



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 39 OF 2009**

**ANTONY W. LUBANO.....1<sup>ST</sup> PLAINTIFF**

**CHARLES L. LUBANO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOHN NJUNGE KAMAU.....DEFENDANT**

**RULING**

By the Notice of Motion dated 29/5/09, Antony W. Lubano and Charles L. Lubano, the plaintiff/applicants herein, seek an order that the statement of defence filed herein on 26/3/09 by the defendant be struck out and judgment be entered in their favour. The grounds upon which the application is premised are that the defendant failed to abide by the notice to produce dated 6/4/2009 and that the defence does not disclose any triable issues, it is a sham and intended to derail the quick disposal of this suit. The application was brought pursuant to **Order 10 Rule 20, Order 35 Rule 1(b)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. Antony Lubano swore an affidavit in support of the application and deponed that on 6/4/2009 the defendant served on the plaintiffs/applicants a statement of defence without leave of the court since time allowed had lapsed. The defence was served on the plaintiff on 7/4/2009 (AWL 1) and due to want of particulars, a notice to produce was served on the defendant on 7/4/2009 (AWL 2) and without complying with the law as to when to reply to the notice, the defendant/respondent filed and served the plaintiff with a counter notice to produce (AWL 3). The applicant contends that the counter notice is irrelevant. The applicants deny having had any dealings with the defendant. The applicants aver that the defendant/respondent has not shown how he acquired the certificate of lease nor does it disclose when the sale agreement was entered into. It was further deponed that in November 2009, the respondent approached the applicants through an agent, Isaac Kwoba admitting that he had been conned of money by people who cheated them that the property belonged to them but he was willing to buy it from the applicants. They agreed to meet in the presence of the advocates which they did on 25/11/2009, as a result of which the applicants' counsel wrote to the respondents (EXB) giving terms that the defendant fills up the trenches dug on the plot, pays costs of this suit and they could then discuss the possible sale of the plot but the respondent never reverted back to the applicant's counsel. It was the deponents view that the defence is a sham and should be struck out.

The respondent filed two affidavits in reply dated 4/8/2010 and 29/8/2010. He dismissed the application as being frivolous, vexatious and an abuse of the court process. He deponed to having a certificate of lease for the same land and that this being a land matter the same should be determined at a full trial. He also deponed that he is known to the applicants as they had entered into a sale agreement for sale of the

land on 17/6/08 and that receipt of the sale price was acknowledged. He purported to exhibit the sale agreement but there was no annexure. The respondent also averred that his appearance and defence are properly on record and filed within time. Mr. Njaramba, counsel for the defendant urged that the New Constitution guarantees the right to hearing and that matters should not be decided on technicalities but each party to be allowed his day in court.

I have now considered the rival arguments. I have perused the record. On 8/4/2009, Ms Omwenyo, the applicants' counsel filed a notice to produce dated 6/4/2009, pursuant to **Order 10 Rule 15**. Instead of the respondent replying to the notice or producing the documents for inspection, he filed and served on the applicant another notice to produce dated 23/4/2011. Under **Order 10 Rule 16** of the **Civil Procedure Rules**, the documents requested by the notice should be delivered within 10 days of receipt of the notice. The applicant claims to have served the notice to produce on 7/4/2009. There is no evidence to show that the respondent complied with **Order 10 Rule 16** to invite the applicant for inspection or object to the notice. **Order 10 Rule 20**, provides that any party who fails to comply with an order to answer to interrogatories or for discovery or inspection of documents shall be liable to dismissal of the suit in case it is the plaintiff, or the defence struck out if it is the defendant. Unfortunately, the applicant did not seek the court's order to have the respondent produce the documents. The defence cannot therefore be struck out for failure to produce documents for inspection.

The other limb of the application is under **Order 35(1)(b)** of the **Civil Procedure Rules**. It reads as follows:-

**“35(1)(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 person claiming under such tenant or against a trespasser,**

**Where the defendant has appeared 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.”**

I am guided by the above provisions and the principles that the courts will consider before granting summary judgment, that is, that since summary procedure is draconian, summary judgment should only be entered in the clearest of cases. The court has to consider the defence and if it raises any triable issues, then the respondent should be allowed to defend the suit. In the instant case, whereas the plaintiffs claim to be the registered owners of the suit land, the defendant claims to be the lawful owner too. The plaintiffs exhibited a title issued to them dated 19/11/2002; The certificate of official search dated 2/2/09 recorded that a restriction had been placed on the title by the plaintiffs on 31/12/08, restricting any dealings on the land except by the plaintiffs/applicants. A search with the Municipal Council of Nakuru revealed that on 2/2/09, the council sent a demand notice for rates to the respondent and the respondent too has a certificate of lease in respect of the same suit property.

At paragraph 4 of the statement of defence and paragraph 5 of the respondent's replying affidavit dated 4/5/09, the respondent avers that he purchased the land from the applicants on 17/6/2008 through a sale agreement. In the affidavit, the respondent purported to exhibit copies of the sale agreement and receipts in which payment was purportedly made but none were exhibited. It is a result of the filing of defence and the averments therein that the applicants had issued a notice to produce to the respondent. The applicants requested the respondent to produce the said sale agreement, the receipts in which payment was made for purchase price, consent to transfer, clearance of certificate, receipt for stamp duty, registration form and valuation form. The respondent failed or neglected to produce these documents. Notice to produce is a mechanism that enables the parties lay bare before the court all documents they intend to rely on so that no party is taken by surprise and as a result cause unnecessary delay, when the matter is ready for hearing. It also removes uncertainty or any party using unethical methods of ambushing the other side during the hearing and also helps settle and identifies the issues for determination.

In his further affidavit dated 14/6/2010, the respondent seemed to be challenging the manner in which the applicants acquired the suit property from one Pritam Singh Sian but that is not the issue here. The

respondent's defence is that he purchased the property from the applicants and it is his duty to demonstrate that he did so. He has had the opportunity to produce the sale agreement and evidence of payment and transfer of the property but he failed to do so. I find that the defence filed herein to be a bare denial and it will be a waste of the court's precious time if the case were to proceed to full hearing.

The issue here is who is the lawful owner of the property in dispute. The applicants have produced a certificate of lease which is evidence of proprietorship unless the contrary is shown. It has not been shown by the respondent. The respondent's claim to have purchased the land but has failed to support that with any evidence of sale. **Section 3(3) of the Law of Contract Act** provides as follows:-

**“3(3). No suit shall be brought upon a contract for the disposition of an interest in land unless –**

**(a) the contract upon which the suit is founded –**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

The respondent failed to produce any evidence as proof that the above **Section** which is mandatory was complied with. In addition, if there had been such a sale, the documents itemised in the notice to produce issued to the respondent would have been availed. I find that the defence does not raise any triable issues for this matter to go to full trial. I do hereby grant the prayer sought by the applicants in the Notice of Motion dated 29/5/2009, and hereby strike out the statement of defence dated 26/3/2009 and filed in court on 29/5/09. Costs of the suit and application to the plaintiff/applicant.

**DATED and DELIVERED this 23<sup>rd</sup> day of September, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Morendat holding brief for Ms Omwenyo for the plaintiffs/applicants.

Mr. Mosesti holding brief for Mr. Nyaramba for the respondent.

Kennedy - Court Clerk.