



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.104 OF 2015

RUTH ADHIAMBO OKOTH - OGENDO

(Suing as Administrator of the estate of the late Professor H.W.O. Okoth Ogendo)
.....PLAINTIFF

VERSUS

OTTOMAN ADEL DEFENDANT

RULING

1. Ruth Adhiambo Okoth- Ogendo, the Applicant, suing as the administratrix of the estate of the late professor H.W.O. Okoth – Ogendo, filed the notice of motion dated 31st July 2015 seeking to have the defendant’s statement of defence dated and filed on 30th June 2015 struck out with costs, judgment be entered in terms of prayers (a), (b) and (c) and matter do proceed for assessment of damages sought in prayer (d). The application is based on the five grounds on the notice of motion and supported by the affidavit of the Applicant sworn on the 31st July 2015.
2. The Application is opposed by Dr. Adel Ottoman, the Respondent, through a document headed “**Response to notice of motion**” dated and filed in court on the 26th October 2015.
3. The application came up for hearing on the 14th July 2016 when Ms Ouma, learned counsel for the Applicant, made her submission in the absence of the Respondent who though served did not attend.
4. The issues for the determination by the court are as follows;
 - a. Whether the statement of defence filed raises triable issues to the Applicant’s claim.
 - b. Whether the statement of defence should be struck out.
 - c. Whether judgment should be entered in terms of prayers (a), (b) and (c).
 - d. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, the Applicant’s affidavit evidence, the grounds on the document filed by the Respondent in response, which the court will take as grounds of opposition, submissions by Applicant’s counsel and come to the following findings:
 - a. That the notice of motion, invokes **Order 2 Rule 15, Order 51 Rule 1** of the Civil Procedure Rules 2010, **Section 1A, 1B and 3A** of the Civil Procedure Act 2010. That Order 51 Rule 1 of the

Civil Procedure Rules sets out the procedure of moving the court through a motion. That the provision of Sections 1A, 1B and 3A of Civil Procedure Act, provides for the objective of the Act, the duty of the court and the inherent jurisdiction of the court respectively. That prayer 1 of the notice of motion seeks the striking out of the filed statement of defence dated 30th June 2015 and hence the invocation of Order 2 Rule 15 of Civil Procedure Rules that provides as follows:

“ 15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

a. It discloses no reasonable cause of action or defence in law; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

e. That Plaintiff’s claim is as particularized at paragraph 6 of the plaint dated 29th April 2015 that the Defendant has without consent constructed, fenced off and erected an electricity pole on the northern portion of land parcel **Kisumu/Kasule/2664** belonging to the estate of the late H.W.Okoth Ogendo for which she is the admistriatrix. That the defence filed by the Defendant dated 30th June 2015 does not specifically respond to the Plaintiff’s claim as it is coached as if it is claim of his own. That the statement of defence filed does not amount to a defence and counterclaim.

f. That the defence do not contain any statement that can be said to amount to traverse or generally deny the specific claims in the plaint.

That as counsel for the Plaintiff submitted, all the Defendant appear to have done is to paraphrase the contents of the plaint. That the defence filed does not raise triable issues and cannot be said to be a reasonable defence to the Plaintiff’s case contrary to the requirements set out in the case of **Banquez Indosuez –V- D.J. Lowe & Company Limited** [2006] eKLR. That the defence is evasive as it does not specifically traverse the allegations of fact in the Plaintiff’s claim as set out to be one of the requirements in the case of **Ragbir Sigh Chatte –V National Bank of Kenya Limited** [1996] eKLR.

d. That there were no statement of witnesses and lists of documents filed with the statement of defence contrary to **Order 7 rule 5** of Civil Procedure Rules.

6. That from the foregoing, the Plaintiff’s notice of motion dated 31st July 2015 has merit and is allowed in the following terms:

a. That the Defendant’s statement of defence dated 30th June 2015 is hereby struck out for failure to disclose triable issues.

b. That interlocutory judgment is hereby entered and the suit be fixed for formal proof on all the prayers.

c. That the costs of this application will be in the cause.

d. That if date for formal proof is fixed without the involvement of the Defendant, the Plaintiff do ensure hearing notices are served on him as required.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Omondi for Oraro for Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/11/2016

30/11/2016

S.M. Kibunja Judge

Oyugi court Assistant

Parties Absent

Mr Omondi for Oraro for Plaintiff

Court: Ruling dated and delivered in open court in presence of Mr Omondi for Oraro for the Plaintiff/applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/11/2016