



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 523 of 2006

GABRIEL NDUNG’U GITHUA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....1<sup>ST</sup> DEFENDANT

CHARLES OLOO.....2<sup>ND</sup> DEFENDANT

GARAM INVESTMENTS.....3<sup>RD</sup> 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 the court’s orders for the plaintiff’s suit, as against the 2<sup>nd</sup> defendant, to be struck out and judgment be entered in favour of the said 2<sup>nd</sup> defendant as prayed in his counterclaim. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Charles Oloo, the 2<sup>nd</sup> defendant. The application is opposed. The plaintiff filed two affidavits in reply and in opposition to the 2<sup>nd</sup> defendant’s application. I did not see any papers filed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants, either in support or in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Wainaina for the 2<sup>nd</sup> defendant, the plaintiff who was acting in person and Mr. Ojiambo for the 1<sup>st</sup> and 3<sup>rd</sup> defendants. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the rival arguments presented during the hearing of this application. The issue for determination by the court is whether the 2<sup>nd</sup> defendant established a case for the striking out of the plaintiff’s suit against him and for the entry of judgment in his favour as against the plaintiff in terms of his counterclaim. The principles to be considered by this court in determining whether or not to strike out a defence are similar to the principles that this court takes into consideration when determining whether or not to enter summary judgment. In **Johnson Joshua Kinyanjui & Anor vs Rachel Wahito Thande & others CA Civil Appeal No.284 of 1997 (unreported)** the Court of Appeal held at page 10 as follows;

*“This court per Madan J. A. (as he then was) said in the case of **Continental Butchery Limited vs Samson Musila Nthiwa, civil Appeal No.53 of 1977(unreported)**:*

*‘with a view to eliminate delays in the administration of justice which would keep litigants out of their*

***just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by O.35 subject to there being no triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.'***

*Although Madan J.A. was referring to an O.35 application it would not be wrong for us to say that defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."*

The facts of this case in relation to the suit filed by the plaintiff as against the 2<sup>nd</sup> defendant are more or less not in dispute. The plaintiff was advanced a loan by the 1<sup>st</sup> defendant. The plaintiff charged his property, being LR. No. Nairobi /Block 73/422 Buruburu Nairobi (*hereinafter referred to as the suit property*) to secure the said loan facility. There is dispute as to the exact amount that was advanced by the 1<sup>st</sup> defendant to the plaintiff. There is further dispute whether the plaintiff had paid in full the loan in question together with the accrued interest. That is not an issue for determination by the court in this application. That issue will await further proceedings in this matter.

According to the pleadings filed by the 1<sup>st</sup> defendant, the plaintiff defaulted in repaying the amount due necessitating the 1<sup>st</sup> defendant to issue statutory notice seeking to sell the suit property to recover the defaulted amount in exercise of its statutory power of sale as contained in the instrument of charge. The suit property was advertised for sale. The plaintiff moved to the court and filed suit against the 1<sup>st</sup> defendant seeking to prevent the 1<sup>st</sup> defendant from exercising the said statutory power of sale. In the said suit i.e. **Nairobi HCCC No.645 of 2005 Gabriel Ndung'u Githua vs National Bank of Kenya Ltd**, the plaintiff filed an application for injunction seeking to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale. In his considered ruling delivered on 29<sup>th</sup> March 2006, Ochieng J allowed the application for injunction but on terms. The plaintiff was required to deposit with the 1<sup>st</sup> defendant the sum of Kshs.200,000/= within sixty (60) days of the date of the ruling or in default thereof the 1<sup>st</sup> defendant was to be at liberty to sell the charged property. It was apparent that the plaintiff failed to comply with the said order of the court requiring him to deposit the said amount pending the hearing and determination of the suit.

The 1<sup>st</sup> defendant, having been granted leave by the court to sell the charged property, duly advertised the same for sale. According to the 2<sup>nd</sup> defendant, on 4<sup>th</sup> July 2006, he participated in a sale which was conducted by the 3<sup>rd</sup> defendant on behalf of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant stated that he bid to purchase the suit property for the sum of Kshs.1.7 million. He was declared the highest bidder and was successful in his bid. He paid the full purchase consideration and the suit property was duly transferred to him by the 1<sup>st</sup> defendant. On 27<sup>th</sup> November 2006, the 2<sup>nd</sup> defendant was registered as the owner of the suit property. Upon becoming aware that the suit property had been sold, the plaintiff filed the present suit. He obtained interim orders of injunction which were however discharged by Ochieng J on 27<sup>th</sup> October 2006 when the plaintiff failed to prosecute his application.

In this suit, the thrust of the complaints raised by the plaintiff are essentially against the conduct of the 1<sup>st</sup> defendant in the exercise of its statutory power of sale. Apart from praying for permanent orders of injunction to restrain the defendant from dealing with the suit property, the plaintiff prayed to be awarded general damages. In his counterclaim, the 2<sup>nd</sup> defendant prayed for an eviction order of the plaintiff from the suit property. The 2<sup>nd</sup> defendant averred that he was the legal owner of the suit property having purchased the same in a legally convened public auction. He stated that by virtue of his registration as the owner of the suit property, the plaintiff's equity of redemption had been extinguished. In response to the 2<sup>nd</sup> defendant's counterclaim, the plaintiff denied that his equity of redemption had been extinguished by the sale and transfer of the suit property. He averred that the transfer of the suit property to the defendant was illegal and void in light of the outstanding dispute between him and the 1<sup>st</sup> defendant. The plaintiff denied that the 2<sup>nd</sup> defendant was entitled to possession of the suit property by virtue of his registration as the owner thereof.

Can the plaintiff resist the 2<sup>nd</sup> defendant's counterclaim? I do not think so. The 2<sup>nd</sup> defendant purchased the suit property from the 1<sup>st</sup> defendant which was legally exercising its statutory power of sale by chargee. The said public auction was sanctioned by the court when the order granted restraining the 1<sup>st</sup> defendant from selling the suit property lapsed after the plaintiff failed to fulfill the conditions attached to the grant of the said order. The suit property is registered under the **Registered Land Act**. Under **Section 77(3)** of the **Registered Land Act**, a transfer by chargee in exercise of its statutory power of sale is sufficient evidence that the statutory power of sale has been duly exercised. Any person aggrieved by the said sale of the charged property on account of any irregularity, shall have a remedy in damages as against the person exercising the power. In the present application, the 2<sup>nd</sup> defendant is already registered as the owner of the suit property. His proprietorship over the same cannot be impeached. The plaintiff's equity of redemption in respect of the suit property was thus extinguished. The plaintiff cannot seek to impeach the said exercise of statutory power of sale by the 1<sup>st</sup> defendant for the purpose of reversing the sale and transfer of the suit property to the 2<sup>nd</sup> defendant.

The only remedy available to the plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether the plaintiff's equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J (*as he was then*) in **Nairobi HCCC No.9 of 2003 Ze Yu Yang vs Nova Industrial Products Ltd** (*unreported*) where at page 9 of his ruling he held as follows:

*“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of GEORGE MBUTHIA & JUMBA CREDIT CORPORATION CIVIL APPEAL 111 OF 1986. In that case the decision of Chief Justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S.60 of the Transfer of Property Act...If any doubt existed or persisted after the GEORGE MBUTHIA & JIMBA CREDIT CORPORATION concerning the extinguishment of the equity of redemption, the following two subsequent decisions of the Court of Appeal have crystallized the position in law. PRISCILLA KROBOUGHT GRANT V KENYA COMMERCIAL FINANCE CO. LTD. C.A 227 OF 1995. At page 4 in the unanimous decision of the judges of Appeal after citing in full S.69B of TPA:*

***“In the present case therefore, the only remedy of the applicant would be a claim for damages should she be able to prove that there was an improper or irregular exercise of the statutory power of sale. It would therefore, appear to us, at this stage, that the applicant does not have an arguable case.”***

*IN THE CENTRAL BANK KENYA LTD VS TRUST BANK & 4 OTHERS C.A NO.215/1996 at page 14 held that a purchaser pursuant to statutory power of sale, who has a title registered in his favour had an indefeasible title and a right to immediate possession. The title was registered under Registration of Titles Act in case in question.”*

Although the court was referring to properties sold by mortgagees in exercise of their statutory power of sale in respect of titles registered under the **Registration of Titles Act**, the principles enunciated in the said ruling apply with equal force to charges in respect of titles registered under the **Registered Land Act**.

As stated earlier in this ruling, the plaintiff may have a case when he alleges that there is dispute in regard to the amount that he is legitimately required to pay to the defendant in view of the dispute regarding the exact amount that was advanced to him. That is an issue between the plaintiff and the 1<sup>st</sup> defendant. Even if the plaintiff succeeds in establishing his case against the 1<sup>st</sup> defendant, it will not result in the reversal of the sale and transfer of the suit property to the 2<sup>nd</sup> defendant. As provided by statute, the plaintiff's remedy lies in damages. He will be awarded appropriate damages by the court that will hear his case if he is able to establish his case. Such damages can only be secured as against the 1<sup>st</sup> defendant. The plaintiff has no cause of action against the 2<sup>nd</sup> defendant. There are no allegations of fraud or collusion made against the 2<sup>nd</sup> defendant in regard to the purchase of the suit property. The 2<sup>nd</sup> defendant is a purchaser for value without notice.

In the premises therefore, it is evident that the 2<sup>nd</sup> defendant's application is for granting. The same is allowed. The plaintiff's suit, as against the 2<sup>nd</sup> defendant, is struck out with costs to the 2<sup>nd</sup> defendant. The plaintiff's defence to the 2<sup>nd</sup> defendant's counterclaim is struck out. Judgment is entered in favour of the 2<sup>nd</sup> defendant, as against the plaintiff, as prayed in the counterclaim. The plaintiff is hereby ordered to give vacant possession of the suit property i.e. LR. No. Nairobi/Block 73/422 Buruburu Nairobi within forty five (45) days of today's date or in default thereof the 2<sup>nd</sup> defendant shall be at liberty to evict the plaintiff therefrom. The 2<sup>nd</sup> defendant shall have the costs of the application and the costs of the suit and the counterclaim. It is so ordered.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**