



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 71 OF 2005

SAMUEL WAGORO NGUGI PLAINTIFF

VERSUS

NICODEMUS HONGO OMOGO DEFENDANT

RULING

This is an application by the plaintiff made under Order 6 Rule 13 (d) of the Civil Procedure Rules.

The application seeks basic orders that the defence and counterclaim dated 25th August 2005 be struck out and Judgment be entered against the defendant to remove himself from the suit premises and give vacant possession, that rent arrears of Ksh. 30,000/- per month be provided to the plaintiff and that the costs of this application be borne by the defendant.

The grounds in support of the application are enumerated in the Chamber Summons dated 2nd March 2007. These are fortified by the facts contained in the plaintiff's supporting affidavit dated 2nd March 2007.

In the affidavit, the plaintiff states that prior to the 19th February 2005, the suit premises belonged to the defendant but was charged to the Kenya National Assurance Co. Limited which advertised the property for sale by public auction through its successor in title, the Kenya National Assurance Co. (2001) Limited on the 17th January 2005. Consequently, the plaintiff attended the public auction on the 19th January 2005 and emerged the highest bidder hence the purchaser in terms of the agreement entered with the chargee's agents i.e. the auctioneers. Thereafter, on the 30th March 2005, the plaintiff obtained transfer by charge and lodged the same with the land registry on 13th April 2005. He was eventually registered as the proprietor of the suit property, the defendant's interest having been extinguished by sale. The plaintiff then issued the defendant with a notice to give vacant possession. The defendant failed to do so and continues to trespass and forcefully remain in the property without any colour of right. Consequently, the plaintiff filed this suit and prayed for an injunctive order against the defendant, vacant possession and/or eviction, mesne profits, costs and interest.

Learned Counsel, **MR. NGIGI**, argued the application on behalf of the plaintiff and submitted that prior to the public auction, there was another suit No.225 of 2007 involving the defendant and the charge holder but the same was dismissed in a judgment delivered on 16th August 2002. This paved way for the realization of the security charged and this was done by Kenya National Assurance Co. (2001) Limited which was the successor in the title held by the defunct – Kenya National Assurance Co. Limited.

Learned Counsel contended that the plaintiff acquired the suit property by valuable consideration and by operation of law, a transfer was registered in his favour and a title issued. Therefore, the plaintiff cannot be faulted for having bidden successfully for the property.

Referring to the defendant's replying affidavit, learned Counsel, argued that the alleged High Court Order preserving the property was never registered in the appropriate register and in any event, the property had already been transferred to the plaintiff such that the letter from the registrar did not affect him. Conceding that there was no privity of contract between the defendant and the plaintiff, learned Counsel contended that there was privity between the plaintiff and the chargee and that the defendant's rights in the property had already been extinguished. Further, as per S. 72 of the Registered Land Act, the equity of redemption subsists before the public auction and not after.

Learned Counsel submitted that in the present instance, there was a complete sale in exercise of statutory powers but ever since, the defendant has remained in the suit property without payment of rent and mesne profits. The Orders sought herein against the defendant should therefore be granted.

The defendant opposed the application on the basis of the facts contained in his replying affidavit filed on 3rd April 2007 and dated 14th March 2007 in which he contends that he is the legally registered owner of the suit property and that there was no privity of contract between him and the plaintiff. He says that he has never had any transaction with the alleged vendor, Kenya National Assurance (2001) Limited and has no assignment of mortgage transferring the interest in the mortgage from Kenya National Assurance Co. Limited to the alleged Vendor.

The defendant also says, that he has no record of the statutory notice issuing between himself and the mortgagor, Kenya National Assurance Co. Limited and that the alleged Certificate of Lease issued to the plaintiff is non-existent as it was cancelled by the letter from the Land Registrar dated 10th May 2005.

MR. ANGU KITIGIN, learned Counsel, submitted on behalf of the defendant that there was no privity of contract between the Plaintiff and the Defendant and that the Chargee was Kenya National Assurance Co. Limited which enjoyed a relationship with the defendant. Further, the alleged Vendor Kenya National Assurance Co. (2001) Limited was said to be the successor of the Kenya National Assurance Co. Limited yet there was no instrument to that effect neither was there a transfer of the property to the alleged Vendor by the defendant.

Learned Counsel, went on to submit that the defendant instituted Civil Suit NO. 5 of 2005 at the Kisumu High Court and obtained orders preserving the suit property a fact confirmed by the Land Registrar.

Learned Counsel contended that the alleged Vendor is a trespasser in this matter but went ahead to sell the property yet there is nothing to show that it took over the assets and liabilities of the Kenya National Assurance Co. Limited. Learned Counsel further contended that the defendant's title in the property is still good and that the suit challenging the mortgage is subsisting and awaiting consolidation with this suit and another. Learned Counsel submitted that the defendant has a good defence which should be decided by way of full trial and that since the defendant took the mortgage he has been in occupation of the property and only a third party is complaining against him. Learned Counsel therefore prayed for the dismissal of this application.

All considered, Order 6 Rule 13 (1) (a) of the Old Civil Procedure Rules provided for striking out of a defence if it is otherwise an abuse of the Court process. Such jurisdiction is normally exercised with extreme caution in cases which are plain and obvious and only after all the facts have been considered without the Court embarking on the merits of the case itself as that is the duty of the trial Court (**See, DT DOBIE & CO. (K) LTD VS. MUCHINA (1982) KLR 1**).

It was therefore incumbent upon the applicant/plaintiff to clearly demonstrate that the defence filed herein by the respondent/defendant is nothing short of an abuse of the Court process. A perusal of the said defence and counter claim shows that it raises pertinent and serious issues which would best be

determined by way of a full trial rather than a summary procedure.

The defendant has implied impropriety in the manner the suit property was allegedly sold by public auction at the instigation of Kenya National Assurance Co. (2001) Ltd whose "*locus standi*" in the whole matter is seriously disputed.

Indeed, the plaintiff may be the current registered owner of the property. However, the manner in which the registration was obtained is challenged by the defendant who contends that his title to the suit property is still valid despite the alleged public auction and the subsequent transfer of the property to the plaintiff by the alleged Vendor.

The defendant also contends that the transfer of the property to the plaintiff and the issuance of the title deed in his name were actions which were invalidated by the Land Registrar after it emerged that a Court Order issued in Kisumu High Court Case No. 6 of 2005 prohibited the transfer of the suit property by the alleged Vendor, Kenya National Assurance Co. (2001) Limited.

Most important the defendant contends that there was no privity of contract between himself and the alleged Vendor and that he has remained in occupation of the suit property since the time of taking the mortgage in favour of the Kenya National Assurance Co. Limited.

From all the foregoing, it is evident that the defendant's defence and counter claim raises issues which are highly triable for effective determination not by summary procedure but a full trial.

In the circumstances, the defence and counter claim cannot be said to be an abuse of the Court process.

Consequently, this application is devoid of merit. It is hereby dismissed with costs to the defendant/respondent.

J. R. KARANJA
JUDGE

[Read and signed this 23rd day of June 2011]
[In the presence of Mr. Ngigi Mbugua for the applicant]