of the *Civil Procedure Act* in addition to order 35 rule 1 of the *Civil Procedure Rules* the Plaintiff/Applicant seeks the following orders: -
 - i. That summary judgment be entered against the Defendants as prayed in the Plaint herein.
 - ii. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Philip Edward Kioko Kalii sworn on 8/12/2021.

The Applicant's Case

3. The Applicant averred that he instituted the suit herein seeking orders to stop the Defendants from trespassing or otherwise interfering with his possession of the suit property. According to the Applicant, the Defendants have not demonstrated any valid legal claim over the suit property either through their statement of defence and counterclaim or through documentary evidence. The Applicant averred that it is in the interest of justice that the application be granted to enable him to enjoy peaceful possession over his property.

The Respondents Case

4. The Respondents opposed the application through the replying affidavit of Serah Mutiso sworn on 8/3/2023 on her behalf and that of the 1st, 3rd, 4th, 7th and 10th Defendants. She averred that the 1st – 10th Defendants joint statement of defence and counterclaim dated 11/12/2017 raises triable issues namely: -
 - i. Whether or not the Defendants have been in occupation and use of the suit property since time immemorial and whether the premises were available for allocation to the Plaintiff.
 - ii. Whether the suit premises were part of parcel of land known as LR No. 12968; a trust land then vested in the County Council of Makueni and on which the Defendants herein and many other families resided, occupied and used.
 - iii. Whether or not the County Council of Makueni was constitutionally obligated to use the suit property having been trust land for the benefit of people like the Respondents.
 - iv. Whether or not the County Council was precluded by the *Constitution* and the law from alienating, selling or transferring trust land vested in it save only as permitted by the law.
 - v. Whether or not the allocation of the suit property to the Plaintiff was unconstitutional and illegal and whether the same ought to be revoked by this Court.
 - vi. Whether or not the Respondents are entitled to the prayers in their counterclaim.
5. She further averred that, the Plaintiff filed a reply to defence and defence to counterclaim which is a clear indication that the pleadings raises triable issues. According to the deponent, striking out of the Respondents' pleadings is a draconian measure which should be exercised in the clearest of cases. She urged the Court to dismiss the application with costs.
6. The application was canvassed by way of written submissions.



The Applicant's Submissions

7. The Applicant's submissions were filed on 3/4/2023. On his behalf, Counsel submitted that the instant suit is against the 1st – 10th Defendants since the 11th and 12th Defendants were removed from the proceedings as they were not contesting the Plaintiff's title to the suit property.
8. Counsel submitted that the purpose of summary judgment is to enable the Plaintiff to obtain quick judgment where there is no defence to the suit or where the defence does not address the issues raised in any material way. Counsel argued that for a suit to qualify for summary judgment, it must meet the threshold set out in the case of *Harit Sheth t/a Harit Sheth Advocates v Sharma Charania* [2014] eKLR.
9. Counsel contended that the instant suit is based on ownership of the suit property which the Plaintiff has established by producing an application for the land, survey, registration and issuance of a title deed and subsequent possession which is uncontroverted save for mere denials and baseless allegations by the Defendants.
10. Counsel insisted that the allegations made in the counterclaim must be subjected to the evidentiary threshold to avoid a wastage of judicial time and resources. Counsel contended that the absence of documentation to ascertain the veracity of the Defendants interest in the suit property was fatal to their claim. Counsel submitted that a claim related to historical land injustice should be referred to the National Land Commission under the provisions of section 15 (4) of the *National Land Commission Act*, 2012. According to Counsel, a claim of historical land injustice cannot lie against a private party as a response to a suit except where the evidentiary threshold has been met.
11. Concluding his submissions, Counsel urged the Court to allow the application as prayed.

The Respondents Submissions

12. The Respondents submissions were filed on 12/6/2023. Counsel for the Respondents submitted that Order 35 Rule 1 of the Civil Procedure Rules under which the application is made is irrelevant in the present application since it deals with proceedings by agreement of parties. Counsel submitted that the correct provision of the law is order 36 rule 1 of the *Civil Procedure Rules* which provides for summary procedure.
13. Counsel argued that if the Plaintiff had desired to bring the application under order 36 rule 1, then the same is misadvised since the provision deals with recovery of land between landlord and tenant and where the Defendant has entered an appearance but not filed a defence. Counsel contended that the Respondents have filed a defence and counterclaim, hence the Rule is not applicable in the present case.
14. While citing the provisions of order 2 rule 15 of the *Civil Procedure Rules* which provides for applications for striking out of pleadings, Counsel argued that the Respondents' defence is not a sham as it raises triable issues.
15. Counsel further submitted that failure to file witness statements and supporting documents alongside the defence is not a ground for striking out a defence. Counsel argued that the Respondents ought to be given their day in court as per article 50 of the *Constitution*. Counsel submitted that the application is devoid of merit and should be dismissed with costs.
16. To buttress his submissions, Counsel relied on the following authorities: -
 - i. *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR
 - ii. *Gladys Jepkosgei Boss v Star Publication Limited* [2021] eKLR



Analysis and Determination

17. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the only issue for determination is whether the Applicant has met the threshold for the grant of the orders sought.
18. The Applicant brought this application under order 35 rule 1 of *Civil Procedure Rules, 2010* which provides for proceedings by agreement of parties. The suit herein has not been filed at the agreement of the parties and no question has been agreed upon by them for the decision of the Court.
19. The law on summary judgment is set out under order 36 rule 1 of the *Civil Procedure Rules* which provides as follows: -
 - (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.
20. The Plaintiff vide the Plaint dated 7/12/2016 seeks the following orders:-
 - a. A declaration that the Defendants have unlawfully encroached onto plot known as No. 1/130 situated within Makueni County the property herein of the Plaintiff.
 - b. The Defendants be restrained by themselves, their servants, agents, employees and/or anyone of them claiming ownership through or under them by permanent injunction from encroaching onto or interfering in any manner howsoever with the Plaintiff's quiet use and enjoyment of land known as plot No. 1/130 situated within Makueni County.
 - c. An order for the assessment of the general damages occasioned by the Defendants as a result of the encroachment and trespass with a view of effecting compensation to the Plaintiff.
 - d. Costs of this suit and interest at Court rates.
21. The Plaintiff averred that the Defendants have not afforded a good defence and counterclaim since he has demonstrated a valid legal claim to the suit property. He further averred that the Defendants have not annexed documentary evidence to validate their claim over the suit property. The Defendants on the other hand contended that the joint defence and counterclaim is not a sham as it raises triable issues. A reading of order 36 rule 1 of the *Civil Procedure Rules* shows that summary judgment can only be applied where the judgment sought is with regard to a liquidated sum and recovery of land or where the Defendant has entered appearance but has not filed a defence.
22. The Plaintiff has not pleaded a case of a landlord-tenant relationship against the Defendants. It is clear that this suit does not relate to a liquidated amount. From the replying affidavit of Rose Mutiso, it is clear that the matter before the court is not plain and obvious as the Plaintiff will be required to prove



certain facts . The Defendants filed a defence and counterclaim on 11/12/2017. It is therefore clear that the court will not grant summary judgment if there is a defence on record that raises triable issues.

23. In the case of *Dhanjal Investment Ltd vs Shabaha Investment Ltd* [1998] eKLR the court of Appeal held that “The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandlal Resturant v Devshi & Company* (11952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd v Mooring Hotel Ltd* (1959) EA 425 that if the defendant shows a *bona fide* triable issue, he must be allowed to defend without condition..”
24. Similarly, in *Kenya Trade Combine Ltd v N. M. Shah* [2001] eKLR, the Court of Appeal aptly held as follows: -

“In this appeal, it is clear that by the time the application for summary judgment was being heard, there was already a defence and counter-claim on the file... In a matter of this nature, all that a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

25. Having found that there is a defence and counter claim on record, this court finds and holds that a summary judgment cannot be granted.
26. The upshot of the foregoing is that the application dated December 9, 2021 is devoid of merit and the same is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS ON 21ST FEBRUARY 2024.

In the presence of:

Mwendwa for the plaintiff/Applicant.

Court assistant Kwemboi.

