



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL CASE NO. 1194 OF 2001**

**NISHIT BIKHUBHAI SHAH ..... PLAINTIFF**

**VERSUS**

**KIRIT BABULAL BAKRANIA ..... DEFENDANT**

**RULING**

By his Application of the 10th December, 2001 the Plaintiff seeks an order for summary Judgment against the Defendant and that the Defendant's counterclaim be struck out.

The Application is supported by the Plaintiff's affidavit in support and is based on the grounds that the Defence does not raise triable issues and the counter-claims is an abuse of the process of the court.

The suit filed claims an order for

- (a) Vacant possession of the suit premises and
- (b) Damages for trespass at Shs.18,00/= from the 8/12/1995 until possession is given. I presume this is a daily rate.

The Plaintiff is the registered owner of the suit premises by virtue of an Indenture of Assignment dated the 5/12/1995.

The Plaintiff in paragraph 5 alleges that the vendor of the suit premises had permitted the Defendant's father to occupy the premises as a licensee.

It is also alleged in the Plaintiff's Affidavit that the Defendant was given notice to vacate the suit premises and having failed to do so is a trespasser.

O.35 rule 1(b) provides for summary Judgment to be given against a person who is a trespasser.

Is the Defendant a trespasser or does he have any lawful right to remain on the suit premises.

The Defence in paragraph 3 does not admit that the Plaintiff is the owners and entitled to possession of the suit premises. I do not see that the Defendant has any right to question the Plaintiff title to the property, which is properly registered in the Plaintiff's name pursuant to the provisions of the Government Land Act

The question of whether the Plaintiff is entitled to possession rather depends on the nature of the Defendants' right, if any, to remain in possession of the suit premises.

In paragraph 5 of the Defence the Defendant alleges that the attempt to remove him from possession of the suit premises breaches a trust, which is, set out on paragraph 9, 10 and 11 of the counterclaim.

The counterclaim seeks and declaration that the Plaintiff holds the suit premises in trust for the Defendant and his Brother who is not a party to the suit. Other relief is sought postulated on the basis that there is a trust as alleged.

Annexed to the Defendant's affidavit in Reply two agreements dated 1/7/1974 and 19/3/1993 respectively. As Mr. Chacha Odero rightly points out there are unstamped and unadmitted in evidence until stamped. In my discretion I will allow the Defendant's advocate to stay these documents on their undertaking to do so within 14 days from to-day and submit the duly stamped copies to the court.

In so far as these agreements purport to give the Defendant an interest on the property the same have not been enforced. However the question remains do these agreements create an equity in the Defendant over the suit premises which is binding on the Plaintiff.

That is not a question for me to answer now but is an issue, if valid, which is to be determined at the hearing of the suit.

The Plaintiff claims that the Defendant's father was a licensee in the suit premises and that the Defendant is now trespasser.

The Defendant on the other hand alleges that the Plaintiff was aware of the Defendant's status in the suit premises and has fraudulently colluded with the vendor to defeat the Defendant's right to be in the property.

Neither Counsel referred to the Indenture Transfer of property Act. In Mulla the Transfer of property Act 9th Edition page 56 the following passage from a Judgment of Lord Kingsdown in the case of Barnhart V. Greenshields (1853) 9 Moo P.C. 18/32 is cited.

“With respect to the effect of possession merely, we take the law to be that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenants extends not only to interests connected with his tenancy, as in Taylor V Stibbert, but

also to interests under collateral agreements, as in Daniel v Davison and Alien v Anthony, the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is, or to give effects to it, whatever it may be.”

See also right of buyers under section 55 of 1(f) of the Transfer of Property Act. The Principles determining whether or not a Defence is shown or leadings unsustainable is well settled. In the case of Provincial Insurance Company E.A Ltd versus Kivuti C.A No.261 of 1996 the Court of Appeal in a Judgment stated at page 4 and 5 as follows:-

“ Whilst a Judge of the superior court is bound to carefully consider any summary judgment or striking out application he ought to, when specific bona fide triable issues are raised, give unconditional leave

to defend. We are unable to say that in the instant case the issues raised were not worthy of consideration at trial”

In the result as the status of the Defendant in the suit premises has been challenged I hold that this a triable issue which must be determined in a full hearing, and as such dismiss this application with costs to the Respondent.

I would add that the Defendant's advocates do not appear to have addressed their minds properly to the issues arising in this case and should consider amending their pleadings and if necessary applying to form other necessary parties to this suit.

Dated and delivered at Nairobi this 7th day of May 2004

**P.J. RANSLEY**

**JUDGE**