



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. E136 OF 2020**

**DANIEL KIPSANG TANUI.....PLAINTIFF**

**VERSUS**

**GREEN SYSTEMS AFRICA LIMITED.....DEFENDANT**

**RULING**

What is before this court is the Plaintiff's application dated 9th October, 2020 seeking for the following orders;

1. Spent.
2. THAT summary Judgment be entered for the Plaintiff against the Defendant in terms of prayer (a) of the Plaint.
3. THAT the costs of this application be awarded to the Plaintiff.

The application is brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the Plaintiff on 9<sup>th</sup> October, 2020. The Plaintiff has averred that he is the lawful registered proprietor of all that parcel of land known as Apartment No.2, First Floor, Block B erected on Title Number I.R 146380, L.R No.209/20672 situated in Upper Hill, Nairobi (hereinafter referred to only as "the suit property"). The Plaintiff has averred that he purchased the suit property at a public auction that was conducted by James Mungai Gikonyo t/a Garam Investment Auctioneers on 12<sup>th</sup> March, 2019 on behalf of HFC Limited. The Plaintiff has averred that the Defendant who was the registered owner of the suit property had charged the same to HFC Limited to secure a loan that was advanced to it and that HFC Limited sold the suit property through the said auctioneer in exercise of its Statutory Power of Sale as chargee after the Defendant defaulted in its loan repayment obligations to HFC Limited. The Plaintiff has averred that he purchased the suit property at a consideration of Kshs. 18,800,000/=. The Plaintiff has averred that he purchased the suit property through a bank loan which he is repaying in monthly instalments of Kshs. 354,400.65/=. The Plaintiff has averred that he has not earned any income from the suit property since the same was transferred into his name.

In his written submissions, the Plaintiff has submitted that he has established his title to the suit property. The Plaintiff has submitted further that he has also demonstrated that he served the Defendant with a notice to vacate the suit property and that the Defendant failed to do so. The Plaintiff has submitted that the Defendant has not placed any material before the court in support of its contention that it is the owner of the suit property.

The application is opposed by the Defendant through a replying affidavit sworn by Naomi Wambui Ndiangui on 11<sup>th</sup> November, 2020. The Defendant has averred that the suit property was illegally sold by the HFC Limited on 12<sup>th</sup> March, 2010. The Defendant has averred that the Plaintiff connived and colluded with HFC Limited in the illegal and fraudulent sale of the suit property. The Defendant has averred further that it has filed an application to join HFC Limited as a Third Party in this suit. The Defendant has contended that HFC Limited served it with a defective statutory notice and also failed to take into account or acknowledge receipt of Kshs. 996,359.88/- and Kshs. 1,999,269.21/- that it paid into its loan account on 6<sup>th</sup> November, 2018 and 25<sup>th</sup> January, 2019 respectively. The Defendant has contended further that HFC Limited breached the provisions of section 90 of the Land Act, 2012 and Rule 16 of the Auctioneers Rules by purporting to conduct a public auction on 12<sup>th</sup> March, 2019 without the 14 days advertisement of the auction on a daily newspaper with wide circulation. The Defendant has contended that the HFC Limited conspired with the Plaintiff to transfer the suit property to the Plaintiff on 24<sup>th</sup> January, 2020 while there was a court order in force stopping the same. The Defendant has contended further that the HFC Limited also colluded with the Plaintiff to undervalue the suit property to ensure that the same was sold at Kshs.18, 800,000/= to the Plaintiff. The Defendant has averred that its director was residing on the suit property with her family and as such if the orders sought are granted she will be rendered homeless.

In its submissions, the Defendant has argued that its statement of defence raises triable issues which should go to trial. The Defendant has submitted that this is not an appropriate case to enter summary judgment. The Defendant has submitted that even a single triable issue entitles a defendant to defend a suit. The Defendant has admitted that it had instituted other proceedings against HFC Limited in the subordinate court and the High Court. He has contended however that the lower court suit abated while the High Court proceedings were overtaken by events when the court declined to grant it an injunction pending appeal. The Defendant has cited the following cases among

others in support of its submissions; Commercial Advertising & General Agencies Ltd v Qureishi [1985] 458, Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR, Moi University v Vishva Builders Limited, Civil Appeal No.296 o 2004(unreported) and Gupta v Continental Builders Ltd [1976-80] 1 KLR 809.

#### Determination.

The only issue arising for determination in this application is whether the Plaintiff has met the threshold for summary judgment. Order 36 (1) of the Civil Procedure Rules, 2010 under which the application is brought provides as follows:

**In all suits where a plaintiff seeks judgment for—**

**(a) a liquidated demand with or without interest; or**

**(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**

**where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.**

In Taylor v Bolus (1981) KLR 536, it was held that:

**“It is an established principle of law that where the Plaintiff’s claim is undoubted and clear and the defence is only a sham or a spurious one, the court would grant summary judgment as prayed and where the Defendant demonstrates a fairly arguable case or show triable issue, summary judgment would not issue and he must be given leave to defend.”**

In Zola v Ralli Bros. Ltd. [1969] E. A. 691, the court stated as follows at page 694:

**“Order XXXV (now order 36) is intended to enable the Plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment.”**

In Commercial Advertising and General Agencies Ltd. v. Qureishi [1985]KLR 458, it was held that:

**“Summary Judgment is granted subject to there being no bona fide triable issue entitling a defendant to leave to defend. If a bona fide triable issue is raised, the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham”.**

In Industrial and Commercial Development Corporation v Daber Enterprises Limited [2000] eKLR, it was held that:

**“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross examination - see the case of Wenlock v. Moloney and Others, [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable - see the cases of Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (In Liquidation), [1990] 1 W.L.R. 153, 158 and Balli Trading v. Afalona Shipping, The Coral, [1993 1 Lloyd's Rep. 1, C.A. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition - see the case of Jacobs v. Booth's Distillery Co., (1901) L.T. 262 H.L.”**

The onus was upon the Defendant to show that it has a defence to the Plaintiff’s claim which it should be allowed to put forward at the trial. The Plaintiff’s case is straight forward. The Plaintiff purchased the suit property from HFC Limited at Kshs. 18,800,000/=. HFC Limited sold the suit property by public auction in exercise of its statutory power of sale. The Plaintiff purchased the suit property at the auction. The Plaintiff paid the purchase price in full after which the suit property was transferred to him. Even after being registered as the proprietor of the suit property in February, 2020, the Plaintiff who purchased the suit property using a bank loan has not obtained possession of the suit property. The Defendant’s director who is in occupation has refused to vacate the same claiming that the property is still owned by the Defendant.

The Defendant has not convinced me that it has an arguable defence to the Plaintiff’s claim. The Defendant has not persuaded me that the Plaintiff was involved in any illegality or act of fraud in the purchase of the suit property. All the allegations of irregularities, illegalities and fraud made by the Defendant are against HFC Limited. The Defendant instituted a suit in the subordinate court against HFC Limited in relation to the sale of the suit property. The Defendant abandoned that suit when it failed to obtain an injunction to restrain the transfer of the suit property. The Defendant preferred an appeal against the decision of the subordinate court to the High Court. That appeal was similarly abandoned by the Defendant when the High Court declined to grant to the Defendant an order of injunction restraining the transfer of the suit

property to the Plaintiff pending the hearing of the appeal.

There is now no pending suit by the Defendant against HFC Limited concerning the sale of the suit property to the Plaintiff or at all. HFC Limited is not a party to this suit. The Defendant has contended that it has a pending application seeking to join HFC Limited as a third party to this suit. I have perused the draft third party notice attached to the Defendant's application for leave to join HFC Limited as a third party to the suit. I have noted that the Defendant has sought among others compensation for the loss of the suit property in the sum of Kshs. 35,000,000/=. The Defendant is yet to obtain leave to join HFC Limited to the suit as a third party. I am of the view that the fact that the Defendant has a claim against HFC Limited for indemnity and compensation which it intends to pursue through a third party notice is not a defence to the Plaintiff's claim. I have perused the Defendant's statement of defence and counter-claim on record. The Defendant has made allegations of collusion and connivance against the Plaintiff in the sale of the suit property. No evidence has been placed before the court showing that the Plaintiff who purchased the suit property at a public auction was involved in any wrong doing. I do not think that mere allegations of fraud and collusion without any basis being laid for the same should entitle the Defendant to defend the suit.

Due to the foregoing, it is my finding that the Defendant has no defence to the Plaintiff's claim. In the circumstances, the Plaintiff is entitled to summary judgment. I therefore allow the Plaintiff's Notice of Motion application dated 9<sup>th</sup> October, 2020 and make the following orders;

1. The Defendant, its Servants and/or agents shall vacate forthwith the premises known as Apartment No.2, First Floor, Block B, erected on Title Number I.R 146380, L.R No. 209/ 20672 and in any event not later than 30<sup>th</sup> November, 2021 in default of which warrants shall issue for the forceful eviction of the Defendant from the premises.
2. The Plaintiff shall have the costs of the application while the costs of the suit shall await the determination of the other reliefs sought by the plaintiff in the plaint.

**DELIVERED AND DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Nyabenge h/b for Mr. Bundotich for the Plaintiff

Mr. Shiku for the Defendant

Ms. C.Nyokabi-Court Assistant