



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

**Civil Case 514 of 2003**

**STEPHEN KANYAGIA MWANGI.....1<sup>ST</sup> PLAINTIFF**

**PATRICK GATHONDU GICHUKI..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MACKENZIE MUTISO SILA.....1<sup>ST</sup> DEFENDANT**

**RULING**

By a plaint dated 29<sup>th</sup> May 2003 and amended on 28<sup>th</sup> October 2004 the plaintiff sought judgment against the Defendants in the following terms:

(A) Against the 1<sup>st</sup> Defendant:

(i) A declaration that the 2<sup>nd</sup> plaintiff is entitled to vacant possession of the suit premises being LR NO. NAIROBI/BLOCK 32/813 and an order that the 1<sup>st</sup> defendant do deliver up and/or surrender the suit

premises to the 2<sup>nd</sup> plaintiff.

(ii) That the 1<sup>st</sup> Defendant do pay to the 2<sup>nd</sup> plaintiff mesne

profits at such rate as may be determined by the court from 15<sup>th</sup> March 2003 until the 1<sup>st</sup> Defendant complies with the order being sought in (i) herein above.

(B) Against the 2<sup>nd</sup> Defendant in the alternative to “A” herein above.

(i) Refund of the purchase price herein with interest thereon at the court rates, or at such rates as the court may deem to be expedient.

(C) Against both Defendants:

(i) Costs of the suit

(ii) Any other relief or remedy the court may deem to be just, in the circumstances of the case.

On 4<sup>th</sup> July 2005 by way of Notice of Motion brought under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Procedure Act sought orders:

(1) That the Defence filed by the 1<sup>st</sup> Defendant be struck out for:-

- (a) being scandalous, frivolous and vexatious,
- (b) being calculated to prejudice or delay the fair trial of the suit and/or
- (c) being otherwise an abuse of the process of the court.

(2) That there be judgment against the 1<sup>st</sup> Defendant herein as prayed in the plaint.

(i) That the 2<sup>nd</sup> Plaintiff is the registered proprietor of the suit property herein having acquired the same as an innocent purchaser for valuable consideration pursuant to a normal conveyancing Transaction wherein title to the property lawfully passed to him, from the previous registered proprietor, and

(ii) That the 1<sup>st</sup> Defendant has no right to continue occupying the said property, as he is neither the 2<sup>nd</sup> plaintiff's tenant nor the proprietor of the said property.

The application is also supported by an affidavit sworn by the first plaintiff in which he avers that he is an innocent purchaser without notice and has secured registration of the suit land in his name. The first defendant raises issues touching on resjudicate as the ownership of the suit property was settled in **HCCC NO. 1595 OF 1992** in which judgment was delivered on 3<sup>rd</sup> December 1999 and further at the time the suit property is alleged to have been transferred to the plaintiff there existed a caveat against title by the defendant.

On an application for striking out a defence and enter judgment the Judge is required to exercise extreme caution and to exercise his summary powers in clear and obvious cases. This was so stated by Madan JA (as he then was) in **DT DOBIE CO. LTD VS. MUCHINA & ANOTHER CIVIL APPEAL NO. 37 OF 1978**.

If an application for summary judgment the defendant advances a defence which is reasonable or plausible and bona fide, the Judge must allow him unconditional leave to defend. **CITY PRINTING WORKS (K) LTD VS. BAILEY [1977] KLR 85**. Summary Judgment is a draconian remedy. It drives a party away from a seat of judgment and it is not encouraged by the court except in very clear cases.

I am satisfied that the defence by the first Defendant raises triable issues. I therefore dismiss the application and grant the

Defendant unconditional leave defend.

Costs to the Respondent.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of October 2006.

**J.L.A. OSIEMO**

**JUDGE**