



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**HIGH COURT CIVIL APPEAL NO. 68 OF 1999**

**CHARLES GITHINJI MUTURI ..... APPELLANT**

**VERSUS**

**JULIUS NDERITU KABERA ..... RESPONDENT**

***(Appeal from original Ruling and Order in Senior Principal Magistrate's Court at Nyeri in Civil Case No. 523 of 1998 dated 30<sup>th</sup> June 1999 by Mr. Kaburu Bauni – SPM).***

**J U D G M E N T**

The Respondent as the Plaintiff, sued the appellant as the Defendant in the subordinate court praying for an order of eviction directed at the appellant so that he could be evicted from plot No. 50 at Chaka, Mesne profits and that he be given possession of the suit premises. The respondent's claim to the suit premises was premised on the grounds that on 15<sup>th</sup> December 1997 he bought the suit premises from one **Rose Nyambura Kibunja** the then owner presumably as a member of **Ndathi Mugunda company Limited** for Kshs.100,000/=. That following the purchase the suit premises were transferred to the respondent in the company's register and thereby became the owner and entitled to the possession. It would appear that sometime earlier on in 1998 the appellant had entered the suit premises and put up structures without the consent of Rose Nyambura Kibunja and had refused to vacate the same despite repeated demands by the respondent hence the suit for his eviction.

The appellant by his defence dated 15<sup>th</sup> January 1999 denied that he was a trespasser to the suit premises. He denied that one **Rose Nyambura Kibunja** was ever the owner of the suit premises or that the respondent bought the same from **Rose Nyambura Kibunja**. The appellant went on to claim that he purchased the plot from one **Joyce Wangechi** and **Isaac Miano Karuga** on 30<sup>th</sup> September 1995 and moved in immediately and had since extensively developed the same. He was therefore the legal and lawful owner of the suit premises. The appellant therefore prayed that the suit be dismissed with costs.

Four months or so later, the respondent moved the Senior Principal Magistrate's Court, Nyeri by Notice of Motion pursuant to order 35 rule 1 (b) of the civil Procedure Rules for an order that summary judgment be entered for the respondent as against the appellant, that the appellant be evicted from the suit premises and that the respondent be given possession of the same.

The respondent deponed in an affidavit in support of the Notice of Motion that he was the owner of the suit premises and annexed documents in support thereof. That he had bought the same from **Rose Nyambura Kibunja** and annexed a copy of the sale agreement. That the said agreement was executed in the appellant's advocates chambers who was now acting for the appellant. That the appellant had entered into the said plot and started erecting structures therein and thus interfering with his quiet enjoyment. That the respondent being the real owner of the suit premises, the appellant had no right or interest in the

said plot and the defence filed was an abuse of the process of the court and a sham merely meant to deny him possession of the suit premises. Finally, the respondent deponed that it was mete and just that summary judgment be entered against the appellant so that he is evicted from the suit premises and he be put in possession thereof.

The appellant neither filed grounds of opposition nor a replying affidavit to the application. The Senior Principal Magistrate (**Kaburu Bauni** as he then was) found that the application had merit and allowed it. In reaching this decision the learned magistrate considered that the respondent had shown clearly that he was the owner of the plot in question having bought it from **Rose Nyambura Kibunja**. That the agreement was executed before the counsel now acting for the appellant. Documents from the original company confirmed that the respondent was the rightful owner of the suit premises. The learned magistrate finally concluded that the appellant had not shown how he owned the suit premises. Accordingly his defence was a sham. He thereafter proceeded to strike out the appellant's defence and simultaneously entered judgment for the respondent.

This appeal therefore is by the appellant on the grounds that:

- 1. The Learned Senior Principal Magistrate, erred in law and fact in not holding that the defence on record disclosed triable issues of law and fact and miscarriage of justice was thereby occasioned.**
- 2. The Learned Senior Principal Magistrate erred in law and fact in not holding that the pleadings on record did not disclose a clear and concise case entitling the Plaintiff to the remedy of summary procedure. A miscarriage of justice was thereby occasioned.**
- 3. The Learned Senior Principal Magistrate erred in law and fact in holding that the Defendant's defence is a mere sham and that he has not shown how he owes the plot in question while in his defence he states that he bought it from Joyce Wangechi and Isaac Miano Karuga. A miscarriage of justice was thereby occasioned.**
- 4. The Learned Senior Principal Magistrate erred in law and fact in not considering the Defendant's defence and whether the Defendant has a good defence or whether he ought to be permitted to defend the suit as required by law and a failure of justice was thereby occasioned.**

When the appeal came up for hearing, both parties were contend with arguing the appeal by way of written submissions. I have had a chance to carefully read and consider the respective written submissions.

The general principles governing summary judgment applications are well known. See **Gicien Construction Company v/s Amalgamated trade services (1983) KLR 156, Kenya Horticultural Exporters (1977) Ltd v/s Pape (trading as Osirua Estate (1986) KLR 705 and Gohil v/s Wamai (1983) KLR 486.**

The application for summary judgment can be made after the Defendant has appeared and can even be made before the defendant has filed a defence to the suit (see **order XXXV rule 1 (a) and rule 4 CPR**). In this case, the appellant filed a defence to the claim but no grounds of opposition nor replying affidavit to the summary judgment application. The respondent was required to show that the appellant was truly liable to eviction and that the defence did not raise any genuine issues which should go for trial. The appellant on his part was required to show that he should have leave to defend the suit. (**Order XXXV rule 2 (1) CPR**).

Did the appellant show that there were genuine triable issues fit for trial and that he should have been given unconditional leave to defend? I do not think so. As already stated, the appellant neither filed grounds of opposition nor a replying affidavit to the application. That being the case, what the respondent had deponed to in his affidavit in support of the application remained unchallenged and or uncontroverted. In the case of **Gohil v/s Wamai** (supra), the court of appeal held that "**..... The Civil Procedure Rules order XXXV rule 2 (1) requires the Defendant to show either by affidavit or by**

**oral evidence that he should have leave to defend. The burden is on the Defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good Defence on merit; he must go further and show that the defence is genuine arguable or raises triable issues .....**” In this case, the appellant having failed to file a replying affidavit and or grounds of opposition it was difficult for the learned magistrate to tell whether the defence as filed was genuine, arguable and or raised triable issues. The appellant did not even seek by oral evidence to show that he should have leave to defend the action. I do not think that by merely perusing the Defence filed the learned magistrate would have formed the impression that it was genuine, and that it raised an arguable case or indeed triable issues. Pleadings are not evidence, affidavits are! It should not escape our attention that the appellant was during the hearing of the application represented by a very able lawyer, **Mr. Wahome**. This is the same lawyer who had drawn the agreement for sale of the suit premises between **Rose Nyambura Kibunja** and the respondent. It cannot be said that whilst drawing the agreement it could not have escaped his attention that the appellant was in illegal occupation of the suit premises. I think it was for this reason that there was a specific clause in the agreement of sale of the suit premises to the effect that **(c) “..... The balance of shillings twenty thousand (Kshs.20,000/=) shall be paid upon the vendor successfully evicting the trespasser who has put some structures on the said plot and at the same time of transferring the property sold unto the purchaser.....”**

**(G) The vendor shall forthwith ensure that the trespasser has been evicted from the property sold and immediately give vacant possession of the same .....**”

Now for the same lawyer to turn around and claim that the appellant was not trespasser referred to in sale agreement smacks of dishonesty. The said lawyer did not even bother to file a replying affidavit or grounds of opposition to the application. He did not as much as attempt to have the appellant orally testify as to why he should be granted leave to defend. Again as held in the case of **Gicien Construction Co. Ltd.** (supra), a party who opposes an application for summary judgment ought to place evidence by way of an affidavit showing some reasonable ground of defence. Of course the power to grant summary judgment should be exercised cautiously bearing in mind that, it was intended to apply only to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow the Defendant to defend for mere purposes of delay. This was not the case here. In the application, the respondent in his supporting affidavit proved ownership of the suit premises. He produced a copy of the sale agreement and documents from **Ndathi Mugunda Co. Ltd.** showing that the respondent was the owner and entitled to the possession of the suit premises. It would appear that the suit premises had title and ownership still vested in **Ndathi Mugunda Co. Ltd.** which had bought the land which the suit premises formed a portion thereof for its members.

The appellant had a good opportunity to counter the respondent’s contention by producing his own set of documents to show how he came by the suit premises. He did not. Failure to do so clearly showed that the defence was a mere sham meant to delay the court process.

The absence of grounds of opposition and the replying affidavit notwithstanding the learned magistrate went out of his way to look at the defence filed as he ought to and came to the conclusion that it was a sham defence. I have also looked at the defence, I am certain that it is not a serious defence. It consists of mere denials. One would have expected that if the appellant was serious with the defence, he would raise a counterclaim in the light of the claim by the respondent to the suit premises. He did not. The senior principal magistrate I think, properly exercised his discretion in allowing the application after he had heard the submissions of both the appellant and the respondent. I see no reason to interfere with that exercise of discretion.

In the result, I dismiss the appeal with costs to the respondent.

***Dated and delivered at Nyeri this 3<sup>rd</sup> day of June 2008***

**M. S. A. MAKHANDIA**

**JUDGE**