



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Civil Case 20 of 2007

BENARD CHEPKWONY MUTAIPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD 1ST DEFENDANT

PROF. PAUL K. RONO2ND DEFENDANT

RUTH CHEPKOECH RONO3RD DEFENDANT

RULING NO. 2

Application dated 8th November, 2007 to strike out the Plaintiff and enter summary judgment on counter –claim Order VI rule 13 B,C & D cpr Section 3A of Civil Procedure Act

I: Procedure

1. Parties in this application are

a) **Benard Chepkwony Mutai – Plaintiff/Respondent.**

The original registered owner of Land Parcel LR.NO. 8938/88 Registration of titles Act Cap 281, Laws of Kenya Bomet Municipality measuring 1.794 hectares. Premises used as an Education Institution.

b) **Housing Finance Co. of Kenya Ltd – 1st defendant/respondent who mortgage premises in favuor of Respondent for Kshs. 6 million.**

c) **Prof. P.K. Rono & Prof Ms. R.C. Rono –**

2nd and 3rd defendant/applicants who brought property from 1st defendant.

2. The Plaintiff/Respondent charged his property on 23rd July, 1998 with the 1st defendant. It is alleged that he was unable to pay the said loan. The 1st defendant alleges that he exercised his rights of sale duly exercised so by the 1st defendant to sell the property to 2nd and 3rd defendants.

3. The plaintiff/respondent alleged the sale was a fraud and filed this current suit on 12th march, 2007. He also filed an application for an injunction on 12th March, 2007 which application came before Koome J. The Hon. Judge in her ruling of 8th June, 2007 dismissed the application for injunction restraining the 2nd and 3rd defendant from interfering with the quite possession of the 1st defendant pending the determination of the suit. The Hon. Judge gave reasons for such dismissal inter –alia due to multiplicity of suits having been field but not disclosed to the court.

4. Namely

aa) HCCC 168/01 filed by the plaintiff in Nakuru.

An injunction application was refused and dismissed on 1st October, 2001. The suit was finally dismissed for lack of prosecution.

bb) The Plaintiff filed HCCC. 1/07 at Kisii.

The suit was transferred to Kericho and a new file number given being HCCC. 4/07. This suit was then withdrawn.

cc) HCCC. 20/07 filed by the plaintiff being this current suit.

While this suit was pending Defendant 2 and 3 filed a new suit being HCCC. 46/07.

dd) HCCC. 46/07 was a case seeking eviction order from the premises of the plaintiffs.

This suit was withdrawn by 2nd and 3rd defendants on 13th May, 2009.

5. The position of this current suit was that the plaintiff/respondent being aggrieved with the decision of Koome J filed a Notice of appeal on the said ruling. A further application to the Court of Appeal by the Plaintiff/Respondent was filed seeking stay of execution of the orders of Koome J pending appeal to the Court of Appeal. This application being reported in the case of **Bernard Chepkwony Mutai v HFCK Ltd and 2 others CA 223/07 (Tunoi, Githinji – Onyango Otieno JJa)**

The Court of Appeal considered the application and rejected the same. The main appeal pending now is that of the refusal by Koome J to issue an injunction.

6. The main suit in this file may proceed to hearing regardless of the Court of Appeal. Instead the 2nd and 3rd defendant have now both filed an application dated 8th November, 2007 seeking to struck out the Plaint and enter summary judgment on the counter-claim **order VI rule 13, B, C & D Civil Procedure Rules. Section 3A of the Civil Procedure Act** which is the subject of the ruling herein.

7. I wish to just state at this juncture that the only suit now pending between the parties is this current one. Though this is a commercial transaction, it touches on land that has a limitation of action of twelve (12) years from when the cause of action arose. The effect of withdrawing a suit and filing a new one under **order XXIV r 2(2) Civil Procedure Rules** means a suit may be so filed on condition that it is within the limitation of action period.

III: Application dated 8th November, 2007

8. I sympathize with the 2nd and 3rd defendant/applicants. Their arguments has always been that they purchased the property as required by law because the plaintiff/respondent was unable to repay back his loan. On 10th January, 2006 the property was transferred to the two of them. Both are unable to enjoy the property as the Plaintiff/respondent is still in possession. Both are repaying back a loan to the same mortgage company.

9. They bring their application under **order VI r 13 B, C & D Civil Procedure Rules** stating that this Court should struck out the Plaint as being an abuse of the Court, and frivolous, scandalous, vexatious, prejudice and embarrassment.

10. They further sought for a summary judgment to their counter –claim and asked if the said claim may be allowed, namely, of evicting the Plaintiff from the premises. There was no merit in his case.

11. The defendant case, in reply had always been that he was being depended of his property because of fraud between 1st defendant and the 2nd and 3rd defendant. This is noted by the transfer transaction in the transfer agreement that the 2nd and 3rd defendant did not use independent moneys to purchase the property but the very same funds belonging to HFCK to purchase the property.

12. The issue of summary judgment must be in the very clearest terms. Under **order VI r 13 Civil Procedure Rules**, the application is discretionary upon the court. The problem in this case is that the parties have never gone to trail. Both parties require to be heard. Even if per chance this court would allow the application, which it does not, 2nd and 3rd

defendants must give evidence in court by way of formal proof. The authorities relied on deal with the **Registration Land Act Cap 300** and not with the **Registration of Titles Act Cap 280** Laws of Kenya.

13. As it stands I decline to allow the application but order that the parties move with haste to bring this matter to trial and full conclusion by way of a full hearing.

14. I dismiss the application with costs to the respondents.

DATED this 3rd day of June, 2009 at **KERICHO**

M.A.ANG'AWA

JUDGE

Advocate

K.B. Murimi advocate instructed by M/S Mukite Musangi & Co. advocate for the 1st defendant and instructed to hold brief for M/S Sigh Gitau & Co. advocates for the 2nd and 3rd defendants/applicants – present

K. Ochieng advocate instructed by M/S Sila Munyao & Co. advocates for the Plaintiff/Respondent – present