



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1252 of 2003**

**PETER KIPYEGEN ROTICH ..... PLAINTIFF**

**VERSUS**

**ELIJAH KIPGENO ARAP BII ..... DEFENDANT**

**RULING**

The applicant herein has moved the Court by way of a Chamber Summons dated 17<sup>th</sup> March 2004 brought under Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He seeks orders as follows:

- 1. That the Defence and counterclaim filed (by the Defendant/Plaintiff in the Counterclaim) on 20<sup>th</sup> January 2004 be struck out.**
- 2. That the Defendant do give vacant possession of L.R. No.Kericho/Kabianga/1824 to the Plaintiff forthwith.**
- 3. That the question of mesne profits sought in the Plaint be set down for assessment.**
- 4. Costs of this application be provided for.**

The application is made on the grounds that the defence and counterclaim are both scandalous, frivolous and vexatious; are an abuse of the process of Court and that they may prejudice, embarrass and delay the fair trial of the action.

The applicant's main grounds are that the defendant has no right to the suit property the same having been extinguished at the public auction held on 20<sup>th</sup> November 2002 at which the Plaintiff bought the suit premises for valuable consideration without notice. The Applicant argues that the circumstances of the case are such that it is fair and just that the orders are made otherwise the defendant shall not vacate the suit land. The applicant contends that if the Defendant has any complaint as to how the public auction was conducted then his claim would lie in damages as against the 1<sup>st</sup> Defendant as chargee and/or the auctioneers.

The Respondent does not deny that an auction did take place but complains that the price paid by the buyer was "inordinately low" and that "The Land Control Board Consent was fraudulently obtained". These are the only grounds contained in the Respondent's Replying affidavit and I will limit myself to them only. For that reason I find that the Respondents authority NYANGILO OCHIENG & OBEL OMUOM –vs- FANNUEL B. OCHIENG, GLADYS OLUOCH & KENYA COMMERCIAL BANK

LTD CIV. APPEAL NO. 148 OF 1995, which dealt entirely on the issue of Notice of Sale is not relevant and does not help the Respondents case.

In his supporting affidavit, the Plaintiff has annexed a copy of the Certificate of Sale issued at the auction as well as a copy of the Title Deed issued subsequent thereto. There is no doubt therefore that a bid was accepted at the sale as required under Section 77 (2) of the Registered Land Act under which the power of sale was exercised leading to the purchase of the suit premises by the Applicant.

No doubt striking out pleadings is a draconian procedure which must be exercised with caution and in very special circumstances. Indeed the striking out of a defence will only be allowed where the defence as filed is unarguable, raises no triable issues and which can easily be recognized as invalid or non-existent in law.

The main defence to the action by the Plaintiff is that the transfer and subsequent registration of the Plaintiff as the owner of the suit premises if any was in

“flagrant disregard of the laid down provisions of

the law; in that

- a) **The defendant has been and continues to be the owner of the said property and has not and is not about to transfer it to any third party**
- b) **The Plaintiff has not stated how he got the suit property registered in his name.”**

The rest of the defence consists of mere denials of material facts and does not in my view amount to a reasonable defence.

As earlier stated, it is not disputed that the Plaintiff purchased the suit premises pursuant to the exercise of a statutory power of sale by the Kenya Commercial Bank to whom the Defendant had charged the property. The Defendant has admitted having been in possession of the property at the time and that he continues to be in possession. According to Section 77 (2) of the Registered Land Act, a chargee becomes entitled to possession of the charged land and becomes entitled to recover such possession upon a bid being accepted at the auction sale. Under Section 77 (3)

**“...any person suffering damage by an  
irregular exercise of the power (of sale)  
shall have his remedy in damages only  
against the person exercising the power.”**

Further, Section 77 (4) provides that

**“Upon registration of the transfer, the interest  
of the charger as described therein shall pass  
to and vest in the transferee freed and discharged  
from all liability on account of the charge....”**

I find that in view of the above provisions, the Respondent cannot claim to have any valid defence to the applicants’ suit his defences being thus ousted by statute. I find that the authorities submitted herein in regard to the operation of Section 77 of the Registered Land Act, in particular the case of HILTON

WALTER NABONGO OSINYA & ANOR –vs- SAVINGS & LOANS & ANOR CIVL. SUIT NO. 582 OF 1998 do support the Plaintiff's case.

This application was made by the Plaintiff only and orders sought can only be construed to have been so sought on behalf of the Plaintiff. Although the 1<sup>st</sup> Defendant in the counterclaim did adopt the Plaintiff's submissions at the hearing I find that in the presence of ground (e) and the provisions of Section 77 (3) I do not think the adoption of the Plaintiff's submissions by Counsel for the 1<sup>st</sup> Defendant goes to disprove the claim for damages which the Defendant has sought in his counterclaim.

Based on my above findings I am of the considered view that the Defence against the Plaintiff is not a valid defence in law, it is scandalous, frivolous and vexatious and an abuse of the process of the Court. On the same premises, the counterclaim too cannot stand as against the Plaintiff. I allow the application and strike out the Defence and counterclaim in as far as the same are in answer to the Plaintiff's claim for possession of L.R. KERICHO/KABIANGA/824. Consequently I grant orders 2 and 3 of the application and award costs to the Plaintiff in any event.

Dated and Delivered at Nairobi this 13<sup>th</sup> day of May 2005

**M.G. Mugo**

**Judge**

***In the presence of:***

***Mrs. Odhiambo for Ojiambo for Applicant***

***Mr. Sumba for Respondent***