



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.2205 OF 2007

JOSEPH ODHIAMBO MORO.....PLAINTIFF

VERSUS

DIRK JOZEF MARIE-ROSE VAN BUNDER.....DEFENDANT

R U L I N G

1. This suit was initiated by Joseph Odhiambo Moro (hereinafter referred to as the plaintiff). He had sued Dirk Jozef Marie-Rose Van Bunder (hereinafter referred to as the defendant). The plaintiff was seeking for an order of injunction restraining the defendant, his agents or servants from evicting or otherwise interfering with the plaintiff's use or occupation of LR No. Nairobi Block 121/129 Komarock Estate (hereinafter referred to as the suit property). The plaintiff claimed that he agreed to relinquish to the defendant his rights over the suit property in consideration of the defendant refunding him the sum of Kshs. 450,000/= which plaintiff had paid as deposit for the suit property, and the defendant further allowing the plaintiff to occupy the suit property during the plaintiff's lifetime. In breach of that agreement, the defendant served the plaintiff with a notice on 25th July, 2007, requiring the plaintiff to vacate the suit property within 3 months.
2. The defendant filed a defence and counterclaim in which he maintained that he refunded the plaintiff the sum of Kshs. 450,000/= in full and final settlement. The defendant further contended that the plaintiff remained in possession of the suit property pursuant to a tenancy agreement. In accordance with the tenancy agreement, the defendant had issued the plaintiff with a notice to vacate the house. The defendant therefore counterclaimed for judgment, for an order of vacant possession of the suit property as well as rent arrears and *mesne* profits.
3. The defendant has now filed a motion seeking summary judgment against the plaintiff for the recovery of land, rent arrears and *mesne* profits. The defendant has exhibited a certificate of lease showing that the suit property is registered in his name. He has also exhibited a tenancy agreement signed between him and the plaintiff, and a notice terminating the tenancy agreement. The defendant contends that the plaintiff has no defence to the counterclaim as he has no proprietary rights over the suit property.
4. In response to the application, the plaintiff swore a replying affidavit on 16th September, 2008, and another affidavit on 11th June, 2009. The plaintiff maintained that he paid the deposit of Kshs.450,000/= from his own resources. He came to an agreement with the defendant, that the defendant would refund him the money, but the defendant failed to refund the money. The plaintiff maintained that the defendant should refund his money together with 20% interest before the notice served upon him by the defendant can be effective. The plaintiff denied having failed to pay any rent or being liable to the defendant for

mesne profits.

5. Following an agreement by the parties, written submissions were duly filed. For the defendant it was submitted that the defendant paid the full purchase price for the suit property, including the deposit of Kshs. 450,000/= which the defendant actually gave the plaintiff before the auction. It was therefore argued that the defendant is the legal and rightful owner of the suit property. It was submitted that the lease agreement between the defendant and the plaintiff which was not disputed, was valid. It was submitted that the alleged agreement between the plaintiff and the defendant, that the plaintiff would remain in the suit property was not established and could not be relied upon by the plaintiff. It was argued that the plaintiff having been issued with a notice to vacate the suit property, he remains in the premises as a trespasser, and has no proprietary or legal rights over the suit property. Therefore the defendant was entitled to summary judgment on the counterclaim.

6. For the plaintiff it was submitted that the parties recorded a consent on 3rd October, 2008 that the plaintiff's defence to the counterclaim be deemed as properly filed. Therefore the defendant could not go back on this consent and claim that the plaintiff did not file any defence to the counterclaim. It was argued that the defence filed does in fact raise triable issues.

7. The plaintiff maintained that the defendant was in breach of the agreement to refund the deposit paid by the plaintiff. The defendant was also in breach of the Tenancy Agreement as he purported to terminate the tenancy without giving the required notice and that the plaintiff has paid the rent up front and therefore the plaintiff's claim for *mesne* profits is not maintainable. The court was therefore urged to dismiss the defendant's application.

8. I have given due consideration to the motion which is before me. The defendant seeks summary judgment on his counterclaim which is for recovery of the suit property, rent arrears and *mesne* profits. The plaintiff filed a defence to the counterclaim in which he denied the defendant's claim for vacant possession and rent arrears. However, the plaintiff has not demonstrated any credible claim to the suit property. In his affidavit sworn on 19th October, 2007 which forms part of the court record, the plaintiff conceded that the defendant raised 75% of the purchase price after the plaintiff had paid the initial 25% deposit. Although the plaintiff alleges that the defendant did not refund him the 25% deposit as agreed, the plaintiff did not pray for any judgment for that sum. The defendant on the other hand has demonstrated through a copy of the certificate of lease that the suit property is registered in his name and therefore the ownership vests in the defendant. The plaintiff has no right to remain on the suit property, if the defendant who is the registered proprietor has given him notice to quit. I find that the plaintiff has failed to show any credible defence to the defendant's counterclaim for vacant possession. The claim for refund of Kshs. 450,000/= even if true can only give rise to a separate claim. It cannot vitiate the defendant's ownership right to the suit property. As regards the claim for rent arrears and *mesne* profits, the defendant did not provide any sufficient details of the amount claimed either in the counterclaim or in the affidavit sworn by him in support of his claim for summary judgment. I would not therefore allow that part of the claim.

9. The upshot of the above is that I do allow the claim for summary judgment to the extent of giving judgment in favour of the defendant on the counterclaim for recovery of vacant possession of the suit property. I order the plaintiff to vacate the suit property within 90 days from today in default eviction orders shall issue.

Dated and delivered this 22nd day of July, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff absent
Ogudo for the defendant/applicant
B. Kosgei - Court clerk