



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 895 of 2012**

**JOHNSTONE AMULIOTO AYUB.....PLAINTIFF**

**VS**

**PETER MWANGI NJUGUNA.....DEFENDANT**

***(Application for summary judgment; plaintiff having bought suit land by way of public auction and having become registered proprietor; suit by plaintiff seeking orders to have the previous owner/chargor evicted; whether the defendant has a defence that raises triable issues to entitle him to leave to defend; whether application for summary judgment merited; application allowed)***

**RULING**

I have before me a Motion dated 10 August 2012 filed by the plaintiff. The same is brought under the provisions of Order 36 (1) (b) of the Civil Procedure Rules, 2010. It is an application that seeks the following prayers :-

- (1) *That summary judgment be entered in favour of the plaintiff/applicant in terms of the plaint.*
- (2) *That the costs of this application be borne by the defendant/respondent.*

The grounds upon which the application is brought are that :-

- (a) *The applicant bought the suit parcel at an auction.*
- (b) *The defendant has failed to hand over vacant possession.*
- (c) *The defendant is thereby a trespasser on the land his title having been extinguished by the sale.*

The application is supported by the affidavit of the plaintiff and is opposed by the defendant who has filed a replying affidavit.

This suit was commenced by way of plaint filed on 4 July 2012. It is pleaded in the plaint that the plaintiff on the 13 January 2012 bought the land parcel Moi's Bridge/ Ziwa Block 16 (Chebarus)/114 through a public auction. The suit land was initially owned by the defendant who had charged it to Equity Bank Ltd to secure some financial accommodation. He defaulted, and the bank as chargee, put up the property for sale in exercise of its statutory power of sale. The sale was held by way of public auction on 13 January 2012 and the plaintiff bought the suit land. It is pleaded that the plaintiff paid the full purchase price and the property was then transferred to him and is now registered in his name. The plaintiff has sought orders of vacant possession of the property and in the alternative eviction of the defendant from the suit land.

In his supporting affidavit to this application, the plaintiff has displayed the advertisement for the auction sale, the memorandum of sale and the certificate of title indicating that the suit land was transferred to the him on 22 March 2012.

The defendant upon being served with summons entered appearance on 19 July 2012 through the firm of M/s Simiyu Wafula & Co Advocates. No defence was filed and on 13 August 2012 the plaintiff filed this application for summary judgment.

In his response, the defendant has deponed that the application for summary judgment ought not to be allowed as he has a good defence to the plaintiff's claim which raises triable issues. He has annexed a draft defence to his affidavit, where he has denied everything in the plaint; the draft defence also contains a proposed counterclaim. In the proposed counterclaim, the defendant intends to plead that there was a breach of contract between himself and Equity Bank Ltd. He has proposed to seek the following orders in his counterclaim.

*(a) A declaration that the auction done on 13/1/2012 be declared null and void.*

*(b) A declaration that the instrument and/or charge created on 6/3/2010 was breached.*

*(c) An order to rectify the title to the suit land from the 1st defendant to the plaintiff.*

*(d) Damages for breach of contract and conversion.*

*(e) Cost of this Defence and counterclaim.*

The application was canvassed before me on 30 April 2013. Only Miss. C.N. Mufutu, counsel for the applicant was present. Counsel for the respondent did not appear although he was duly served.

Miss. Mufutu urged me to allow the application and relied upon the grounds and the affidavit in support. She asserted that the plaintiff is now the owner of the suit land after transfer of the same to himself by the chargee. She averred that the defendant is a trespasser and can have no defence to the plaintiff's claim. She urged me to allow the application.

I have considered the application and the submissions of counsel. Summary procedure is provided for under Order 36 of the Civil Procedure Rules 2010. The situations in which summary procedure is available are set out in Order 36 Rule 1 which provides as follows :-

*(1) 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.*

*(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.*

*(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.*

It will be discerned from the above provision that summary procedure is only available in three types of cases. The first is where the suit is for a liquidated demand. The second is an action by a landlord to

recover land from a tenant and the third is an action to recover land from a trespasser. The court has no jurisdiction to entertain an application for summary judgment save for these three situations. It will also be observed, although it is not material in our instance, that such application can only be made where the defendant has appeared but has not yet filed defence. It means that where there is a defence on record, the court has no jurisdiction to entertain an application for summary judgement.

The strongest attack available to a defendant faced with an application for summary judgment, is to demonstrate that he has a defence that raises triable issues and that he ought to be granted leave to defend the suit. This in most cases will be demonstrated by annexing a draft defence to the replying affidavit.

In as much as summary procedure is provided for, it is a procedure that ought to be sparingly used and only in the clearest of cases. If the defendant demonstrates that he has a defence that raises triable issues, then he ought to be given leave to defend.

In our instance, there is no doubt that the plaintiff bought the suit land at an auction that was arranged by Equity Bank Ltd as chargee. The transfer of the suit land has already been effected and the plaintiff is now the registered proprietor thereof. Does the defendant have any defence to the plaintiff's claim to the land? I think not.

The auction sale and the transfer to the plaintiff of the suit land took place when the Registered Land Act (CAP 300) (now repealed) was still in force. The operative provision was Section 77 (3) of the RLA. The same provided that :-

*S.77 (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.*

The only remedy of an aggrieved chargor where the statutory power of sale has been conducted was, and still remains, a remedy for damages against the chargee. The chargor has no remedy against the purchaser. Therefore if at all the defendant is aggrieved by the sale, his remedy is against Equity Bank Limited and not against the plaintiff. The defendant cannot sustain any sort of counterclaim against the plaintiff and neither can he recover the land from the plaintiff who is a bona fide purchaser for value. His remedy is only in damages as his equity of redemption is now extinguished and he cannot obtain the order to nullify the auction sale. Neither can an order be made to rectify the title to the suit land to have it transferred back to the defendant. If at all the defendant is serious about filing suit against the Chargee then he can do so but without the involvement of the plaintiff herein. In summary, I am not satisfied that leave to defend ought to be given to the defendant as he has not raised any triable issue as against the plaintiff.

I am not in doubt that the plaintiff's case is as clear as a case can get. He has an open and shut case against the defendant. In the premises I do not hesitate to enter summary judgement in favour of the plaintiff as prayed in the plaint. I therefore order the defendant to forthwith vacate the suit premises, and must do so, no later than 7 days upon service of this decree upon himself. If he does not so vacate then the plaintiff is at liberty to apply for an order of eviction in execution of the decree. The plaintiff shall also have the costs of this application and of the suit.

It is so ordered.

DATED and DELIVERED THIS 2ND DAY OF MAY 2013

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT & LAND COURT AT ELDORET**

Ruling delivered in the presence of :-

Mr. Y.M. Barasa advocate holding brief for Miss. C.N. Mufutu of M/s Manani Lilan & Co Advocates for the plaintiff/applicant.

No Appearance on the part of M/s Simiyu Wafula & Co Advocates for the defendant/respondent.