WASHINGTON NDERITU.....PLAINTIFF

VERSUS

STANLEY THUO.....DEFENDANT

RULING

The application by way of Notice of Motion before the court is dated 30th August 2011 and is brought by the Plaintiff/Applicant. The Plaintiff is seeking orders that summary judgment be entered in his favour as against the Defendant/Respondent as prayed for in the Amended Plaint, and that in the alternative, the Defendant/Respondent's Defence and/or Memorandum of Appearance filed herein be struck out, and judgment entered for the Plaintiff as prayed in the Amended Plaint. The grounds for the application are that the Defence filed herein is frivolous and a bare denial of the Plaintiff's claim and raises no triable issues. Further, that the defence as filed is a sham and is only meant to prejudice and/or delay the realization of the Plaintiff's claim.

The Plaintiff states that the subject matter of the dispute herein is LR No. 4953/1022 in Thika (hereinafter referred to as the suit property), which the Plaintiff bought by way of public auction on 24th September 2004 pursuant to orders issued in **Nairobi High Court Divorce Cause No.[....] - A.W.T vs. S.T**. The Plaintiff then obtained a vesting order in the divorce cause aforesaid declaring the sale by public auction absolute and that a provisional title to issue in his favour. The provisional title over the suit property was issued to the Plaintiff on 2nd September 2010, and he then filed the suit herein as the Defendant has refused to move out of the suit property for the last seven (7) years. The Plaintiff fears that the Defendant will vandalize the suit property and thus his application, and has attached exhibits of the aforesaid rulings and orders of the Court, and of documents on the public auction held on 24th September 2004 to his supporting affidavit sworn on 30th August 2011.

The Defendant has responded in a Replying Affidavit sworn on 30th November 2011, wherein he denies that that the Defence filed hereto is a sham, and states that the said defence raises triable issues which are meritorious. The Defendant also states that the suit property is the subject matter of an Appeal before the Court of Appeal being **Civil Appeal No. [.....] - S.T –vs- A.W.T,** and that the Court of Appeal had granted a stay by its order given on 24th September 2004. The Defendant averred that the Plaintiff's application lacked merit, and that he should be granted leave to defend the suit on its merits, as the Defence and Counterclaim filed herein raise issues whose veracity can only be tested in cross-examination.

At the hearing of the application on 16th February 2012, the Advocates for the Plaintiff and Defendant asked that a ruling be given on the basis of the pleadings and submissions filed. The Plaintiff's Advocate in his submissions dated 30th January 2012 relied on this Court's decisions in **Mohammed Sheikh Abubakar vs Zacharius Meri Baya, Mombasa H.C.C.C No. 7 of 2004** for the grant of summary judgment, and in **Lilian Njeri Mwangi vs Municipal Council of Nakuru, Nakuru H.C.C.C No. 191 of 2003** for the striking out of the Defence and Counterclaim.

The Plaintiff's Advocate argued that the stay order by the Court of Appeal was issued on the day the auction was scheduled to take place, and was conditional on the auction not having taken place, and that by the time the said order was being granted the auction had already been done and concluded. Further, that the said order was not served on the auctioneers before they conducted the auction. The Advocate submitted that the auction was done and the provisional title issued according to the law. The Advocate also contended that the purported appeal by the Defendant had been overtaken by events and rendered nugatory, and in any event does not act as a stay of execution.

The Defendant's Advocate's written submissions are dated 13th December 2011, and he argued therein that the prayer for summary judgment cannot be granted, as Order 36 Rule 1 are clear that a Plaintiff may apply for summary judgment where a Defendant has entered appearance but has not filed a Defence. In the present case the Defendant filed his Statement of Defence and Counterclaim on 13th May 2011, before the filing of this application on 14th September 2011. The Advocate also submitted that the Defence and Counterclaim filed are not a sham, and have raised issues of fraud and irregularity which can only be determined after the matter is set down for full hearing, and evidence of the various witnesses tested through cross examination. The Advocate relied on the decision of the Court of Appeal in **D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1** in this respect.

I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The application is brought under the provisions of Order 36 Rules 1(1)(b) and 2, Order 2 Rules 15(1)(b)(c) and (d), and Order 51 Rule 1 of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act. On the first issue raised whether the prayer for summary judgment can issue, Order 36 Rules 1 and 2 provide as follows:

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.

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

In **Richard H. Page and Associates Ltd vs Ashok Kumar Kapoor (1976-80) 1 KLR 1394** it was held by Chesoni J. (as he then was) that the ordinary time for making an application for summary judgment is after the Defendant has appeared, and when the defence has not been filed, but such an application may be made after the defence has been filed, in which case the Plaintiff must satisfy the Court that the delay is justifiable. Indeed it is then upto the Defendant to show by affidavit that there is a bona fide triable issue and

to be allowed to defend. This was also stated by the late Honourable Madan J.A. in **Continental Butchery Ltd. vs. Nthiwa (1989) KLR 573** as follows: **-**

"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enforcement of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by Order 35 subject to there being no *bona fide* triable issue which would entitle a defendant leave to defend. If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham."

It is therefore clear that the purpose of Order 36 Rules 1 and 2 is to obtain a quick judgment where a Defendant is unable not show any triable issue that needs to go to full trial, and an application for summary judgment needs to be made without delay by the Plaintiff and before the filing of the Defence. In the present case the Plaintiff filed his Amended Plaint on 13th April 2011 and has not shown any cause for the delay in filing his application for summary judgment on 14th September 2011. In the meantime the Defendant filed his Defence on 13th May 2011. I therefore find that prayer 1 of the Plaintiff's application for summary judgment cannot stand.

The second issue for determination is whether the Defence and Counterclaim and/or Memorandum of Appearance filed herein should be struck out for being frivolous and raising no triable issues. It is clear in Order 2 Rule 15 (1) of the Civil Procedure Rules, when a pleading may be struck out. The said provisions state as follows:

"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. "

It is also settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

The Plaintiff in his Amended Plaint filed on 13th April 2011 claimed that the Defendant's continued occupation of the suit property is a violation of his right to property as the Defendant is now a trespasser, and that he has suffered loss and damage as a result of the said trespass. The Plaintiff is seeking relief in terms of a permanent injunction and/or eviction order, damages for trespass and mesne profits for the years the Defendant has been in occupation.

The Defendant in the Defence and Counterclaim filed on 13th May 2011 denied the allegations in the Amended Plaint, but in addition averred that the public auction conducted on 24th September 2004 was unlawful and irregular and tainted with fraud, and that the provisional title issued thereafter to the Plaintiff was irregular and a nullity. The Defendant also counterclaimed against the Plaintiff for the cancellation of the said provisional title and claims damages. The Defendant averred that the particulars of irregularities are the obtaining by the Plaintiff of a vesting order which is void *ab initio*; the Plaintiff's carrying out an attachment contrary to law and selling the suit property when there was an order for stay in place; and his irregular securing of a provisional title. The particulars of fraud averred by the Defendant were that the Plaintiff failed to comply with the orders given by the court, and allegedly purported that an auction was held when no auction took place.

Upon perusal of the pleadings filed herein, I established as follows: this Court in a ruling delivered by Honourable Justice Koome (as she then was) on 24th October 2003 in **Nairobi High Court Divorce Cause No.[....] - A.W.T vs. S.T.** ordered for the attachment and sale of the suit property by public auction. This ruling is produced as evidence by the Plaintiff as his Annexure "WN-1". The Defendant herein made an application for stay of execution of the said orders in the Court of Appeal in **Civil Application No.[....] - A.W.T vs. S.T.** The Court of Appeal stayed execution in its ruling dated and delivered on 16th January 2004, but ordered the Applicant to pay the Respondent therein Kshs 15,000/= per month until the Applicant's intended appeal was heard and disposed of, and the Respondent to be at liberty to execute in default. This ruling is produced as evidence by the Defendant in his bundle of Documents filed on 7th October 2011.

The said Applicant who is the Defendant herein then made another application in the Court of Appeal on 16th January 2004 for a variation of these orders in **Civil Application No. NAI. 223 of 2004(109/04UR),** whereupon the Court of Appeal on 24th September 2004 held that it could not proceed with the hearing of the said application, but stayed the auction scheduled for that day if it had not already taken place, until the application was heard. This order is produced in evidence by the Plaintiff as annexure "WN-7", and by the Defendant in his bundle of Documents filed on 7th October 2011.

Evidence produced by the Plaintiff in the bundle marked as Exhibit "WN-3" shows that there was notification of and advertisement of the said public auction, and the Plaintiff duly made payments for the suit property of Kshs 642,500/= on 24/9/04 and Kshs 1,927,500/= on 15th October 2004 after having purchased the same at the public auction conducted on 24th September 2004. The Plaintiff has also attached as Exhibit "WN-4" a copy of orders given in **Nairobi High Court Divorce Cause No.[....] - A.W.T vs. S.T** by the late Honourable Justice Kamau on 21st April 2005, declaring the said sale by public auction as absolute, and that a certificate of to issue in the name of the Plaintiff. No evidence was provided of any stay of execution of the said orders.

The Defendant produced as evidence a Notice of Appeal filed on 22nd February 2005 of the same date in **Nairobi High Court Divorce Cause No.[....] - A.W.T vs. S.T**a decision of Honourable Justice Kamau given on 17th February 2005, which notice he has annexed as his Exhibit "ST-1" to his Replying Affidavit. In his witness statement filed on 7th October 2011 the Defendant does state that the said decision of 17th February 2005 by Honourable Justice Kamau dismissed his application in the aforementioned Divorce Cause, which application was seeking to set aside the alleged sale of the suit property by public auction.

Arising from the foregoing examination of the pleadings and evidence, it is the finding of this Court that the Defendants averments in his Defence and Counterclaim have at one point or another been the subject of decision by this Court in **Nairobi High Court Divorce CauseNo.[....] - A.W.T vs. S.T**, and that the Defendant herein is seeking to overturn the said decisions by way of the Defence and Counterclaim filed in this suit, rather than follow the correct procedure of appealing the said decisions. It is therefore my finding that the Defence and Counterclaim dated and filed herein on 13th May 2011 by the Defendant is frivolous, as it does not raise any substantive issue capable of determination by this Court, and is an abuse of the process of court. The said Defence and Counterclaim is hereby struck out.

The final issue for determination is whether judgment as prayed for in the Amended Plaint filed on 13th April 2011 can be granted by this Court. It is not disputed that the Plaintiff

brought the suit property as a public auction and was issued with vesting orders and a provisional title, and this is also admitted by the Defendant in his Defence and Counterclaim save his pleading irregularities which as shown in the foregoing have already been decided on by this Court. The Plaintiff has produced as evidence a copy of provisional title of the suit property issued to him under section 71 of the Registration of Titles Act, which is annexed as Exhibit "WN-5. The Defendant has not produced any evidence of title to the suit property.

In addition the Plaintiff herein filed an application dated 22nd September 2010 seeking a mandatory injunction for the Defendant to vacate the suit premises, and in the alternative for eviction orders to issue. The Defendant in his replying affidavit to the said application sworn on 13th October 2010 deponed to residing on the suit property, and the Defendant's Advocate in written submissions dated 2nd February 2011 also contended that the Defendant and his family stood to suffer serious damage, as they had been in occupation of the suit property since the public auction of the same. It is therefore the finding of this court the Defendant has admitted to being in possession of the suit property from the pleadings he has filed, despite his denial in his Defence and Counterclaim.

It is an established principle of law that trespass to land is a direct interference with the possession of another person's land without lawful authority. It was held by the Court of Appeal in **Moya Drift Farm Ltd vs Theuri (1973) EA 114,** that an absolute and indefeasible owner of land is entitled to take proceedings in trespass. Further, that the Registration of Titles Act gives a registered proprietor title upon registration, and that title carries with it legal possession. Having found that it is the Plaintiff who has title to the suit property, it is also the finding of this Court the Plaintiff is deemed to have been owner and in legal possession of the suit property from the date of issue of the provisional title of the suit property to him on 2nd September 2010, and the Defendant has been a trespasser on the suit property since that date. The Plaintiff is therefore entitled to the prayers sought for injunction and eviction.

On the prayers sought for mesne profits it is trite law that mesne profits being special damages must be specifically pleaded and particulars thereof provided. The same have neither not been specifically pleaded nor proved by the Plaintiff, and cannot therefore be granted. In any event the title annexed as evidence by the Plaintiff as Exhibit "WN-5" was issued on 2nd September 2010, and it therefore cannot be the case that the Defendant has been trespassing on the suit property for 7 years, or that the Plaintiff is entitled to mesne profits for those 7 years. Furthermore, no evidence was also given of the damage alleged to have been caused to the Plaintiff by such trespass, and I cannot therefore make any award of damages.

In light of the foregoing reasons and findings, I find judgment for the Plaintiff as against the Defendant as follows:

a) The Defendant is hereby ordered to vacate the parcel of land known as Land Reference Number 4953/1022 in Thika within three (3) months from the date of service of the orders given in this ruling, and an order for eviction to issue in the event of the Defendant's default.

b) The Defendant by himself, or his agents, employees and/or servants or anybody claiming through him is restrained from trespassing upon, or in in any manner whatsoever interfering with the Plaintiff's quiet user and possession of Land Reference Number 4953/1022 in Thika

c) The Plaintiff is awarded the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____18th____ day of ____May_____, 2012.

P. NYAMWEYA

JUDGE