



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CIVIL SUIT NO. 1082 OF 2013 (OS)**  
**IN THE MATTER OF DELIVERY OF POSSESSION OF**  
**LAND REFERENCE NO 7158/539**

**BETWEEN**

**FIDELITY COMMERCIAL BANK LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**HITEN SHANTILAL SHAH.....DEFENDANT/RESPONDENT**

**R U L I N G**

**Introduction**

1. On 11/9/2013, the plaintiff took out an originating summons dated 9/9/2013 seeking the following orders:-

**a. That the plaintiff/applicant is entitled to vacant possession of L R No 7159/539, Nairobi, to facilitate the completion of the exercise of its statutory power of sale.**

**b. That the defendant/respondent by himself, tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession of L R No 7158/539, Nairobi, to the Plaintiff/applicant and/or the appointed agent.**

**c. That the defendant/respondent, his servant, agents or any other occupants be forcefully evicted from the subject premises should they fail to deliver vacant possession within fourteen (14) days from the date of the order of this honourable court.**

**d. The defendant/respondent do bear the costs of this application.**

2. The above orders are sought on the ground that the plaintiff disposed the suit property in exercise of its statutory power of sale but the defendant has declined to give up vacant possession of the suit property. The instrument of transfer attached to the originating summons indicates that the suit property was transferred to M/s Dong Fang Development Company Limited on 18/3/2013.

3. On 1/4/2014, the defendant filed a replying affidavit opposing the originating summons on the ground that: (i) the plaintiff has no proprietary interest in the suit property and has no *locus standi* to seek vacant possession thereof; (ii) upon sale and transfer of the suit property to a third party, the mortgagor/mortgagee relation between the parties herein was extinguished hence the plaintiff cannot

invoke the provisions of Order 37 rule 4 of the Civil Procedure Rules; and (iii) there being **Milimani HCCC No. 308 of 2013 Fidelity Commercial Bank Ltd v Hiten Shantilal Shah** in respect of the same subject matter, this suit is statute- barred under Section 6 of the Civil Procedure Act.

4. The above grounds were canvassed as a preliminary objection before Nyamweya J in the year 2015. On 19/7/2017 this File was before the Deputy Registrar of the Environment and Land Court, Hon Isabel Barasa, who listed it for mention before this Court on 21/11/2014. On 21/11/17, Ms Koki, counsel for the plaintiff appeared before this court and urged the court to render a ruling on the preliminary objection. That preliminary objection is the subject of this ruling.

### **Grounds of Objection**

5. The first ground of objection is that the originating summons taken by the plaintiff is incompetent because currently there is no subsisting charge or mortgage hence the plaintiff has no legal basis for taking out the originating summons. Secondly, the defendant argues that the issues for adjudication and determination in this suit are contested and complex and the platform of an originating summon is not available to the plaintiff. The third ground raised by the defendant is that the plaintiff having exercised the statutory power of sale, it no longer has a proprietary interest in the suit property. The defendant further argues that the mortgagor – mortgagee relation between the parties in this suit stood extinguished upon sale of the suit property. The fourth ground of objection is that there being in existence **Nairobi HCC No. 308 of 2013 Fidelity Commercial Bank Limited v Hiten Shautilala Shah**, the plaintiff herein is under the doctrine of *les pendency* prohibited against seeking vacant possession of the suit property. In this regard, the defendant relies on **Sections 107 of the Land Registration Act and Section 162(1) of the Land Act**.

6. The fifth ground of preliminary objection raised by the defendant is that because there subsists **Nairobi HCC 308/2013 Fidelity Commercial Bank Limited v Hiten Shantilal Shah** involving the same parties and relating to the same suit property, the present suit is statute barred by Section 6 of the Civil Procedure Act.

7. The defendant relies on the following cases to buttress his objection (i) **Floriculture International Limited v Central Limited, [1995-1998] 1EA 57**; (ii) **Kibutiri v Kibutiri [1983] eKLR**; (iii) **Re Giles (2) [1890]43 Ch.D391**; (iv) **Kulsumbai v Abdulhussein [1957] EA 699**; (v) **Carol Silcock v Kassim Shariff Mohammed [2013] eKLR** (vi) **Salome Wambui Njau v Caroline Wangui Kiguru [2013] eKLR**; and (vii) **Phoenix properties Limited v Equip Agencies & 6 others [2006] eKLR**.

### **Plaintiff's Response**

8. The plaintiff filed written submission dated 27/4/2015. The first ground of attack against the preliminary objection is that the matters raised by the defendant are not preliminary points because, in the plaintiff's view, there is no question of law attached to them.

9. On the contention that the plaintiff has no *locus standi* because he sold the suit property to someone else, the plaintiff contends that the plaintiff has an obligation to hand over vacant possession to the registered owners in compliance with the conditions of sale. The plaintiff argues that a charge has two elements: privity of contract; and privity of estate, and that privity of estate, still exists in the present suit.

10. On the defendant's contention that the plaintiff lacks *locus standi* to take out an originating summons under **order 37 rule 4 of the Civil Procedure Rule**, the plaintiff contends that because the plaintiff seeks vacant possession, he is properly entitled to take out an origination summons.

11. On the defendant's contention that this suit offends **Sections 6 of the Civil Procedure Act**, the plaintiff argued that the cause of action in the present suit is not the same as the cause of action in **Milimani HCCC No. 308 of 2013** because in the present suit the plaintiff seeks vacant possession while in the other suit the plaintiff seeks to recover balance of the loan amount.

12. Lastly, the plaintiff submits that the jurisdiction to strike out pleadings ought to be exercised cautiously and with a lot of restraint. The plaintiff relies on the following cases (i) **Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696**; (ii) **Pacis Insurance Company Limited v Gabriel Muthoma Kithika [2014] eKLR**, (iii) **Total Fedha Service station v Nairobi Water Conservation & Pipeline Corporation [2014] eKLR**, (iv) **James Kimani Kabogo v Kenya Commercial Bank Limited & Another [2014] eKLR**; and (v) **DT Dobie & Co. Limited v Muchina [1982] KLR**. The plaintiff urged the court to dismiss the preliminary objection.

### **Determination**

13. The first question that emerges for determination beforehand is whether the matters raised by way of preliminary objection satisfy the essential elements of a preliminary objection. A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose the suit [**Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696**]. A matter ceases to be a preliminary point of law if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

14. I have carefully interrogated each of the grounds put forth by the defendant. Broadly, there are two grounds raised, which in my view, satisfy the essential features of a preliminary objection. The first ground relates to the question on whether the plaintiff has *locus standi* to take out an originating summons under **Order 37 Rule 4** of the **Civil Procedure Rules**. The second ground relates to the question on whether this suit is statute-barred under **Section 6** of the **Civil Procedure Rules** by dint of the fact that there exists **Nairobi HCCC No. 308/2013**. In my view, the other grounds raised in the Preliminary Objection would require further interrogation and ascertainment by way evidence.

15. The defendant's contention is that the plaintiff is not a mortgagee within the definition of **Order 32 Rule 4** of the **Civil Procedure Rules** because it exercised its statutory power of sale, discharged the suit property and transferred the suit property to a third party prior to taking out the originating summons. **Order 37 Rule 4** of the **Civil Procedure Rules 2010** provides as follows;

**Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.**

16. My understanding of the entire framework in **Order 37** of the **Civil Procedure Rules** is that it provides the instrument of an originating summons as a tool to be used in the initiation of certain proceedings. It similarly specifies the categories of persons who have *locus standi* to take out the originating summons. Lastly, it specifies the orders that may be sought or granted through the instrument of an originating summons. It follows that, to take out an originating summons under **Order 37**, the applicant must be one of the persons specified in the framework, and the relief sought must likewise be one that is available within the framework. An applicant outside that scope lacks *locus standi* to take out the originating summons. Similarly, the court lacks jurisdiction to entertain the originating summons or grant any relief outside what the law prescribes.

17. In the present suit, the plaintiff exercised the statutory power of sale, completed the sale, and transferred the suit property to Dong Fang Development Company Limited who in turn charged the property to the same bank on 18/3/2013. Six months later, the plaintiff took out an originating summons seeking an order that it is entitled to vacant possession of the suit property. Prior to taking out the originating summons, the plaintiff had filed **Nairobi HCC No. 308/2013** against the defendant seeking to recover the outstanding debt after the realization of the sale proceeds.

18. My interpretation of the framework in **Order 37 rule 4 of the Civil Procedure Rules** is that the

instrument of an originating summons is available to a chargee who still has a valid charge registered against the title. In the present suit, the title was discharged on 18/3/2013, transferred to Dong Fang Development Company Limited, and a new charge registered. It follows that the mortgagor and mortgagee existing as at the time of taking out the present originating summons were Dong Fang Development Company Limited (chargor) and Fidelity Commercial Bank Limited (chargee). These are the parties entitled to take out originating summons under **Order 37 rule 4**. It is to be noted that the originating summons contemplated under **Order 37 rule 4**, in my interpretation, **relates** to titles to land, and the mortgagee and mortgage contemplated under the same framework are existing mortgagee and existing mortgagor in relation to specific titles to land; they are not former mortgagee and former mortgagor. My finding on this issue therefore is that the plaintiff having sold the suit property in exercise of the chargee's statutory power of sale, discharged the title, transferred the title to Dong Fang Development Company Limited and created a new charge against the title to secure money lent to Dong Fang Development Company Limited, it has no *locus standi* to take out an originating summons against the previous chargor under **Order 37 rule 4** of the **Civil Procedure Rules**. The forum available to the plaintiff, if indeed it demonstrates that it is the party entitled to vacant possession of the suit property, is a suit by way of plaint. Consequently, this ground of the Preliminary Objection is upheld.

19. I now turn to the second ground of objection, which relates to the question as to whether this suit is statute barred by dint of the provisions of **Section 6** of the **Civil Procedure Act**. Section 6 of the **Civil Procedure Act** provides as follows;

**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

**Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.**

20. The framework in **Section 6** of the **Civil Procedure Act** predates the Constitution of Kenya 2010 which redesigned the architecture of the judiciary. Consequently, any interpretation of the framework in **Section 6** ought to be done within the context of the jurisdictional architecture of the courts as currently constituted.

21. In the present suit, the plaintiff seeks vacant possession of the suit property which was sold in exercise of the chargee's statutory power of sale. The proper court with jurisdiction to deal with that issue is the Environment and Land Court. In **Nairobi HCCC No 308/2013**, the plaintiff seeks balance of the loan amount after realization of the loan security. The court with jurisdiction to deal with that issue is the Commercial and Admiralty Division of the High Court. For this reason, and taking into account the reliefs sought, I do not agree with the view taken by the defendant that this suit is statute-barred by dint of the existence of **Nairobi HCCC No. 308/2013**. That ground is therefore rejected.

22. In light of the above reasons, my finding is that the plaintiff, Fidelity Commercial Bank Limited, lacks *locus standi* to take out an originating summons against the defendant within the framework of **Order 37 rule 4 of the Civil Procedure Rules**. The present originating summons is therefore incompetent and is struck out. The defendant shall have costs of the suit.

23. In conclusion, may I register my appreciation to both counsel for their incisive submissions. I similarly convey the courts regrets for the inordinate delay of close to 3 years in making a determination on the preliminary objection. It should however be noted that this court got seized of this matter only 3 months ago.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2018.**

.....

**B M EBOSO**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendant

Halima - Court clerk