



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

Civil Case 395 of 2006

JOHN GITHI KIGUNDAPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

BEACON OF HOPE2ND DEFENDANT

JUDGEMENT

In the Notice of Motion dated 6th November, 2006 under Order 35 Rule 1 (1) (b) and 2, the Applicant seeks;

“That this Honourable court be pleased to order the Plaintiff to give vacant possession of all the property known as **Title No.Ngong/Ngong/3347** to the 2nd defendant as prayed for in the counterclaim dated 6/9/2006”.

It is the case of the Applicant that the suit property is registered in its names and that the Respondent is a trespasser, as he does not have the consent of the owner. And that this is a plain and obvious case meritorious of summary judgement.

Mr. Mutiso for Respondent submitted as follows: That the way the application is worded renders it incompetent. It is an application for summary judgement by the 2nd Defendant and the success of the application would mean that the suit would remain outstanding or undecided. He also submitted that there are triable issues raised in the Plaint and reply to the counterclaim. It is the contention of the Respondent that the Applicants were not the real purchasers of the suit property. The applicants were not the ones who, were at the auction and that is crucial to the determination of the matter. According to **Mr. Mutiso** Advocate, the highest bidder during the Auction was **George Adams Maina** who has no relationship with the Applicants.

Mr. Mwicigi Advocate in reply submitted that the issue of ownership of the suit property has been addressed by a court of competent jurisdiction. And that there is no dispute that the person who attended the Auction was an agent of the Applicant and did so on behalf of the present Applicants.

The present application is under Order 35 Rule 1 (1) b which states: -

“In all suits where a plaintiff seeks judgement for

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from

tenant whose tm 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”

There is no dispute that the suit property had been advertised for sale by the 1st Defendant in exercise of its statutory power of sale. The public Auction took place on 16th July, 2004 and the Applicant allegedly sent one of the agents to attend Auction to bid for the property on its behalf. The said agent was one **Mr. George Adams Maina**, who was issued with a certificate of sale and memorandum. The Advocate of the bank thus initiated the process of transfer of the property in favour of the applicant.

Owing to the fact that the transaction fell within the purview of the Land Control Act, an application for consent to transfer was duly made and a letter of consent to transfer by the chargee issued in favour of the applicant. On 25th May, 2006 after the registration of the transfer by the chargee, a title Number NGONG/NGONG/3347 was issued in favour of the Applicant as absolute proprietor of the said suit property.

On 11th July, 2006 the Respondent filed Plaintiff seeking a permanent injunction to restrain the Defendants from interfering with L.R. No.Ngong/Ngong/3347 pending the rectification of the register to the Plaintiff's name. That relief was sought on the ground that the sale by public auction of the suit property by the chargee to the present Applicant was fraudulent and illegal. The Plaintiff then filed a Chamber Summons seeking the same prayer in the Plaintiff. That application was heard interpartes by **Azangalala J** and a ruling delivered on 11th October, 2006, wherein the application for injunction was dismissed. His **Lordship Azangalala J** also mentioned HCCC No.110/2004, wherein the Plaintiff expressly admitted that indeed a public auction was held on 16th July, 2004. Subsequent to the auction the Plaintiff sought to restrain the transfer of the suit property but the application was dismissed by **Mutungi J**. The court also dismissed the Plaintiff's argument that **George Adams Maina** withdrew the bid he had made at the auction of 16th July, 2004. **Justice Azangalala** in his ruling at page 6 held;

“The indebtedness of the Plaintiff to the 1st Defendant is therefore beyond question, yet the Plaintiff makes no attempt to show how the indebtedness would be dealt with if his application were to succeed. Besides the Plaintiff's previous attempts to challenge the 1st Defendant's exercise of its statutory power of sale have all come to nought. The scape goat now used that the said George Adams Maina withdrew his bid at the auction sale is a red herring since the said Maina is not complaining. As I said in HCCC No.110/2004 there was no way the Plaintiff could repay his indebtedness to the 1st defendant and he could not therefore benefit from an injunction then”.

The Respondent has not raised the same issues that were determined earlier by **Justice Azangalala** in two separate rulings. The Plaintiff claims the transfer was done un-procedurally and fraudulently, as no proper notice of intended sale was made after **George Adams Maina** withdrew his offer after prolonged proceedings in HCCC No.110/2004. And that the withdrawal by **Mr. Adams Maina** of his offer can only be proved through a full hearing upon calling witnesses as no documents to that effect are within his access.

As things stand, the suit property is legally registered in the names of the Applicant and it is demanding that it be given a vacant possession. Under Order 35, a party seeking to get possession of his property is entitled to benefit from the summary powers of the court. Since the suit property has been transferred into the names of the Applicant, any person in occupation can be rightly termed as a trespasser. The remedies available to a person whose land is in the hands of a trespasser is to seek the intervention of the court to remove the said person. In my view this application is fit for summary judgement since all the ingredients of ownership has been established by the Applicant. The Applicant is entitled to quiet and unrestricted enjoyment of its property.

The Applicant has filed a defence and a counterclaim in this matter and in my view a counterclaim is like a Plaintiff. Where a party has filed a defence and a counterclaim, it can commence a summary judgement in respect of its counterclaim. In ordinary parlance a counterclaim is treated as a claim or

cause of action against the parties to the suit. There is no restriction imposed on a party who has filed a counterclaim to proceed through a summary jurisdiction of the court. The summary powers of the court is available to the Plaintiff and any Defendant who has a cause of action against the other parties, whether in counterclaim or otherwise. It is my decision that a counterclaim is as good as a Plaint and a party can apply for summary judgement if the facts dictates the same.

The law is that where there is plainly no defence to the claim, the party who made an application for summary judgement is entitled to benefit from the summary jurisdiction of the court. In my view there is no triable issue that warrants the claim of the Applicant to await a full hearing. There is nothing to be determined at full hearing as the Plaintiff lost substratum of the matter when he failed to challenge the two rulings of **Justice Azangalala** in respect of the suit property. The Applicant has no role to the contentions raised by the Respondent/Plaintiff in respect of the suit property. In my view the Applicant is an innocent purchaser for value who wants to enforce the rights given to it in the statute.

The arguments by the Plaintiff is plainly unsustainable in view of the two decisions by **Justice Azangalala**. The issues now raised were properly determined in those rulings and were found to be unmeritorious. I agree with **Mr. Mwicigi** Advocate that issue estoppel bars the Plaintiff from raising matters already litigated and ruled on by a court of competent jurisdiction. The Plaintiff is using the same issues and facts that were subject in previous litigation and determination. The said issues were substantively addressed through a ruling delivered on 11th October, 2006, therefore it is my decision that issue estoppel bars the Plaintiff from raising and relying on such issues.

In the premises the application dated 6th November, 2006 is allowed with costs.

Dated and delivered at Nairobi this 28th day of March, 2007.

M. A. WARSAME

JUDGE

Court: Judgement delivered in the presence of

Mr. Nganga for the Plaintiff and Mr. Mwicigi for 2nd Applicant.

M. A. WARSAME

JUDGE