



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

Civil Suit 48 of 2007

KENYA AIDS NGOS CONSORTIUM.....1ST PLAINTIFF
CHRYSANTHUS MUCHORI GICHERU.....2ND PLAINTIFF
VERSUS
ANDREW OUKO.....1ST DEFENDANT
DAVID SCOT ONGOSI.....2ND DEFENDANT

R U L I N G

1. What is before me is a chamber summons dated 18th March, 2010, brought by the 1st plaintiff, Kenya Aids NGOs Consortium, under Order VI Rule 13(b), (c), and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks to have the 1st defendant's statement of defence dated 25th May, 2007, and the 2nd defendant's statement of defence dated 21st May, 2007, struck out from the suit and judgment entered for the plaintiffs as prayed in the plaint.

2. The application is supported by an affidavit sworn by Chrysanthus Muchori Gicheru who is the 2nd plaintiff. In short, the 2nd plaintiff swears that the 1st and 2nd plaintiffs are the registered owners of a parcel of land known as LR. No.11877 (Original No.3589/5) (hereinafter referred to as the suit property). They jointly purchased the suit property at a public auction carried out by Kenya Commercial Bank Ltd in exercise of its statutory powers of sale. The 2nd plaintiff swears that the defendants have no legal or equitable interest in the suit property and are therefore trespassers on the suit property. The 2nd plaintiff avers that the defences filed by the two defendants are an abuse of the court process, since they are devoid of any merit or substance. The 2nd plaintiff further contends that the defences are frivolous and only meant to delay the trial of the suit or vex the plaintiffs.

3. Although both the defendants were duly served, there was no response to the application, nor did any of them attend court for the hearing of the application.

4. I have carefully considered the application, the affidavit in support and the annexures thereto. It is clear to me that the plaintiffs bought the suit property at a public auction carried out by Kenya Commercial Bank Ltd in exercise of its statutory power of sale. The plaintiffs are now the duly registered owners of the suit property. The two defences are identical. They seem to attack the auction sale contending that the amount secured had been fully repaid, and that the sale of the suit property was irregular, as no statutory notice was served. It is further alleged that the suit property was sold at an under-value.

5. The issues being raised in these defences are apparently not new. Annexures CMG4 to the 2nd plaintiff's supporting affidavit is a ruling in HCCC No.558 of 2004, in which Andrew Ouko (the 1st defendant herein) was the plaintiff, and Kenya Commercial Bank Ltd, who was the Chargee of the suit property, the 1st defendant. Kenya Aids NGOs Consortium, who is the 2nd defendant herein, was also a defendant in the suit. The subject matter of the suit was the same as that in the instant suit i.e. the suit property. The relief sought was a declaration that the sale of the suit property on 2nd September, 2004, to the Kenya Aids NGOs Consortium and Patrick Kamuyu, were *null and void abinitio* and did not pass any title. In his ruling, Hon. Azangalala J. dismissed the application for interlocutory injunction holding *inter alia*, that an appropriate statutory notice was served on the Public Trustee, and that although the notice given by the auctioneer was not adequate, that was a mere irregularity which could not invalidate the sale. Nothing has been laid before me to show that this ruling has been overturned.

6. The above being the position, it means that the issues raised in the defence, are not triable issues as they are issues which have already been adjudicated upon. But even assuming that one can argue that the issues were not finally determined as the ruling was in respect of an interlocutory application, nothing can turn on the defences filed as they are attacking the auction sale in respect of which a remedy can only lie against the Chargee and not the plaintiffs who are innocent purchasers for value.

7. For the above reasons, I find that the defences filed by the 1st and 2nd defendants are frivolous and vexatious and only

intended to delay the fair trial. Accordingly, I allow the application and strike out the defences. I enter judgment in favour of the plaintiffs as prayed in the plaint. I award costs of the suit and costs of the application to the plaintiffs.

Dated and delivered this 22nd day of October, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Charagu H/B for Oduor for the plaintiffs

Advocate for the defendants absent

B. Kosgei - Court clerk