



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 1005 OF 2004**

SIMON KINYANJUI KARIUKI.....APPELLANT

- V E R S U S -

FRANCIS NGIGE WAWERU .....RESPONDENT

*(Being an appeal from the ruling of the court delivered on 19<sup>th</sup> April 2004 by the SPM Court at Milimani Commercial Court by the Hon. Mrs. G. L. Nzioka SPM in CMCC no. 5186 Of 2003)*

**JUDGEMENT**

1. On 19<sup>th</sup> April 2004, Hon. G. L. Nzioka (Mrs), learned Senior Resident Magistrate heard and allowed the respondent's application for summary judgment dated 2<sup>nd</sup> July 2003. Being aggrieved by the aforesaid decision, the appellant preferred this appeal.

2. On appeal the appellant put forward the following grounds.

***1. The learned magistrate erred in both law and fact by hearing and determining an application by way of Notice of Motion dated 2<sup>nd</sup> of July 2003 in absent of the appellant or his council.***

***2. The learned magistrate erred in law by failing to hold that the defence was struck out because the appellant had another case No. 7270 of 2002 in the same court which the plaint was dismissed because of incompliant of his lawyers who filed a consent order without the appellant approval or consent through the probable collusion with the respondent.***

***3. The learned magistrate erred in law and fact by not holding that the appellant were destitute, landless and unable to hire a good lawyer to represent them in court and could have not reached a point to dismiss the application.***

***4. The learned magistrate erred in fact by holding that the appellant council was served and failed to oppose the application as there was filed a replying affidavit on 27<sup>th</sup> August 2003, by then council for appellant M/s Njiiri Kanyiti & Co. Advocates the same was served upon the respondent advocates on the same day and rubber stamp it at the back of our copy and signed.***

***5. The learned magistrate erred in law and fact by failing to hold that the respondent fraudulently and conspired with Agriculture Finance Co-operation (herein referred to A.F.C) and dishonestly and fraudulently sold and buy the land for mere sum of kshs.300,000/= knowing very well that the price was unreasonable and below the value of the land.***

***6. The learned magistrate erred in fact by failing to hold that the respondent was a former***

*employee of A.F.C and could have conspired to defraud the appellant the suit land being Muguga/Muguga.802 before he was illegally demarcated into Muguga/Mugua/1886-1892.*

*7. That the learned magistrate erred in law by failing to hold that the notice of motion was filed on 2<sup>nd</sup> July 2002 and another chamber summons dated 16<sup>th</sup> July 2003 was also filed by the respondent council which is contrary to Section 6 of the Civil Procedure Act.*

*8. The learned magistrate erred in law and fact by not holding that the subject matter in issue in both cases are land aforesaid which the appellant has legal claim and the case has never heard to be determined and to dismiss the defence on that account alone deter that right.*

*9. The learned magistrate erred in law by not holding that the respondent could have filed his claim by way of counterclaim/ or cross suit prompting the appellant to abandon this claim in CMCC 7270 of 2002.*

*10. The learned magistrate erred in law and fact by not holding that the appellant charge A.F.C auction was not merited as no proper statutory notices were issued and deny having signed the same.*

*11. The learned magistrate erred in both law and fact in failing to consider exhaustively the nature of the application, the document produced in the support thereof. The appellant replying affidavit, the relevant law applicable and in so failing to do the learned magistrate came to a wrong conclusion which was against the law and the evidence adduced before court.*

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent to have the appeal determined by written submissions. I have re-evaluated the arguments made before the trial court. I have further considered the rival written submissions. Before considering the merits or otherwise of the appeal, let me set out in brief the history behind this appeal. The respondent filed the suit before the trial court against the appellant seeking to have him evicted from LR No. Muguga/Muguga/802 vide Nairobi CMCC no. 5186 of 2003. The evidence on record shows that the respondent purchased the aforesaid parcel of land through a public auction held on 17.4.2002 and conducted by M/s Vackey Auctioneers in exercise of the chargee's (Agricultural Finance Corporation) statutory power of sale. The appellant was subsequently issued with a title deed having met the statutory requirements. Previously, the appellant had filed Nairobi CMCC no. 7270 of 2000 to challenge the manner in which the respondent acquired the aforesaid parcel. This suit was later dismissed for want of attendance on the part of the appellant. The appellant filed a defence against the respondent's suit where the respondent had sought for an order of eviction. The respondent successfully applied to have the appellant's defence struck out and for entry of summary judgment. The ruling delivered on 19.4.2004 provoked the filing of this appeal.

4. Having outlined the background of this appeal, let me now determine the merits or otherwise of the appeal. Though the appellant put forward a total of 11 grounds of appeal, I am convinced that the main ground which would determine the entire appeal is whether or not summary judgment should have been entered in the circumstances of this case. It is the submission of the appellant that the trial magistrate found that the appellant's defence raised triable issues hence the suit ought to have gone for trial. The respondent is of the contrary view that the trial magistrate was right to make an order entering summary judgment since there was no defence with triable issues.

5. Having considered the rival submissions and the material placed before this court, there is no dispute that there never existed any contractual relationship between the appellant and the respondent herein. It is also not in dispute that the respondent bought the parcel of land known as LR no. Muguga/Muguga/802 upon the chargee exercising its statutory power of sale. This court forms the opinion that if any dispute arose from the aforesaid sale, then the dispute basically should be between the chargee and the appellant. There is evidence that the appellant had filed a suit against the chargee vide Milimani CMCC 7270 of 2002 which suit was dismissed on 27.5.2003. The dismissal order has never been impugned on appeal by the appellant.

6. In Milimani CMCC no. 5186 of 2003, the respondent sought for *interalia*, the eviction of the appellant from L.R No. Muguga/Muguga/802 having acquired the same vide a public auction as an innocent bidder for value. The appellant failed to seek the remedies available for him as against the chargee under the relevant provision of the law. In the circumstances of this case, the learned Senior Resident Magistrate properly entered summary judgment having struck out the defence. I am satisfied that the trial magistrate's decision should not be interfered with.

7. In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of September, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent