



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

CIVIL CASE NO. 239 OF 2004

ABDI HASHI DUALE.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

WATTS ENTERPRISES.....2ND DEFENDANT

JOEL K. BETT.....3RD DEFENDANT

RULING

On the 23rd of August 2004, the plaintiff filed this suit seeking a declaration that the sale of Narok Township/32 by the 2nd defendant, at the instance of the 1st defendant to the 3rd defendant be declared to be null, illegal, unlawful and void and that the title issued to the 3rd defendant and or to any other person pursuant to the sale of the 24th of June 2004 be cancelled. In paragraph 5 of the plaint, the plaintiff made the following averment:

“The plaintiff states that there has been no previous proceedings between him and the defendants herein (jointly) over this cause of action and where appropriate the plaintiff shall mention any previous suit(s) by himself against the 1st defendant over different cause(s) of action.”

The plaintiff made this averment presumably in compliance with the provisions of Order VII Rule 1(e) of the Civil Procedure Rules which provides that the plaintiff shall make an averment that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.

It now emerges from the pleadings filed by the defendants that the plaintiff has prior to filing the current suit, filed three other suits concerning the same subject matter.

The said suits are: (a) Nairobi HCCC No. 1944 of 2000 (b) Nakuru CMCCC No. 230 of 2001 and (c) Nakuru CMCCC No. 2316 of 2000. The plaintiff did not disclose these facts in his plaint.

The 3rd defendant has now filed an application under the provisions of Order VI Rule 13(1)(a)(b)(c)(d) of the Civil Procedure Rules to have the plaint filed by the plaintiff struck out. He has also prayed that judgment be entered in his favour against plaintiff as per his counterclaim. The grounds in support of the application can be summarised from the supporting affidavit sworn by Joel K. Bett, the 3rd defendant, as follows:-

(i) The 3rd defendant contends that the plaintiff did not have any cause of action against him as he

had not set out in his plaint any acts or omissions which the 3rd defendant could be said to have been culpable.

(ii) The plaintiff has filed the suit to challenge the power of sale of a charged property by the 1st defendant by way of a plaint.

(iii) The plaintiff ought to have filed an originating summons as provided by **Order XXXVI rule 3A and Rule 3F of the Civil Procedure Rules.**

(iv) The plaintiff had failed to disclose the fact that he had filed several suits over the subject matter of the suit which is the parcel of land known as **CISMARA/NAROK TOWNSHIP/32.**

(v) The 3rd defendant had purchased the said property in a public auction properly conducted by the 1st defendant and had already had the said parcel of land registered in his name.

(vi) The plaintiff's equity of redemption of the said property was thus extinguished and the plaintiff's remedy if any lay elsewhere.

(vii) The 3rd defendant contended that the plaintiff ought to have filed suit for damages as provided by Section 77(3) of the Registered Land Act.

The 1st and 2nd defendants supported the 3rd defendant's submissions. They urged the court to strike out the plaint.

In reply, the plaintiff stated the following arguments:-

(i) That summary judgment could not be entered in favour of the 3rd defendant as the prayer that the 3rd defendant sought in his counterclaim was not a liquidated claim.

(ii) The plaintiff's suit against the 3rd defendant was predicated upon the fact that 3rd defendant had benefited from the fraudulent sale of the suit property by the 1st and 2nd defendants.

(iii) The plaintiff has filed a plaint instead of an originating summons because the prayer that he was seeking was a declaration. He further submitted that the issues raised in the plaint were so complex and could not be adequately addressed by an originating summons being filed.

(iv) The fact that the plaintiff was seeking to have the suit property reverted back to him did not preclude him from claiming damages upon making the necessary application to amend his plaint.

(v) The court should ignore the other suits filed by the plaintiff against some of the defendants herein as the matters in issue in the said suit were different from the matters in issue in the current suit.

(vi) It is the plaintiff's contention that the 3rd defendant was a beneficiary of a fraudulent transaction as no public auction was ever held by the 2nd defendant.

(vii) The plaintiff urged the court to allow him to ventilate the issues raised by being given a chance to adduce evidence in court.

I have carefully considered the arguments made by the plaintiff and the defendants. I have also read the pleadings filed in court and the decided cases referred to by the parties to this suit. There is one issue for determination;- Does the 3rd defendant's application to have the plaintiff's suit to be struck out for being frivolous, vexatious and an abuse of the due process of the court have merit?

The parties to this suit are agreed on one issue and that issue is that the plaintiff had filed three previous suits over the same subject matter. The plaintiff by some form of legal engineering sought to circumvent

the mandatory requirements of the law that requires him to disclose if he had filed any suit over the same subject-matter against the defendant or defendants. The explanations given by the plaintiff why he failed to disclose the existence of the other suits does not wash. Infact the plaintiff's cavalier attitude towards complying with the established law shows his utter contempt of the judicial process.

The plaintiff has filed suits left, right and centre to achieve only one purpose; to frustrate the 1st defendant from realising the security that the plaintiff had charged to it.

The plaintiff does not give a hoot if by filing multifarious suits means that he is breaching the same laws that he is seeking to have enforced and protect him. As a consequence of failing to disclose the existence of the other suits, the plaintiff, in the verifying affidavit in support of the plaint swore a false affidavit. The changes to the Civil Procedure Rules that was made in the year 2000, especially to Order VI Rule 1(a), were meant to guard against unscrupulous litigants of the ilks of the plaintiff. In the circumstances of this case I would hold that the plaintiff abused the due process of the court when he filed this suit. For that reason alone this court would strike out the plaintiff's suit.

I will however address the other issues raised for determination. The 3rd defendant contends that he purchased the suit land in a public auction held by the 2nd defendant on instructions of the 1st defendant. It is not disputed that he is now the registered owner of the suit property known as **CISMARA/NAKOK TOWNSHIP/32**.

The plaintiff contends that no public auction was held. It was his submission that the 1st and 2nd defendants fraudulently transferred the suit land to the 3rd defendant. He has particularised the instances of what he alleges to be the fraud committed by the 1st and 2nd defendants. Implicit in the plaintiff's argument is the admission that the suit property (howsoever transferred) is no longer registered in the name of the plaintiff.

There are plethora of decided cases where it has been held that where a property has been sold by a chargee in exercise of its power of sale, the equity of redemption of the chargor is extinguished. The holding applies in this case.

The plaintiff 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. For this reason the foundation upon which the plaintiff's suit stand is just but quicksand; it cannot withstand the force of legal argument. This is another reason why the plaintiff's suit is frivolous and should be struck out.

The above two reasons suffices to dispose off this application. The 3rd defendant's application must succeed. I will not address the issue raised as regards the format adopted by the plaintiff to bring this suit before court. To me, the form adopted is moot and not germane to the issues in dispute for determination. The plaint filed in this suit is ordered struck out with costs to the defendants. The 3rd defendant shall have the costs of this application.

I will not make any orders on the 3rd limb of the 3rd defendants application as the prayers sought in the counterclaim cannot be granted in an application for summary judgment.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE