



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 25 OF 2010**

**MUSKIE LIMITED**.....  
.....**PLAINTIFF**  
**VERSUS**  
**RAPHAEL KIPSOI A.**  
**KORIR**.....  
.....**DEFENDANT**

**RULING**

By an application brought by way of Motion dated 14<sup>th</sup> April 2010, the Plaintiff/Applicant prayed that the court enter summary judgment against the Defendant in terms of the prayers in the Plaintiff's Complaint filed on 2<sup>nd</sup> February 2010. The prayers in the Complaint were -

- (a) *a declaration that the plaintiff is the sole legal and registered proprietor of land parcel No. NJORO/NGATA/BLOCK 2/100.*
- (b) *an order of permanent injunction restraining the Defendant, his servants, agents, employees and assigns from interfering with the Plaintiff's quiet possession, use and occupation of land parcel No. NJORO/NGATA/BLOCK 2/100.*
- (c) *an order of eviction do issue against the Defendant.*
- (d) *the Defendant be condemned to bear the costs of this suit.*

The Motion was supported by the Affidavit of Elizabeth Muigai sworn on 14<sup>th</sup> April 2010, and the grounds that -

- (a) *the Plaintiff is the registered proprietor of land parcel No. NJORO/NGATA/BLOCK 2/100 ("the suit land"),*
- (b) *the Defendant has no defence to the plaintiff's claim.*

The Defendant, Raphael Kipsoi arap Korir swore a Replying Affidavit on 10<sup>th</sup> May 2010 and filed it on the same day. The Defendant also filed a Defence dated 8<sup>th</sup> April 2010 and in paragraph 3 thereof the Defendant has pleaded *inter alia* that if the Plaintiff was registered as the proprietor of the suit land, then such registration was done fraudulently, wrongly and unprocedurally on the grounds among others that the chargee's rights had not crystallized, that there was collusion between the chargee and the Plaintiff who never conducted any public auction but clandestinely and secretly met, among a select few where negotiations were conducted secretly and the Plaintiff's land was sold at a throw away price, that the suit land was 18.276 acres but that only 16 acres were sold, and there is no explanation of what happened to 2.276 acres etc.

There is no reply by the plaintiff to the Defendant's Defence, but there is a Supplementary Affidavit by Elizabeth Muigai sworn and filed on 27<sup>th</sup> May 2010 in which the deponent avers that the suit land was bought at a public auction in terms of the advertisement by the auctioneers, and that the suit land was comprised of 7.399 Hectares and that the entire parcel was sold at the auction, and denied the Respondents averments.

When this matter was urged before me on 29<sup>th</sup> October, 2010, Mr. Ndolo's (*learned counsel for the Applicant*) thrust of argument was that this Plaintiff is now the registered proprietor of the suit land having bought it at a duly advertised and conducted public auction by a duly licenced auctioneer - Mr. Ndolo argued that if there was any irregularity in the sale of the property, the Defendant's course of action was to sue the chargee for damages. Such action would be in accord with the provisions of Section 77 of the Registered Land Act, (*Cap. 300, Laws of Kenya*) if the chargee has acted in bad faith, and not in the interests of the chargee, for instance not subjecting the suit land to a reserve price.

On his part Mr. Karanja -Mbugua, learned counsel for the Defendant argued that in the circumstances of this case, an order for summary judgment does not lie. I was referred to such cases as **GUPTA vs. CONTINENTAL BUILDERS [1976-1980]1KLR 809, RAOL INVESTMENTS LIMITED vs. LAKE CREDIT FINANCE LIMITED (Civil Application No. 303 of 1997), CHARLES GITONGA vs. AKUSI FARMERS COMPANY LIMITED (Nakuru HCCC No. 97 of 2007), WESTMONT POWER KENYA LTD vs. FREDERICK & ANOTHER t/a CONTINENTAL TRADERS & MARKETING [2003] E.A. 357 and BANQUE INDOSUEZ vs. D. J. LOWE & COMPANY LIMITED [2006] eKLR.**

Those cases, in different language state why summary judgment cannot be entered in certain cases, such as this one. There are two basic reasons why summary judgment does not lie in this case. One reason is given in the case of **WESTMONT POWER KENYA LTD vs. FREDERICK & ANOTHER t/a Continental Traders & Marketing (supra)**. In that case, the Court of Appeal held inter alia that "*it is quite unusual to enter summary judgment when serious allegations of fraud and other wrong doings are made and that such issues could only be decided during a proper trial and not on conflicting affidavits.*"

The other reason why summary judgment cannot be entered in this type of case is provided by the case of **GUPTA vs. CONTINENTAL BUILDERS LTD (supra)**, which concerned the interpretation, not of Order XXXV rule 2 (*which was relied upon by the Plaintiff in this case*) but Order XXXV rule 1 which allows a Plaintiff who seeks judgment for a debt or liquidated demand to apply for judgment "*for the amount claimed.*"

The Application or Motion herein is based upon the provisions of Order XXXV rules 1(1)(b) and 2 of the Civil Procedure Rules. The said order provides as follows -  
"XXXV,

**(1) In all suits where a Plaintiff seeks judgment for -**

**(a) ...**

**(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 or been forfeited for non-payment of rent or for breach of covenant, or against persons 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 and profits.**

**(2) the application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."**

With great respect to learned counsel for the Plaintiff/Applicant, rule 1(1)(b) of Order XXXV is not a disjunctive provision, it is a junctive provision. It must be read as one long provision. Counsel for the Plaintiff read it as one disjunctive provision - recovery of land - by any registered owner. It is not so. The provision allows recovery of land, with or without mesne profits (*not by any registered owner*) but by a *landlord* from a specific person, a *tenant*, and on specific grounds or reasons, the term of tenancy has expired, (*by effluxion of time*), or under a notice to quit, or the tenancy has been forfeited for non-payment of rent or for breach of covenant, or persons claiming under such tenant, or against a trespasser. The mover of the action is a landlord, not a person holding any other capacity.

In this case, the Plaintiff says it is registered owner of the suit land. This may indeed be so. To bring itself within the provisions of rule 1(1)(b) of Order XXXV, the Plaintiff must be a landlord, the Defendant must either be a tenant or a person claiming interest under such a tenant, or merely trespasser not to the land, but to the let or demised premises.

The Defendant is neither a tenant nor is the suit-land let or demised premises. An application for summary judgment under rule (1)(b) of Order XXXV does not lie.

Indeed as the Court of Appeal held in **WESTMONT POWER KENYA LTD vs. FREDERICK & ANOTHER t/a Continental Traders & Marketing** -

*"It is quite unusual to enter summary judgment when serious allegations and other wrong doings are made. Such issues could only be decided during a proper trial and not on conflicting affidavits."*

I agree with the said holding. The Defence herein raises serious issues of fraud, collusion, non-observance of rules applicable to auctions and bad faith. These are issues which a person in the Defendant's position is at liberty to raise against either the purchaser for value such as the Plaintiff in this case, or as the party may choose, against the chargee or both. The fact that the Plaintiff is the registered owner of the suit land is a factor, which will along with others, be taken into account in the trial of the suit. It cannot be a sole factor for determining an application such as the motion herein.

For those reasons, I am constrained to dismiss with costs, the Plaintiff's motion dated 14<sup>th</sup> April, 2010. These shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**