



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 130 OF 2010

**JOSEPH KIMANI KUGUMA.....PLAINTIFF/
APPLICANT**

V E R S U S

**JANE WAMBUI NGUGI.....DEFENDANT/
RESPONDENT**

R U L I N G

The Plaintiff is the registered proprietor of a leasehold interest in Nairobi Block 135/144, Nairobi Block 135/145 and Nairobi Block 135/146 and has annexed the respective certificates. The registration in each case was done on 3rd November 2009. There is no dispute that such registration provides the Plaintiff a *prima facie* absolute and indefeasible claim to the property. He filed this suit on 19th March 2010 claiming that the Defendant had without any lawful claim or colour of right trespassed on the suit lands. More particularly, that she has illegally occupied a 3 bed roomed bungalow on the property and rented out the 3 store building on the same to tenants. All this was without consent and is denying him monthly rent and the use of the property. It was not indicated when the Defendant forced her way into the property. The Plaintiff sought a mandatory injunction to remove the Defendant and all those acting under her, *mesne* profits and costs.

The Defendant filed a defence and counterclaim. Her case is that these properties belong to her late husband James Kigera Thiongo and that she has lived thereon with her family for about two decades. She stated that there is pending before the court **HC Succession Cause No. 585 of 2007 at Nairobi** over the estate of the deceased in which the property herein is indicated as part of the estate. On 15th October 2009, she states, the Probate Court issued an injunction to restrain the administrators from interfering with, transferring, alienating or disposing of these properties or evicting tenants therefrom. The formal order was issued on 21st October 2009. She says that these properties were transferred while the order was in place. To this, the Plaintiff states that he is an innocent purchaser for value without notice and that he was not served with the order.

From the Certificates of Lease, the previous owner of the properties was the deceased. The **Cause** is shown to have been filed in 2007, which means he died earlier than that. The Plaintiff is silent on whom he bought the properties from.

When the Defendant says she has lived here for over 2 decades and the Plaintiff does not say when she allegedly trespassed on the property, it would appear that she was on the property when the Plaintiff allegedly bought it. It is also material that the injunction that was issued acknowledged that there were tenants. This may mean that the Plaintiff found tenants in occupation, and cannot say the Defendant brought them after he bought the property.

The Defendant, in the counterclaim, seeks a declaration that transfers and registration to the Plaintiff were unlawful, illegal, fraudulent, null and void. She seeks the rectification of the registers by the cancellation of the registration to return the property to her.

The Plaintiff filed a motion under Order 6 rule 13 (b), (c) and (d) and Order 35 of the Civil Procedure Rules to strike out the defence and to order summary judgment. This application was on the basis that he is the registered proprietor of the property and that the defence is a mere denial, is sham, frivolous, an abuse of the process of the court and only intended to delay the disposal of the case.

The court received written submissions on the application from Mr. Mwangi for the Plaintiff and M/s. Njuguna for the Defendant. I am grateful to them and for the authorities cited.

It should be noted at that summary judgment or striking out defence are drastic remedies that should only be granted in plain and obvious cases and with a lot of caution, for inherent in them is a denial to the Defendant of his right to defend the claim against it (**D.T. Dobie & Company (K) Ltd. –Vs- Muchina [1982] KLR 1**). Where the Defendant shows by affidavit or oral evidence, or otherwise, that the defence is *prima facie* genuine, arguable or raises a triable issue he is entitled to leave to defend the suit (**Gohil – Vs- Wamai [1983] KLR 489**).

In the Court of Appeal decision in **Shah –Vs- Padamshi [1984] KLR 531** Madan, J.A expressed himself as follows:-

“Except in the clearest of cases, which this one was not it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgment. Summary judgment is a drastic remedy to grant, for in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at trial. The court must not attempt to anticipate that the defendant will not succeed at trial.”

The Defendant has attacked the titles the Plaintiff holds in the parcels of land on basis that the registration was done when there was an injunction, and also that it was fraudulent. The Plaintiff says he was unaware of the injunction as it was not served on him. Whether he knew of the injunction would be a triable issue. He says he was an innocent buyer for value without notice. Whether that is true or not would constitute a triable issue. The fact of the existence of the **Cause** in which the properties herein are subject of discussion would militate against the granting an application for summary judgment. Whether the registration of the properties in the name of the Plaintiff was subject to the interest of the Defendant who had been in occupation for over 20 years would be yet another triable issue.

It is material that the Defendant has a counterclaim. This is a separate suit against the Plaintiff. It alleges fraud and illegality and particulars have been given. The application sought the striking out of the defence, but not the counterclaim. The counterclaim, in my view, raises serious acts of fraud that have to

be investigated by a trial.

In short, the application cannot succeed as there are a number of issues that should go to trial. The application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2011

A. O. MUCHELULE

JUDGE