

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL SUIT 191 OF 2003

LILIAN NJERI MWANGI.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

This is an application made by the plaintiff under the provisions of **Order VI Rule 13(1)(b)(c)(d) of the Civil Procedure Rules**. She has sought the orders of this court to have the statement of defence filed by the defendant struck out and judgment be entered for the plaintiff as per her plaint. The application is supported by the annexed affidavit of Lilian Njeri Mwangi and the grounds stated on the face of the application. The application is opposed. The defendant has filed grounds in opposition to the application.

At the hearing of the application Mr Githui, Learned Counsel for the plaintiff submitted that the defendant, at one point, did negotiate with the previous owners of the suit land known as **Nakuru/Municipality Block 10/4** for the purposes of purchasing the said suit land. The price was agreed. A consent order was recorded in court in a previous suit between the defendant and the previous owners of the suit land. However the defendant did not abide by the terms of the consent order. They did not pay the purchase consideration. The consent order was later set aside due to the non fulfilment of the terms of the said consent by the defendant. After the setting aside of the consent order, the previous owners of the suit land sold the same to the plaintiff. The said property was transferred to the plaintiff. The plaintiff had acquired title to the said parcel of land. The requisite consents were issue to the plaintiff to enable the said parcel of land to be transferred to the plaintiff.

Mr Githui, Learned Counsel for the plaintiff further submitted that although the defendant acknowledged that the plaintiff was the registered owner of the said suit land, it had refused the plaintiff to develop the said parcel of land claiming that it was a public utility. Learned Counsel submitted that the allegation by the defendant that the said property was a public utility was made in jest and was not backed by any documentation. It was contended on behalf of the plaintiff that the plaintiff had paid all the land rent and land rates due in respect of the said property. The plan of the building intended to be erected on the said suit land had been approved by the defendant, sitting in its full council. It was argued that the plaintiff had established that the said suit property was private property and not a public utility parcel of land as contended by the defendant. The plaintiff further argued that a defence which makes allegation that are contrary to the established facts, especially as relates to the ownership of the suit land, is frivolous and is meant to delay the just conclusion of the case. It was further submitted that the defendant in the affidavit filed in court on the 19th of January 2004 had failed to disclose the full facts of the case in a bid to defeat the course of justice. The plaintiff urged the court to allow the application.

Mr Nyamwange, Learned Counsel for the defendant opposed the application. He submitted that the issue for the determination by the court was whether the statement of defence filed by the defendant was such a sham that this court was obliged to give summary judgment in favour of the plaintiff. He submitted that the suit land was a public utility plot, the same having been acquired by the defendant and compensation paid to the previous owners. Learned Counsel submitted that the transfer of the suit land from previous owners to the plaintiff was suspect; The circumstances of the said transfer could only be determined after viva voce evidence had been adduced and the plaintiff had been cross-examined on the contents of her pleadings. Learned Counsel argued that the defence filed by the defendant raised triable issues which could only be ventilated in a full trial and not by summary proceedings.

In response, Mr Githui submitted that the defendant had admitted that the suit land was private property and not a public utility plot; The defendant did not therefore have a case against the plaintiff.

I have considered the rival arguments made by the counsel for the plaintiff and counsel for the defendant. I have carefully read the pleadings filed by the parties to this application including the annexures to the affidavits filed. The issue for determination by this court is whether the plaintiff has established that it is entitled to the orders prayed to have the defence struck out on the basis of it being a sham and thereafter for judgment to be entered for the plaintiff as prayed in her plaint. Certain facts are not in dispute. It is not disputed that the plaintiff is currently the registered owner of the suit land known as **Nakuru/Municipality Block 10/4**. The plaintiff was so registered on the 8th of November 2002 (See annexed LN5(b)). It is further not disputed that the plaintiff obtained all the requisite consents, including the consent of the Commissioner of Lands, before the said parcel of land was transferred to her. It is further conceded by the plaintiff that prior to being registered as the owner of the said parcel of land, the defendant had made an attempt to acquire the said property from the previous owners. The annexures to the affidavit filed by the defendant's clerk to council on the 19th of January 2004 clearly show that negotiations between the previous owners of the suit land (*a partnership known as Taifa Hotel*) and the defendant over the acquisition of the suit land were successful to the extent that a suit which had been filed in court was compromised by a consent order being filed. It was a fundamental term of the said agreement that the defendant was to pay the purchase consideration of the said suit land of Kshs 405,000/=. There is no proof that after the said consent was entered that the said purchase consideration of Kshs 405,000/= was paid the previous owners. Mr Nyamwange, Learned Counsel for the defendant could not confirm to this court that the said sum of Kshs 405,000/= being the agreed purchase consideration was paid to the previous owners.

The events that took place subsequently thereafter confirms that the defendant did not fulfil its part of the bargain. The consent which had been entered between the previous owners and the defendant was discharged by the court on the 22nd of July 1998 (*see annexure marked "LN 11"*). The previous owners of the suit land were registered as the owners thereof on the 26th of October 1999 (See annexure marked "LN 1"). As the registered owner of the said property, the previous owners of the suit land sold the same to the plaintiff. The transaction received the blessing of the Commissioner of Lands. The requisite consents were sought and obtained. The plaintiff has since purchasing the said suit land paid all the land rates and land rent due. She has paid the land rates to the defendant. She has even prepared a development plan which has been approved by the defendant (*see annexure "LN 7"*). However, when the plaintiff sought to assert her proprietary rights over the said parcel of land by commencing construction of the approved building thereon, she was prevented by the defendant. The defendant claims that the suit land was a public utility plot.

From the facts stated above, it is clear that the suit land is not a public utility property. The suit property is private property. This fact was acknowledged by the defendant itself when it made effort to acquire the same from the previous owners. The defendant could not have acquired what belonged to it or what was a public utility plot. The defendant spurned the chance to own the property. It failed to pay the purchase consideration to the previous owners. It dilly dallied for a period of over fifteen years when it had the opportunity of paying the purchase consideration of Kshs 405,000/= to the previous owners on the strength of a consent order which was entered in court between itself and the said previous owners in 1983. The consent order was subsequently set aside by the court. The previous owners were thereafter registered as the owners of the suit property. They legally transferred the same to the plaintiff. The defendant cannot turn around and claim that the suit land, which it recognised as private property, is now a public utility. From the foregoing it is clear that the defence filed by the defendant is a sham. It is meant to delay the just determination of this suit. It does not raise any triable issues. It was filed purposely to frustrate the plaintiff from enjoying her proprietary rights over the suit land. The defence is consequently struck out and judgment entered for the plaintiff as prayed in her plaint.

This court is aware that it is mandated to have suits determined by hearing viva voce evidence from the disputants instead of determining them by summary proceedings. However, this is one of those clear cases, where this court is certain that to have this case listed for full hearing would not serve any useful purpose. It would amount to delaying the inevitable conclusion of this case in favour of the plaintiff. The

defendant cannot in the circumstances of this case resist the plaintiff's claim.

The plaintiff shall have the costs of the application and also the costs of the main suit.

DATED at NAKURU this 3rd day of June 2005.

L. KIMARU

JUDGE