



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 328 of 2004

DAVID MOSE BICHANGA.....PLAINTIFF

VERSUS

SAVINGS AND LOAN KENYA LTD.....1ST DEFENDANT

JACQUINE OSORO T/A VIGILANT AUCTIONEERS.....2ND DEFENDANT

PETER MAINA NJUGUNA.....3RD DEFENDANT

RULING

The applicant (3rd defendant) filed an application dated 5th July 2005 by way of a notice of motion brought under the provisions of Order XXXV Rule 1(1)(b) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He prayed for summary judgment against the plaintiff with a view to getting vacant possession of premises known as **NAKURU/MUNICIPALITY BLOCK 3/1079** (hereinafter referred to as the suit premises) together with mesne profits at the rate of Kshs.12,000/- per month from March 2004 to date.

The applicant stated that he purchased the suit premises through a public auction on 11th March, 2004 and thereafter had the property registered in his name but the plaintiff had continued to occupy the same unlawfully. The application was supported by the applicant's affidavit. He deposed that the suit premises were advertised for sale by public auction on 23rd February, 2004. The auction was said to have been held on 11th March 2004 and the applicant was declared to be the highest bidder at Kshs.1,000,000/-. He paid a deposit of Kshs.380,000/- and was issued with a memorandum of sale. Thereafter he paid the balance of Kshs.620,000/- and was issued with a certificate of sale, the applicant deposed, and later he obtained consent to transfer from the Commissioner of Lands. On 24th September 2004 a certificate of lease was issued. The applicant deposed that his efforts to get the plaintiff to vacate the suit premises had failed and urged the court to not only grant him vacant possession of the same but also order payment of Kshs.12,000/- per month as mesne profits from March 2004.

The plaintiff stated in his replying affidavit that the applicant was not a *bona fide* purchaser of the suit premises as no auction had ever been done. He said he was at the alleged venue of the auction with five other people and did not see any auction being conducted by the second defendant. He further stated that the suit premises were lawfully his and he had been living there since 1994 to date and that if at all the applicant had purchased the same, he did not try to evict him therefrom. Although he said that he had never been aware of the alleged auction, he acknowledged that the property was advertised for sale and he had thereafter met the second defendant on 10th March 2004 who told him that he would not auction the property as he had not yet found a potential buyer. He said that the auctioneer asked him to attend the scheduled venue of the auction and he was there from 8.00 a.m. to 3.00 p.m. and further alleged that at about 3.30 p.m. the auctioneer told him the auction had been suspended. The plaintiff further lamented that the suit premises were valued at Kshs.2,100,000/- and therefore the auction price of Kshs.1,000,000/-

was a rip off.

This is an application for summary judgment. It is trite law that if a bona fide triable issue is raised, the defendant (respondent) must be given unconditional leave to defend.

In considering whether any triable issues have been raised, the court will consider all the pleadings and affidavits on record. The defendant may even show by oral evidence that he should have leave to defend.

In *MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER* [1988] KLR 1 the Court of Appeal held that the equity of redemption is lost at the fall of the hammer at an auction sale. That can only be so if there was a valid auction that took place. If it is sufficiently shown that a valid auction took place, mortgagor would have no basis in resisting an application for eviction by a purchaser at the auction.

In this matter, the respondent advanced some fairly strong averments on oath to suggest that there was no auction at all that took place on the material day. The averments were directed against the auctioneer, the second defendant who did not swear an affidavit to deny the same. In my view, this is a triable issue and it is appropriate that the respondent be granted unconditional leave to defend.

The claim for mesne profits at the rate of Kshs.12,000/- per month from March, 2004 cannot be allowed summarily because it was not shown how that amount was arrived at.

All in all, I decline to grant summary judgment as prayed and dismiss the third defendant's application with costs.

DATED, SIGNED AND DELIVERED at Nakuru this 9th day of December, 2005.

D. MUSINGA

JUDGE

9/12/2005

Ruling delivered in open court in the presence of Mr. Kisila for the first defendant and holding brief for Singh Gitau for the applicant and Mr. Okeke holding brief for Mr. Machage for the plaintiff/respondent.

D. MUSINGA

JUDGE

9/12/2005