



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION MILIMANI**

CIVIL CASE 542 OF 2002

STEPHEN ONYAMBU1ST PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY1ST DEFENDANT

CAROLINE W. WANJIHIA2ND DEFENDANT

S.M. GATHOGO.....3RD DEFENDANT

AGNES NDEGWA4TH DEFENDANT

RULING

This is the 1st defendant's application dated 12th August 2003 brought under Order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules.

The 1st defendant seeks an order that; the plaintiff's suit as against 1st defendant be struck out with costs and the 1st defendant's counter-claim proceeds to hearing.

The 1st defendant has based the application on the grounds that:

- the plaintiff's claim is based on a non existent auction and consequently has no basis in law or in fact;
- the 1st defendant validly exercised its statutory power of sale and had the suit property sold by public auction on 3rd October 2001. That the successful purchaser at the auction has since paid the purchase price and has been registered as the proprietor of the leasehold interest,
- the plaint is scandalous, frivolous, vexatious and an abuse of the court process and should be struck out as against the 1st defendant.

Although the plaintiff's counsel was served with the application and the hearing notice there was no attendance on behalf of the plaintiff, nor was there any papers filed in opposition.

The uncontroverted affidavit evidence on behalf of the 1st defendant states that the plaintiff in the plaint alleged that the auction sale was on 6th November 2002, whereas, the sale was on 3rd October 2001. That there was a finding made by Justice Mbaluto in this matter that the plaintiff's claim was based on imaginary auction and therefore the plaint has no 'legs' to stand on and must collapsed; that the plaintiff had not appealed against that ruling; that the 4th defendant, who was successful in bidding at the auction had already been registered as the owner of the suit property.

I have considered the plaint, the defence and the present application and I am satisfied that indeed this is a fit and proper case for dismissal of the plaint for it states the wrong date of auction, and since the 4th defendant has already been registered as the owner, and the suit against her was dismissed by Justice Mbaluto.

I therefore grant the following orders

- (1) That the plaintiff's suit as against the 1st defendant is struck out with costs to the 1st defendant.
- (2) That the 1st defendant is granted leave to proceed to prosecute its counter claim.
- (3) That the costs of the application dated 12th August 2003 are awarded to the 1st defendant as against the plaintiff.

Dated and delivered this 15th day of July 2005.

MARY KASANGO

JUDGE