



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 9 of 2006

ESTHER WANGARI GITONGA.....PLAINTIFF

VERSUS

JOHNSON KIMELI.....1ST DEFENDANT

HARRIET WANJIRU KIMANI.....2ND DEFENDANT

RULING

The plaintiff, Esther Wangari Gitonga brought this application under the provisions of **Order VI Rules 13(1) (a), (b), (c) and (d) of the Civil Procedure Rules** seeking an order of the court to strike out the defences filed by the defendants and thereafter enter judgment for the plaintiff as prayed in her plaint. The plaintiff avers that the defences filed by the defendants did not disclose any triable issues and further that the said defences were intended to delay the fair disposal of the suit. The plaintiff stated that she was undergoing irreparable loss and damage as a consequence of the defendant's refusal to hand over to her vacant possession of the suit premises. The application is supported by the annexed affidavit of the plaintiff sworn on the 25th October 2006.

The application is opposed. The 1st defendant, Johnson Kimeli swore a replying affidavit in opposition to the application. He deponed *inter alia*, that the plaintiff was not entitled to the order sought since the agreement in respect of the purchase of the suit land in which she was relying in support of her application was questionable. He further deponed that the plaintiff should not benefit from a sale transaction which was entered into during the existence of a court order barring the said sale of the suit property. The 1st defendant further deponed that the issues he had raised in his defence were weighty and ought or should be ventilated in a full trial by the court hearing *viva voce* evidence.

On her part, the 2nd defendant filed grounds in opposition to the application. She stated, *inter alia*, that there were no grounds upon which this court could strike out the defences filed by the defendants as envisaged by the rules. She further stated that, having sold and transferred the suit property to the plaintiff, she had no interest in the suit property. She could not therefore be in a position to give the plaintiff vacant possession of the suit land. She further stated that her defence raised triable issues which could only be canvassed and ventilated in a full trial and not by way of an interlocutory application for striking out of pleadings. Both defendants urged the court to dismiss the application with costs.

At the hearing of the application, Mrs. Omwenyo for the plaintiff submitted that the plaintiff was the registered owner of all that parcel of land known as **Nakuru Municipality/Block 3/490** (*hereinafter referred to as the suit land*) having purchased it from the 2nd defendant and paid valuable consideration for the same. She submitted that the defendants were not challenging the plaintiff's proprietorship of the

suit property. She submitted that the 1st defendant had refused to give her vacant possession despite of the fact that she is the registered owner of the suit land. She maintained that the 1st defendant had no legal right to remain in possession of the suit land and should be compelled to give vacant possession of the same to the plaintiff. She submitted that the defences filed by the defendants were a sham and did not raise any triable issues.

Mrs. Omwenyo maintained the two defences filed were evasive, contradictory and meant to delay the just determination of the suit. She explained that the plaintiff had initially filed a suit against the defendants in the subordinate court, which suit she had withdrawn on technical grounds. She maintained that the only suit now pending was the present suit. She submitted that the 1st defendant's contention that the suit property was fraudulent sold by the bank in exercise of its powers of sale by chargee could not stand since he had not filed any counterclaim to challenge the transfer of the suit property. She reiterated that the defences filed by the defendants were an embarrassment and were meant to delay the just determination of the suit. She maintained that as a registered owner, the plaintiff could not be denied possession. She relied on several decided cases in support of the plaintiff's submissions. Mrs. Omwenyo urged this court to allow the application with costs.

Mr. Karanja for the 1st defendant opposed the application. He submitted that the plaintiff had not established any grounds upon which this court could strike out the defence filed by the 1st defendant and enter judgment as sought in the application. He submitted that the court could not grant a prayer for eviction and *mesne* profit in an application for summary judgment. He maintained that the defence of the 1st defendant raised triable issues. He explained that the 1st defendant had filed another suit (*i.e.* **Nakuru HCCC No.168 of 2004**) which sought to restrain the 2nd defendant from selling the suit property. He submitted that the transfer of the suit land to the 2nd defendant by the bank, which was purportedly in exercise its powers of sale as chargees, was fraudulent and there was a high probability that the said sale would be nullified by the court during trial. Mr. Karanja maintained that subsequent sale of the suit property by the 2nd defendant to the plaintiff was vitiated. He reiterated that the circumstances under which the plaintiff purchased the suit property was suspicious. He urged the court to decline to strike out the defence of the 1st defendant since the same raised triable issues. He maintained that the plaintiff was not an innocent purchaser for value without notice in the circumstances since she purchased the suit property when there existed a court order prohibiting the sale of the same. Mr. Karanja relied on several decided cases in support of the defendant's submissions. He urged the court to dismiss the application with costs. The 2nd defendant did not appear in court during the hearing of the application despite of being served.

I have carefully considered the rival submissions made by the parties to this application. I have also read the entire pleadings filed by the parties in support of their respective positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant her application to strike out the defences filed by the defendants and thereafter enter summary judgment in her favour as prayed in her plaint. The principles to be considered by this court in determining whether or not to strike out pleadings are well settled. In **D. T. Dobie & Co. (K) Ltd vs Muchina [1982] KLR 1**, at page 9 Madan JA, held that;

“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 judgment 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” (sellers LJ (supra)...No suit ought to be summarily dismissed unless it appears so helpless 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.”

What are the facts of this case? The 1st defendant charged the suit property *i.e.* Nakuru Municipality/Block 3/490 to the Barclays Bank of Kenya

It is apparent that the 1st defendant defaulted in repaying the loan that was advanced to him which had been secured by the suit property. Barclays Bank of Kenya Ltd, in exercise of its powers of sale as a chargee, sold the suit property to the 2nd defendant. The plaintiff challenged the sale of the suit property to the 2nd defendant. He filed a suit *i.e.* Nakuru HCCC No.168 of 2004, against the bank, the 2nd defendant, among other defendants. The said suit is still pending determination. Although the 1st defendant argued that the suit property had been sold by the 2nd defendant, to the plaintiff, when there existed a court order barring the transaction, no evidence was placed before this court to support such a contention. The order annexed to the 1st defendant's replying affidavit and marked "JK III" was an interim order which must have expired. In any event, if the 1st defendant was aggrieved that the 2nd defendant had sold the suit property to the plaintiff in defiance of a court order, he was at liberty to institute contempt of court proceedings in the suit in which the order was issued. It is apparent that the 1st defendant did no such thing.

The position therefore was that, at the time the 2nd defendant sold the suit property to the plaintiff, she had legal capacity to dispose off the same. The 1st defendant disputed the legality of the ownership by plaintiff of the suit property. The 1st defendant still insists that he is the owner of the suit property. The plaintiff annexed a copy of a certificate of lease in respect of the suit property. The records at the Lands Office confirm that the plaintiff is the registered owner of the suit property. The 1st defendant was aggrieved with the manner in which the bank sold the suit property when it was exercising its power of sale as a chargee. The 1st defendant's remedy in law is to file a suit for damages as provided by **Section 77(3) of the Registered Land Act**. He cannot seek to claim the re-transfer of the suit property back to him. As this court held in Abdi Hashi Duale vs National Bank of Kenya Ltd & 2 others Nakuru HCCC No.239 of 2004 (unreported) at page 7;

"The plaintiff (in the case) cannot seek orders of this court to declare him to be the owner of a property which has already been transferred to a third party. It will not matter how the property was transferred by the chargee. The only remedy available to the plaintiff is to sue for damages as provided by Section 77(3) of the Registered Land Act."

I have perused the defence filed by the 1st defendant. Apart from raising issues challenging the transfer of the suit property by the 2nd defendant to the plaintiff, the 1st defendant has not counterclaimed to be declared the owner of the suit property. The 1st defendant insists that he is still the registered owner of the suit property. The plaintiff has established otherwise. She is the registered owner of the suit property as evidenced by the copies of the certificate of lease and certificate of search annexed to the affidavit in support of her application.

Can the defendants resist the plaintiff's assertion that their defences are sham and ought to be struck out? In the opinion of this court, they cannot. The defendants have not challenged the ownership of the suit property by the plaintiff. The plaintiff was not party to the complaints raised by the 1st defendant with the manner in which the suit property was sold to the 2nd defendant by the bank when the bank sold the same whilst exercising its powers of sale as a chargee. The defendants cannot resist the plaintiff's claim, that as the registered owner, she is entitled to occupation and possession of the suit property.

The application by the plaintiff is allowed. The defences filed by the defendants do not raise any triable issues. They are a sham. They were filed purposely to delay the just determination of this suit. They are struck out. Judgment is entered for the plaintiff as prayed in prayer (a) of her plaint. The defendants, jointly and severally are ordered to give vacant possession of the suit property to the plaintiff within thirty (30) days of today's date, in default thereof, the plaintiff shall be at liberty to secure the eviction of the defendants from the said suit premises. I decline to make any order on the prayer by the plaintiff that she should be awarded *mesne* profits. She will have to establish this on formal proof. The plaintiff shall have

the costs of this application.

DATED at NAKURU this 23rd day of November 2007

L. KIMARU

JUDGE