



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

Civil Case 51 of 2006

DANSON MBUGUA NJUGUNA..... PLAINTIFF

VERSUS

EAST AFRICA BUILDNG SOCIETY BANK LTD

(FORMERLY KNOWN AS AKIBA BANK LTD).....1ST DEFENDANT

ALIKI PRINTERS AND STATIONERS LTD.....2ND DEFENDANT

RULING

On 6th February 2009, Lesiit J allowed the 2nd defendant's application by which sought the 2nd defendant, among other prayers, an order that the plaintiff's suit against it be struck out on the grounds that there existed no cause of action against it. She held that the plaintiff's suit against the 2nd defendant was frivolous, vexatious and lacked in seriousness and was meant to annoy. She further found that the suit against the 2nd defendant was an abuse of the due process of the court, and if it remained pending, it would delay the just finalization of the suit. However, she declined to grant the 2nd defendant's application for summary judgment to be entered against the plaintiff in accordance with prayers in its counterclaim. The learned judge held that she could not grant the application for summary judgment as the procedure used by the 2nd defendant in seeking to obtain vacant possession of the suit property could not be availed to it under **Order XXXV Rule 1** of the **Civil Procedure Rules**.

On 18th May 2009, the 2nd defendant filed an application pursuant to the provisions of **Order VI Rule 13(1)(b)(c) & (d)** of the **Civil Procedure Rules** seeking this court's orders for the plaintiff's defence to the 2nd defendant's counterclaim to be struck out. The 2nd defendant prayed for judgment to be entered in its favour as against the plaintiff as per the counterclaim. The grounds in support of the application are stated on the face of the application. The 2nd defendant contends that the plaintiff had no defence to its counterclaim as the defence filed was scandalous, frivolous, vexatious and was otherwise an

abuse of the process of the court. The 2nd defendant argued that since the plaintiff's suit as against the 2nd defendant had been struck out by the court, the plaintiff had no claim against the 2nd defendant regard to the suit property. The 2nd defendant stated that it is the lawfully registered proprietor of the parcel of land known as LR. No.13459/67 (original No.13459/42/4) (*the suit property*) and was therefore entitled to vacant possession and quiet enjoyment of the same as against any other person. It was the 2nd defendant's case that the plaintiff had continued to trespass against the 2nd defendant's said property despite a legitimate demand and notice to vacate having been issued. The application is supported by the annexed affidavit of Clement Warutere Ndegwa, the managing director of the 2nd defendant.

The application is opposed. The plaintiff filed grounds in opposition to the 2nd defendant's application. The plaintiff stated that the application was incompetent, bad in law, misconceived and an abuse of the court process. He averred that apart from the application being *res judicata*, it was fatally defective and did not disclose any reasonable cause of action against the plaintiff. The plaintiff was of the view that the application was unfounded and unmeritorious and therefore should be dismissed.

At the hearing of the application, I heard rival submissions made by Miss Mwaniki for the 2nd defendant and Mr. Ibrahim for the plaintiff. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. Before giving reasons for my determination, it is appropriate that I set out the facts of this case, albeit briefly. The plaintiff mortgaged the suit property to the 1st defendant to secure a sum of Kshs.15 million which had been borrowed by a company associated with the plaintiff known as Baraka Agrovat Ltd. There is no dispute that the said company, and the plaintiff as its guarantor, defaulted in repaying the said loan that was advanced thereto. In exercise of its statutory power of sale, the 1st defendant sold the suit property to the 2nd defendant in the process of realization of its security. The suit property was subsequently thereafter transferred to the 2nd defendant. The 2nd defendant is now the registered owner of the suit property. However, to date, it has not been given vacant possession. The plaintiff is still in occupation of the suit property.

The said sale of the suit property by the 1st defendant to the 2nd defendant provoked the present suit. The plaintiff challenged the said sale on, among other grounds, that the 1st defendant had sold the suit property at a price that was an undervalue. He was of the view that the 1st defendant exercised the said statutory power of sale before issuing the requisite statutory notice. He complained that as a result of the 1st defendant's illegal conduct in the sale of the suit property, the subsequent transfer to the 2nd defendant was tainted by irregularity and therefore should be reversed. It was the plaintiff's case that the 2nd defendant had colluded with the 1st defendant in the said sale of the suit property and was therefore equally liable for the breach of law. In the alternative, he prayed to be paid general damages on account of the said breaches. Of course, the defendants filed defences denying the plaintiff's claim. The 2nd defendant counterclaimed against the plaintiff seeking vacant possession of the suit property.

As stated earlier in this ruling, the issue regarding the propriety of the plaintiff's suit as against the 2nd defendant was considered by Lesii J, and who rendered an opinion that the plaintiff did not have any cause of action as against the 2nd defendant and who, as it were, was a purchaser for value of the suit property without notice of any defect in the process leading to the sale of the said suit property by public auction. She found as a matter of fact and law that the plaintiff's equity of redemption in regard to the suit property had been extinguished upon the transfer of the suit property to the 2nd defendant. At page 7 of her ruling she noted as follows:

“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, hereinafter ITPA, in exercise of its statutory power of sale, as in this case, the purchaser acquires a good title to the property. That a 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.”

It was on the basis of the above reason that the learned judge struck out the plaintiff's suit as against the 2nd defendant. She however sustained the suit against the 1st defendant on account of the possibility that the plaintiff may prove his case in regard to the alleged irregularity and illegality in respect of the manner in which the said suit property was sold by the said defendant in exercise of its statutory power of sale.

The Learned Judge observed, correctly in my view, that if the plaintiff establishes any irregularity, the best that any court of law can do to remedy his grievance is to award him damages. The plaintiff cannot, in the circumstances, claim for the re-transfer of the suit property to his name. That is the reason why the learned judge sustained the plaintiff's suit as against the 1st defendant. I have carefully perused the pleadings filed in this case subsequent to the said ruling by Lesiit J. There is no evidence to suggest that the plaintiff was sufficiently aggrieved by the said ruling to an extent that he appealed to the Court of Appeal. The said decision so far stands unchallenged.

Can the plaintiff therefore resist the 2nd defendant's application to have his defence to the counterclaim struck out on the grounds that it is frivolous, vexatious or otherwise an abuse of the due process of the court? I do not think so. The 2nd defendant established to the required standard of proof on a balance of probabilities that it is the registered owner of the suit property. The fact of transfer of the suit property to the 2nd defendant is acknowledged by the plaintiff in his pleadings. Since a court of competent jurisdiction reached a finding that the 2nd defendant was legally registered as the owner of the suit property, it is only proper and just that the 2nd defendant be allowed to enjoy the fruits of ownership of the said property. The plaintiff has no legal justification to remain in possession of a property that he is no longer its legal owner.

I will allow therefore allow the 2nd defendant's application dated 27th April 2009. The plaintiff's defence to the 2nd defendant's counterclaim is hereby struck out as it is scandalous, frivolous, vexatious and otherwise an abuse of the process of the court. The plaintiff has no legitimate defence to the counterclaim. The 2nd defendant is entitled to vacant possession as the registered owner. Judgment is entered in favour of the 2nd defendant as against the plaintiff in accordance with the prayers in the counterclaim. The plaintiff is ordered to give vacant possession of the suit property, namely LR. No.13459/67 (original No.13459/42/4) within forty five (45) days of today's date or in default thereof the 2nd defendant shall be at liberty to use appropriate legal force to evict the plaintiff from the suit property. The 2nd defendant shall have the costs of this application together with costs of the counterclaim. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2009.

L. KIMARU

JUDGE