

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Case 30 of 2006

EVALINE CHEPKURUI CHUMO (*suing as legal representative*

***of the estate of Jimmy Joshi Ramdas - deceased*).....PLAINTIFF**

VERSUS

**ZAMARI CHEPKEMOI ROGITO 1ST
DEFENDANT**

**SARAH ROGITO 2ND
DEFENDANT**

RULING

This is an application made by the plaintiff under the provisions of order XXXV rules 1 (b), 2 & 3 of the Civil Procedure Rules seeking summary judgment to be entered against the defendants in terms of the plaintiffs plaint dated the 12th of May, 2006. The grounds in support of the application are on the face of the application. The plaintiff has stated that the defendants have no plausible defence to her suit which seeks, inter alia, the eviction of the defendants from the parcel of land known as Kericho/Kipsonoi SS/259 (*hereinafter referred to as the suit land*). The application is supported by the annexed affidavit of the plaintiff, Evaline Chepkurui Chumo. The application is opposed. The 1st defendant, Zamari Chepkemoi Rogito has sworn an affidavit in opposition to the application. In the said affidavit, she has deponed that the family of their late husband were not aware that the suit land had been transferred to Jimmy Joshi, the deceased husband of the plaintiff. She stated that the family of the deceased would suffer irreparable loss if the application for summary judgment is allowed and they are evicted from the suit land. She further deponed that the plaintiff had not obtained Letters of Administration which could enable her to give effect to the judgment of this court were the application for summary judgment to be allowed. She deponed that her family were negotiating with the plaintiff with a view to amicably resolving the matters in dispute.

I heard the rival submissions made by Mr. Rotich on behalf of the plaintiff and by Mr. Rono on behalf of the defendants. Mr. Rotich submitted that the deceased husband of the plaintiff had purchased the suit land in a public auction which was held by the bank to which the said parcel of land had been charged to. He submitted that the plaintiff had obtained Letters of Administration ad litem which granted her authority to file the present suit. The plaintiff submitted that after purchasing the said parcel of land, the same was transferred to her deceased husband. The title in respect of the suit land was annexed to the affidavit in support of the application. Mr. Rotich submitted that the defendants were aware that the suit land had been sold to her deceased husband and had even at one time entered into an agreement with the said deceased whereby the said parcel of land was to be sold back to them. The defendants did not however pay the purchase consideration, hence the plaintiffs suit which seeks the eviction of the defendants from the suit land. Mr. Rotich submitted that the defence filed by the defendants did not exhibit any triable issues and summary judgment should therefore be entered against them. He argued that the defendants had not established any legal reason that would enable this court grant them leave to defend the suit. He urged this court to allow the application for summary judgment with costs.

Mr. Rono for the defendants opposed the application. He relied on the replying affidavit filed by the 1st

defendant. He submitted that defendants had been in occupation of the suit land long before the said parcel of land was sold to the deceased husband of the plaintiff. He submitted that after the defendants learnt that the suit land had been sold to the deceased husband of the plaintiff, they entered into negotiations with him where by they had agreed to purchase back the suit land. Before the transaction could be completed, the husband of the plaintiff died. He argued that the plaintiff had not obtained full grant of Letters of Administration which could have enabled her to deal with the defendants as regard the completion of the said sale agreement. He urged this court to find that the plaintiff lacked legal capacity to file a suit in respect of the deceased's estate where full grant of Letters of Administration has not been granted. He submitted that in the amended defence filed by the defendants, triable issues had been raised which could only be ventilated in a full trial. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by the counsel for the plaintiff and the counsel for the defendants. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is whether the plaintiff has established a case so as to entitle her to the order of summary judgment sought. Certain facts are not in dispute in this case. It is not disputed that the deceased husband of the plaintiff is the registered owner of the suit land. It is further not in dispute that the deceased husband of the plaintiff purchased the said parcel of land in a public auction after the previous owner of the land had defaulted in repaying the loan due to the bank. The suit land had previously been charged to the bank. It is not disputed that the plaintiff has obtained Letters of Administration ad litem which granted her authority to file suit on behalf of the deceased estate. It is further not disputed that when the defendants became aware that the suit land had been sold to the deceased husband of the plaintiff, they sought to reclaim back the land from the said deceased husband of the plaintiff. An agreement was entered into whereby the defendants agreed to purchase back the suit land for a purchase consideration of Kshs. 4,000,000/= (see *annexture ECC 6*). The defendants did not however pay the purchase consideration. They are still occupying the suit land.

The plaintiff has filed this suit seeking the eviction of the defendants from the suit land. The defendants have resisted the plaintiff's claim. They have filed an amended defence which they have stated, inter alia, that the plaintiff lacked capacity to bring the suit on behalf of the estate of her deceased husband. The principles to be considered by this court in deciding whether or not to grant an application for summary judgment are well settled. Both the plaintiff and the defendants appreciated the principles to be applied by this court in determining whether or not to allow an application to strike out pleadings. In DT Dobie & Co. (K) Ltd. vs. Joseph Muchina [1982] KLR 1, Madan J.A held at page 9 as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits " without discovery, without oral evidence tested by cross examination in the ordinary way".... No suit should 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 the case before it".

In Gupta vs. Continental Builders Ltd., [1980]1 KLR 83 at page 87, the Court of Appeal held that;

"The appellant has appealed to this court against this ruling. The first thing to say is that this was an application for Summary judgment. If a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily".

In the present case, the defendants cannot resist the plaintiff's claim. This is because the plaintiff has

established that her deceased husband is the registered owner of the suit land. The deceased husband of the plaintiff got so registered after purchasing the suit land in a public auction by a bank exercising its statutory power of sale as a chargee. The defendants were aware that the suit land had been sold to the deceased husband of the plaintiff. They had even made attempts to have the suit land returned back to them by the deceased husband of the plaintiff after paying some purchase consideration. They however did not pay a single cent. They have continued to reside on the suit land without making any effort to pay the said agreed purchase consideration. I agree with the plaintiff that the defence filed by the defendants raises no triable issue that would enable this court grant unconditional leave to the defendants to defend the suit.

In the premises therefore, I do hold that the application for summary judgment by the plaintiff has merit and is hereby allowed. The argument by the defendants that the plaintiff lacked capacity to bring this suit on behalf of the estate of the deceased is misguided. This is because, the two decisions relied upon by the defendant were made before the amendments to the Law of Succession Act were made in the year 2002 which allowed a party who is interested in filing a suit on behalf of an estate of a deceased person to apply for Letters of administration *ad litem*. The plaintiff in this case has been issued with such letters. The defendants, their agents, assigns and/or servants are hereby ordered to give vacant possession of the suit land to the plaintiff within forty five (45) days of today's date or in default thereof the plaintiff be at liberty to evict them. The plaintiff shall have the costs of the application and the cost of the suit.

DATED at Kericho this 22nd day of March, 2007.

L. KIMARU

JUDGE