



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 610 of 2008

AMOS KINUTHIA..... PLAINTIFF

VERSUS

PLANFARM INVESTMENT COMPANY LIMITED1ST DEFENDANT

PURMA HOLDINGS LIMITED.....2ND DEFENDANT

RULING

1. The Chamber Summons dated 18th August 2009, is brought by the 2nd Defendant under the provisions of **Order 6 rule 13(1)(b) (c)(d) and 16 of the Civil Procedure Rules**. The 2nd Defendant is seeking for an order that the Plaintiff's suit be struck out and the same be dismissed on the grounds that it is frivolous, vexatious and otherwise an abuse of the court process. This application is supported by the affidavit of **Mary Mungai** sworn on 18th August 2009. According to the 2nd Defendant, it is the registered owner of the property known as **LR No. 2/268** having purchased it from the 1st Defendant on 9th September 2008
2. The 1st Defendant sold the property in exercise of its statutory power of sale under the mortgage. Pursuant to that sale, the Plaintiff filed an application before this court seeking for an order of injunction which application was heard by **Kimaru J**, and by a ruling dated 5th March 2009 that application was dismissed. The Plaintiff also filed an application before the Court of Appeal seeking for similar orders which was also disallowed.
3. In further arguments, counsel submitted that the Plaintiff's case does not raise any triable issues as against the 2nd Defendant in view of the provisions of **Section 69B of the Transfer of Property Act** which provides that the Plaintiff's claim is only limited to a claim for damages as against the 1st Defendant. There is a long line of authorities by this court and the Court of Appeal which gives the guidelines on the principles to bring to bear when dealing with an application to strike a suit. Principally the court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and cannot be cured by an amendment. (see the case of **DT Dobbie & Co. Ltd versus Muchina 1982 KLR**)
4. This application was opposed by the Plaintiff who filed grounds of opposition and written submissions. It was submitted that the Plaintiff's suit raises triable issues going by the facts set out on paragraph 15, 16, and 17 of the Plaintiff's prayer especially the prayers seeking for the sale to be declared illegal null and void. Moreover, **Section 69B of the ITPA** imposes a duty on the mortgagee to exercise the statutory power of sale in good faith and offer a reasonable opportunity to the mortgagor to redeem the property. The 1st Defendant is faulted for

failure to exercise good faith and for defeating and clogging the mortgagor's equity of redemption. Counsel for the Plaintiff also cited several authorities the case of M/s Ramji Megji Gudka Limited vs Alfred Morgat Omundi Michira & 2 others, CA No. 335 of 2001, especially the holding by their Lordships that:

“... In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court...” (Emphasis mine)

5. Under the provisions of the Civil Procedure Rules cited in this application, a suit which does not disclose a reasonable cause of action can be dismissed. However, the power to strike out pleadings should be exercised in plain and obvious cases. The summary remedy of striking out pleadings is applicable whenever it can be shown that the suit is one which cannot succeed, or is in some way an abuse of the court process. The Plaintiff's suit is in regard to a mortgage over the suit premises to secure some borrowing from the 1st Defendant. The property was sold pursuant to the 1st Defendant's statutory power of sale thus the Plaintiff is claiming there was a breach of duty of care on the part of the 1st Defendant and its agents. The Plaintiff also claims there was a breach of contract and statutory obligations on the part of the 1st Defendant.

6. Is there any cause of action against the 2nd Defendant? It is not in dispute that the suit property is now registered in favor of the 2nd Defendant. The suit property is governed by the provisions of Section 69B of the Transfer of the Property Act which provides:

“...and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power to otherwise properly and regularly exercised; but any person indemnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

The 2nd Defendant is a purchaser there was no privity of contract between the Plaintiff and the 2nd Defendant and as such no claim can be sustained against the 2nd Defendant. Moreover under the provisions of **Section 69** of **ITPA** the Plaintiff's remedy lies in damages where a mortgagee exercises its statutory power of sale.

7. Similarly under the provisions of **Order 6 Rule 13** of the **Civil Procedure Rules** a suit which does not disclose a reasonable cause of action can be struck out. I have no hesitation in making a finding that the Plaintiff's suit as drawn in the Plaint does not disclose any reasonable cause of action against the 2nd Defendant. The 2nd Defendant was not a party to the contract and the claim of damages can only be sustained in the circumstances against the 1st defendant.

The suit against the 2nd Defendant is hereby struck out and dismissed with cost.

RULING READ AND SIGNED ON 30TH APRIL 2010 AT NAIROBI.

M. K. KOOME

JUDGE