REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 51 OF 2006

DANSON MBUGUA NJUGUNA…….PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY BANK LTD

FORMERLY KNOWN AS AKIBA BANK LTD……..…1ST DEFENDANT

ALIKI PRINTERS AND STATIONERS LIMITED…….....2ND DEFENDANT

R U L I N G

The suit property is registered under the Registration of Titles Act. As such the Indian Transfer of Property Act applies to the suit. The 2nd Defendant in this case purchased the suit property LR No. 13459/67 (originally No. 1359/42/4), from the 1st Defendant as chargee in exercise of the latter's Statutory Power of Sale under section 69B of ITPA. Having been unable to secure occupation and or possession of the suit property from the Plaintiff, the 2nd Defendant filed HCCC No. 44 of 2007 for vacant possession of the property. In the instant suit, the 2nd Defendant filed a statement of defence and counter claim for vacant possession and mesne profit. He has now filed this Notice of Motion application dated 6th August 2008 seeking:

1. **THAT the Plaintiff's suit be struck out.**

2. **THAT summary judgment be entered for the 2nd Defendant against the Plaintiff as prayed in the 2nd Defendant's defence and Counter-claim.**

3. **THAT the costs of this application be provided for.**

The application is expressed to be brought under section 3A of the Civil Procedure Act, Order VI Rule 13 (1), (b), (c), and (d) and order XXXV rule 1 (b) of the Civil Procedure Rules.

The application is opposed. The Plaintiff, who is the Respondent, has sworn a replying affidavit dated 2nd October, 2008 with several annexures.

I have considered the application together with the pleadings herein and submissions of Mr. Kamande for the Applicant and Mr. Ibrahim for the Plaintiff/Respondent.

In the case of **Nairobi Golf Hotels (Kenya) Limited v. Lajji Bhimji Sanghani Builders and Contractors (Civil Appeal No. 5 of 1997)** (unreported), the Court of Appeal had this to say of applications for summary judgment:

"***It is trite law that in an application for summary judgment under order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, prima facie, the existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the preview of order XXXV, is shadowy or a sham is entitled to summary judgment.***

The Court of Appeal in the case of **Industrial and Commercial Development Corporation v. Daber Enterprises Ltd. Civil Appeal No. 41 of 2000** (Unreported) stated that unless a matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried. The learned justices of appeal held:

"***The purpose of proceeding in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable."***

Mr. Ibrahim for the Respondent has expressed surprise that the Applicant has made no attempts to challenge the Respondent's defence to the Applicants counterclaim and yet he seeks to have the defence struck out.

The application has been brought under order VI rule 13(1), (b), (c) and (d) and order XXXV rule 1(b) of the Civil Procedure Rules. Under order VI rule 13(1) (b) the duty lies on the Applicant to show that the Plaintiff's defence to the counterclaim is scandalous, frivolous and vexatious. Under rule 13(1) (c) that the Plaintiffs defence may prejudice, embarrass or delay the fair trial of the case and under rule 1(d) that the Plaintiff's defence is otherwise an abuse of the court process.

The Applicant claims that it obtained a good title to the suit property, having been a Purchaser for reasonable price without notice. The Applicant relies on the certificate of title in which the suit property has been transferred to this name from that of the Plaintiff. It is the Applicant's contention that the Plaintiff has no cause of action against him and further that the Plaintiff's cause of action, if any, lies in damages as against the 1st Defendant.

Mr. Ibrahim's answer to the Applicant's claim is that since the Applicant did not attack the Plaintiff's statement of defence to the Applicant's counterclaim, then the application does not lie.

Both parties rely on the case of **Ze Yu Yang v Nova Industrial Products Limited [2003] 1 EA 362** where Nyamu, J. held:

"***The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power.*** *Mbuthia v Jimba Credit Corporation [1986] LLR 3292 (CAK), Grant v Kenya Commercial Finance Limited Civil Appeal Number 227 of 1995 and Central Bank Kenya Limited v Trust Bank and Others [1996] LLR 472 {CAK}* ***applied.***

The title issued to the Purchaser cannot be impeached whatsoever except on ground of fraud."

The learned Judge has in his judgement examined several other cases on the issue when a mortgagor's or chargor's right of redemption extinguishes. Among the cases considered include the Court of Appeal

decision of **Kanyagia v. Wangechi [1993] LLR 2168** where **Akiwmui, Shah** and **Omolo JJA** held:

"***Since preparing this judgment my attention has been drawn to the Statute Law (Miscellaneous Amendment) Act 1985 (19 of 1985) which amends section 60 of the Transfer of Property Act of 1882 by adding to the words "a court" in the second paragraph of the proviso to the section the following:***

'***and is exercised before the mortgagee, has under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property'.***

This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it."

I need not reinvest the wheel. I am persuaded by the **Zang case**, supra, and bound by the holding in **Kanyagia case**, supra.

The suit property is registered under the Registration of Titles Act, hereinafter RTA, under section 70 thereof. Under the RTA the Mortgagor's right of Redemption extinguishes once the mortgagee or chargee enters into a valid contract to sell the property and upon registration of the property in the name of the Purchaser. The Applicant has shown that it bought the suit property from the mortgagee and that it has since had the property transferred to its name.

There are numerous cases which have gone on record to hold that once the suit property is sold by a Mortgagee or chargee under section 69B of the Indian Transfer of Property Act, hereafter ITPA, in exercise of its statutory power of sale, as in this case, the Purchaser acquires a good title to the property. That title cannot be impeached on any grounds even that of fraud. The only remedy available to an aggrieved mortgagor is an award of damages when the alleged fraud is proved.

Mr. Ibrahim has urged the court to find that fraud was pleaded and that therefore the sale could be vitiated. With due respect to Ibrahim, under section 60 of ITPA as amended by Act No. 19 of 1985, the Plaintiff's right of redemption was lost as soon as the 1st Defendant sold the suit property whether by public auction or private treaty. The Plaintiff's claim, if any, lies in damages as against the 1st Defendant. The law protects the 2nd Defendant as Purchaser from the 'sins' of the 1st Defendant, if any, including those of fraud even if proved.

Having come to the conclusions I have, it is clear that the Plaintiff has no cause of action against the 2nd Defendant. Even though the Applicant sought to strike out the entire Plaintiff's suit, the application can only be considered as against the 2nd Defendant/Applicant's application dated 6th August, 2008. the irregularities in the said application, as pointed out by Mr. Ibrahim for the Plaintiff, go only to form and not the substance of the application. In any event having concluded that the Plaintiff has no cause of action against the Applicant, the plaint as against the 22nd Defendant has been proved to the frivolous, vexatious and lacks in seriousness and tends only to annoy, and is therefore an abuse of the court process and may delay the finalization of the suit. I am satisfied that the Plaintiff's suit as against the 2nd Defendant is unsustainable. That suit must go.

Regarding summary judgment against the Plaintiff as prayed for in the Amended Defence and Counterclaim, the holding in the case of **Gurbashk Singh & Sons v. Njiri Emporium Limited** answers the application fully. It is reported in **1985 KLR 695**. The Court of appeal in that case held as follows: -

"***1. Summary judgment for a Plaintiff may be granted under order 35 rule 1(1) (a) for,*** *inter alia* ***a debt or liquidated demand with or without interest unless the Defendant shows he should have leave to defend the suit as per order 35 rule 2(1).***

2. Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic."

The Applicant has not made a specific claim in its amended defence and counterclaim. The Applicant claims as a Purchaser for value not as a Landlord. In the circumstances the application could not have been brought under rule 1(b) of order XXXV as the Applicant cannot meet the conditions of order XXXV rule 1(b) of the Civil Procedure Rules. That rule provides:

"***1. In all suits where a plaintiff seeks judgment for-***

(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 persons claiming under such tenant or against a trespasser,

Where the defendant has appeared the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits." (emphasis mine)

The Applicant is not claiming as a Landlord. He claims as a Purchaser. As such order XXXXV rule 1(b) does not apply.

The application in terms of order 2 does not therefore lie.

This brings me to the following conclusion.

1. The 2nd Defendant's application dated 6th August, 2008 is allowed in part.

2. The Plaintiff's plaint as against the 2nd Defendant be and is hereby struck out with costs.

3. The order for summary judgment be and is hereby dismissed with costs.

4. The costs in (2) and (3) above to abide the final determination of the suit.

Dated at Nairobi, this 6th day of February, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kamande for the Applicant

Mr. Ibrahim for the Plaintiff/Respondent

LESIIT, J.

JUDGE