



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 390 OF 2004**

RITA NALIAKAPLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED1ST DEFENDANT

J.K. HORERIA T/A HORERIA & COMPANY2ND DEFENDANT

RULING

The second defendant has moved this court by way of a Notice of Motion brought under Order 6 Rule 13 (b) (c) and (d) and Order 35 Rule 1 (b) of the Civil Procedure Rules, Section 77 of the Registered Land Act and Section 3 A of the Civil Procedure Act.

The second defendant seeks the striking out of the Plaintiff's suit as against him and for judgment as prayed in the counter claim.

When the application was called out in court counsel representing the 1st defendant informed the court that the 1st defendant did not oppose the application. The counsel appearing for the plaintiff was unsuccessful in her application for an adjournment.

By the time the matter began to be heard both counsels for the plaintiff and the 1st defendant were not in court and accordingly the 2nd defendants application proceeded ex parte.

The second defendant deponed that he purchased the suit property at a legally constituted auction where being a bona fide purchaser he acquired an indefeasible title. He said that despite that purchase he had been unable to gain actual possession of the said property because the plaintiff has remained in possession thereof.

The second defendant's counsel in submission stated that the plaintiff lost the right to redeem the suit property and her continued occupation thereof without the 2nd defendant's permission is trespass. That the Plaintiff's plaint raises no bona fide triable issues against the second defendant.

It is noteworthy that the plaintiff despite being served has not filed any papers in opposition to the present application.

I have perused the plaintiff's plaint and although it mentions fraud, it does not give particulars of fraud but instead gives particulars of malice and bad faith. The final prayers of that plaint claim for firstly a declaration that the equity of redemption has not extinguished; secondly for an injunction to restrain the

defendant's purported purchase and thirdly, that prayer I could not decipher it accordingly I will reproduce it hereof as follows:

“A declaration that the intended Registration of the invalid transfer on behalf of a Third Party by the 2nd Defendant is illegal.”

In regard to the Plaintiff's first prayer it is defeated by the 2nd defendant's authority; **MBUTHIA – V – JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) KLR 1.**

The 5th holding states as follows: -

“As regards this case involved land registered under the Registered Land Act, the equity of redemption was lost at the fall of the hammer at the auction sale, unless the mortgagee wish to set aside the sale for non- payment of the price.”

It follows from the above that the Plaintiff lost her equity of redemption and having done so the other two prayers in the Plaint are unattainable. I agree with the 2nd defendant that the Plaintiff does not raise triable issues that can go to trial and accordingly I will order that the plaint be struck out.

On the converse the 2nd defendant has raised a bona fide claim against the plaintiff and from counsel's submission and from the affidavit evidence the claim is indeed merited. I note that the plaintiff has not to date filed a defence to the counter claim.

The orders of this court are as follows: -

- (1) That the Plaintiff's plaint filed on 16th July 2004 is dismissed as against the 2nd defendant with costs to the 2nd defendant.**
- (2) That the 2nd defendants counter-claim filed in court on 2nd August 2004 is granted as prayed.**
- (3) That the costs of the application dated 4th October 2004 are awarded to the 2nd defendant.**

Dated and delivered this 12th day of November 2004.

MARY KASANGO

AG JUDGE