



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

**CIVIL CASE 360 OF 2003**

**STEPHEN BORO GITIHA.....PLAINTIFF**

**- VERSUS**

**FAMILY FINANCE BUILDING SOCIETY.....1ST DEFENDANT**

**GEORGE MWANGI HIUHU.....2ND DEFENDANT**

**MUIBAU AGENCIES.....3RD DEFENDANT**

**THE LAND REGISTRAR NAIROBI.....4TH DEFENDANT**

**RULING**

The 2<sup>nd</sup> defendant filed an application pursuant to the provisions of **Order VI Rule 13(1)(b)(c) & (d)** of the **Civil Procedure Rules** seeking orders of this court to strike out, with costs, the plaintiff's suit as against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant further seeks orders of the court that the further amended defence and the defence to the counterclaim filed by the plaintiff on 28<sup>th</sup> November 2008 be struck out with costs. The plaintiff prays for judgment to be entered for the 2<sup>nd</sup> defendant as against the plaintiff in terms of the 2<sup>nd</sup> defendant's further amended counterclaim dated 10<sup>th</sup> November 2008. The 2<sup>nd</sup> defendant prayed that if the court allows the application, then it should direct the O.C.S. Pangani police station to provide the 2<sup>nd</sup> defendant with necessary assistance to ensure compliance with the order given. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the 2<sup>nd</sup> defendant. Edith Wanjiru Gachomba, the advocate of the 1<sup>st</sup> and 3<sup>rd</sup> defendants swore an affidavit on behalf of the said defendants in support of the plaintiff's application. The plaintiff filed a replying affidavit in opposition to the application.

At the hearing of the application, I heard the submissions made by Mr. Kang'ethe for 2<sup>nd</sup> defendant, Mrs. Gachomba for the 1<sup>st</sup> and 3<sup>rd</sup> defendants and Mr. Mureithi for the plaintiff. Mr. Kang'ethe submitted that the 2<sup>nd</sup> defendant purchased the suit property in 2003 in a public auction duly convened by the 1<sup>st</sup> defendant. He submitted that the public auction was conducted by the 3<sup>rd</sup> defendant acting on instructions of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant purchased the suit property for Kshs 9 million and paid the entire purchase consideration. Part of the purchase consideration was financed by the 1<sup>st</sup> defendant. After purchasing the suit property (i.e. LR No.218/278 New Huruma Estate, Nairobi) the same was transferred to the 2<sup>nd</sup> defendant. He submitted that perusal of the entries made in the title of the

suit property confirms that the 2<sup>nd</sup> defendant is the registered owner of the suit property. It further confirms that the suit property was charged to the 1<sup>st</sup> defendant.

Mr. Kang'ethe submitted that to date the 2<sup>nd</sup> defendant has not been able to take possession of the suit property. The plaintiff has continued receiving rental income of about Kshs 200,000/= per month from the time the property was knocked down to the 2<sup>nd</sup> defendant. It was the 2<sup>nd</sup> defendant's case that as a result of being locked out of the suit property it has suffered loss income. It was argued that since the suit property is already transferred to the 2<sup>nd</sup> defendant, the plaintiff no longer had any proprietary rights over the suit property. He submitted that the plaintiff's equity of redemption was extinguished upon the transfer of the suit property to the 2<sup>nd</sup> defendant and the only remedy available to the plaintiff was to seek damages from the bank in accordance with **Section 69** of the **Transfer of Property Act**. He maintained that the plaintiff's suit as against the 2<sup>nd</sup> defendant was not maintainable since the plaintiff had made no allegation of fraud and set out particulars against the 2<sup>nd</sup> defendant as required by law.

Counsel for the 2<sup>nd</sup> defendant explained that if there was any impropriety in the manner in which the sale by public auction was conducted, the only remedy available to the plaintiff was damages. He was of the view that as an innocent purchaser of the suit property, the 2<sup>nd</sup> defendant could not be kept out of the property. He reiterated that the plaintiff's application made in attempt to stop the suit property from being transferred to the 2<sup>nd</sup> defendant was dismissed by the court. He submitted that since the said ruling was delivered affirming the position that the plaintiff's equity of redemption had been extinguished, the plaintiff did not file appeal challenging the said decision of the court. He maintained that the reply to the counterclaim was filed in abuse of the process of the court since the pleadings were not underlined in the specific colours required by the rules. He urged the court to allow the application, strike out the plaintiff's suit as against the 2<sup>nd</sup> defendant, and enter judgment in favour of the 2<sup>nd</sup> defendant as prayed in his counterclaim. On the issue of damages, he urged the court to refer the matter for determination by way of formal proof.

Mrs. Gachomba for the 1<sup>st</sup> and 3<sup>rd</sup> defendants associated herself with the submission made on behalf of the 2<sup>nd</sup> defendant. She urged the court to disallow the reply filed by the plaintiff in response to the 2<sup>nd</sup> defendant's amended defence and counterclaim. She submitted that the plaintiff had filed the said reply in terms of earlier pleadings which had been rejected by the court. She submitted that the plaintiff should not be allowed to file amendments to pleadings earlier rejected by the court by the backdoor. She supported the submission made by the 2<sup>nd</sup> defendant that the said reply to the 2<sup>nd</sup> defendant's counterclaim was offensive and prejudicial to the defendants and therefore should be struck out.

Mr. Mureithi for the plaintiff opposed the application. He submitted that the plaintiff's suit disclosed a reasonable cause of action in that the plaintiff had pleaded *inter alia*, that the power to sell the suit property by statutory power of sale had not arisen at the time the 1<sup>st</sup> defendant purported to sell the suit property to the 2<sup>nd</sup> defendant. He submitted that the plaintiff had fully paid the loan that was advanced to him. He referred to a bank statement annexed to the plaintiff's replying affidavit which indicated that the plaintiff had settled the outstanding loan by 30<sup>th</sup> June 2000. He maintained that the current application was brought by the 2<sup>nd</sup> defendant purposely to forestall the 1<sup>st</sup> defendant from replying to the request for particulars made by the plaintiff. He reiterated that the present case was different from the other cases where statutory power of sale was properly exercised.

Mr. Mureithi explained that the 2<sup>nd</sup> defendant was not an innocent purchaser for value without notice since the plaintiff had established that the transfer of the suit property to the plaintiff was tainted by fraud. He submitted that there were irregularities in the manner in which the suit property was transferred to the 2<sup>nd</sup> defendant before the 2<sup>nd</sup> defendant had paid the full purchase consideration. He maintained that the reply by the plaintiff to the 2<sup>nd</sup> defendant's counterclaim was not an abuse of the due process of the court as the plaintiff had been granted corresponding leave to respond to the 2<sup>nd</sup> defendant's amended counterclaim. He submitted that the pleadings filed on behalf of the plaintiff raised substantial and

weighty issues which can only be determined in a full trial. He urged the court to give the plaintiff an opportunity to present its case so that the court may determine the outstanding issues on its merits.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the 2<sup>nd</sup> defendant made a case to enable this court strike out the pleadings filed on behalf of the plaintiff and thereby enter judgment in favour of 2<sup>nd</sup> defendant as prayed in his amended counterclaim. The principles to be considered by this court in determining whether or not to strike out the pleadings filed by the plaintiff and enter judgment in favour of the 2<sup>nd</sup> defendant as prayed in the amended counterclaim are well settled. In **Five Continents Ltd –vs- Mpata Investment Ltd [2003] 1EA 65** the Court of Appeal held at page 67 as follows:

*“In **Dhanjal Investments Ltd – vs – Shabaha Investments Ltd [1997] LLR 618 (CAK)**, this Court stated:*

*“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandnlal Restaurant –vs- Devshi and Company [1952] EACA 77** and followed by the Court of Appeal for Eastern Africa in the case of **Sonza Figuerido and Company Limited – vs- Mooring Hotel Limited [1952] EA 425** that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions ...”.*

And in **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Ltd –vs- Kivuti [1996] LLR (CAK)**, the Court against stated:

*“In an application for summary judgment even one triable issue if bona fide; would entitle the defendant to have unconditional leave to defend”.*

Lastly, in **Kenya Trade Combine Ltd –vs- Shah [1999] LLR 2847 (CAK)**, the Court said:

*“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”.*

In the oft cited case of **DT Dobie & Co. (K) Ltd –vs- Muchina [1982] KLR 1** at page 9 Madan JA held that:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

In the present case, certain facts are not in dispute. It is not disputed that the plaintiff borrowed money from the 1<sup>st</sup> defendant and offered the title of the suit property as security. The 1<sup>st</sup> defendant claimed that the plaintiff was in default hence its decision to realize the security by exercising its statutory power of sale. The plaintiff disputes that such power to sell the suit property under the 1<sup>st</sup> defendant’s statutory power of sale had arisen. The plaintiff is challenging the said exercise of the statutory power of sale by the 1<sup>st</sup> defendant as chargee. It is not disputed that when the 1<sup>st</sup> defendant sought to exercise its statutory power of sale, the plaintiff attempted to seek the court’s intervention to prevent the 1<sup>st</sup> defendant from selling the suit property. The plaintiff’s application seeking to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale and later from transferring the suit property to the 2<sup>nd</sup> defendant did not find favour with the court.

It is further not disputed that the 2<sup>nd</sup> defendant is the registered owner of the suit property. The 2<sup>nd</sup> defendant has however not been allowed to take possession of the suit property by the plaintiff. In his

counterclaim, the 2<sup>nd</sup> defendant essentially seeks orders of the court to enable him take possession of the suit property. The 2<sup>nd</sup> defendant has prayed that the court declare him to be the legal owner of the suit property and further that a declaration be made that the plaintiff's equity of redemption had been extinguished by the sale of the suit property to him. He further prayed for an order of the court directing the plaintiff to give vacant possession of the suit property or in default thereof the 2<sup>nd</sup> defendant be at liberty to forcefully evict the plaintiff from the suit property.

I have considered the plaintiff's case. It is the plaintiff's case that the suit property was unlawfully sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant when the power to sell the same had not arisen. The plaintiff claims that by the time the 1<sup>st</sup> defendant purported to exercise its statutory power of sale, the plaintiff had paid in full the loan that was advanced to him. The plaintiff alleges that the defendants had colluded and fraudulently deprived him of his property. The above allegations by the plaintiff can only refer to the 1<sup>st</sup> defendant who was the chargee of the property. Under **Section 69B(2) of the Transfer of Property Act:**

*“Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-*

*(a) that no case had arisen to authorize the sale; or*

*(b) that due notice was not given; or*

*(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or after transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damaged by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”*

As stated earlier in this ruling, there is no dispute that after the sale of the suit property to the 2<sup>nd</sup> defendant, the same was transferred to him. The 2<sup>nd</sup> defendant is now the registered owner of the suit property.

It is clear that the plaintiff has no legitimate cause of action against the 2<sup>nd</sup> defendant. If the plaintiff was aggrieved by the manner in which the 1<sup>st</sup> defendant exercised its statutory power of sale, then the only remedy available to the plaintiff is to sue for damages against the 1<sup>st</sup> defendant. The plaintiff is not allowed by the law to come to court and seek orders to have the sold property reverted back to his ownership and possession. The Court of Appeal has held in several cases including **Priscillah K. Grant vs. Kenya Commercial Bank & 2 others CA Civil Application No. Nai 227/95(unreported)** and **Downhill Ltd vs. Harithi Ali El-Busaidy & anor CA Civil Appeal No. 254 of 1999 (unreported)** that once a property has been sold by a chargee in exercise of its statutory power of sale, the only challenge to that sale is for the aggrieved chargor to sue for appropriate damages.

In the present case, it is clear that the 2<sup>nd</sup> defendant established to the required standard of proof that it lawfully purchased the suit property in a public auction duly convened by the 1<sup>st</sup> defendant and was thereafter legally registered as the owner of the suit property. It has been held time and again, and I need not quote any authority on that point, that once a property has been sold by chargee in exercise of its statutory power of sale in a public auction, the equity of redemption of the chargor is extinguished upon the fall of the hammer. It is not open for the chargor, in this case the plaintiff, to challenge the manner in which the sale was conducted as justification for his continued retention of possession of the suit property.

I therefore hold the 2<sup>nd</sup> defendant has established, to the required standard of proof on a balance of probabilities that the plaintiff has no cause of action against him. If the plaintiff has any cause of action, then it will be against the 1<sup>st</sup> defendant, and in any event it will be for damages only.

The plaintiff's suit against the 2<sup>nd</sup> defendant has no merit and is hereby struck out with costs. The plaintiff's reply to further amended defence and defence to counterclaim filed on 28<sup>th</sup> November 2008 is struck out with costs. Judgment is entered in favour of the 2<sup>nd</sup> defendant as against the plaintiff in terms of prayer (a),(b) & (c) of the amended counterclaim.

The plaintiff is ordered to give to the 2<sup>nd</sup> defendant vacant possession of the suit property within forty-five (45) days of today's date or in default therefore the 2<sup>nd</sup> defendant be at liberty to forcefully evict the plaintiff thereof. As regard the claim for mesne profit, the same shall be determined by the court on formal proof. The 2<sup>nd</sup> defendant shall have the costs of the application together with costs of the suit. It is so ordered.

**DATED** at **NAIROBI** this 17<sup>th</sup> day of **JUNE 2009**.

**L. KIMARU**

**JUDGE**