

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA
Civil Suit 128 of 2001

NABAYI MULTI-PURPOSE CO.....PLAINTIFF

VS

AGRICULTURAL FINANCE CO. LTD.....1ST DEFENDANT

RONALD KILELE.....2ND DEFENDANT

MOSES KHOYA WAFULA.....3RD DEFENDANT

RULING

Nabayi Multipurpose cooperative Society Ltd invoked the provisions of Order XXXIX rules 1,2, 2A and 3 of the Civil Procedure rules to have the defendants restrained from entering, trespassing or occupying the parcel of land known as L.R. NO. 8994/22 Kaptech Farm in Trans Nzoia District. The applicant filed the affidavit of Jestimore Kibunguchi to support the summons.

The applicant has attempted to show that it has a prima facie case with a probability of success by showing that it went into an agreement with defendants to purchase LR No. 8994/22 for Ksh.4,560,000 in which it paid a sum of Ksh.2,052,500/=. It avers that if given time it would settle the outstanding balance. The plaintiff claims that pursuant to agreement it settled its members on the aforesaid parcel of land whereupon they undertook substantial developments to wit building houses, keeping livestock and of course cultivating crops. The applicant now cries foul that any attempt to deprive the plaintiff's members of the land will render them landless. The applicant has expressed fears that the 3rd defendant is likely to evict the applicant's members from the aforesaid land due to the fact that the 3rd defendant had purchased the land on a Public auction on 17th November 2003 from the 1st defendant whom it has accused of selling the land despite signing an agreement with the applicant. The applicant further accused the 1st defendant of acting in bad faith over the deal.

The affidavit in support of Jestimore Kibunguchi had annexures of a copy an agreement between the 2nd defendant, Ronald Kilele and the applicant executed on 21st March 2002. The applicant has also exhibited receipts of evidence of acknowledgment of payment of the outstanding debt due to the 1st defendant.

The observation I make over these annexures, particularly the receipts acknowledging payment issued by the 1st defendant is that all these payments were received on a without prejudice basis. It was therefore wrong for the receipts to be used as evidence in this matter. The deponent of the affidavit in support breached the provisions of Section 23 of the Evidence Act.

The 1st defendant opposed this application by filing a replying affidavit sworn by one D.M. Tunje. The 1st defendant averred that it exercised its power of sale after the 2nd defendant failed to redeem the security despite having received sufficient notice. The 1st defendant claimed that it is incapable of complying with the orders prayed for in the summons because its proprietary interest over the parcel of land passed to the 3rd defendant when he purchased the property on a public auction. It was the submission of Mr. Shivachi for the 1st defendant that the plaintiff's equitable rights could not upstage the 3rd defendant's legal rights.

After considering the rivaling submissions in this matter I have formed the opinion that the applicant has not established a prima facie case with a probability of success. I am not satisfied that the plaintiff would suffer irreparable loss. There is no cogent evidence that the 1st defendant would not be in a

position to refund the amount allegedly paid to it in anticipation to purchase the property in dispute. In any case the plaintiff was not vigilant enough to realise when and how the 1st defendant exercised its statutory power of sale. I am of the view that it would inconvenience the 1st and 2nd defendant more than the plaintiff if this court issued the orders prayed for in the summons.

In the final analysis, I think it would in the best interest of justice and fair play to have the application dismissed. Consequently the chamber summons dated 7th June 2004 is ordered dismissed with costs to the 1st defendant.

DATED AND DELIVERED THIS 13th DAY OF May 2005

J.K. SERGON

JUDGE