



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 118 OF 2016**

**SILVANUS LUKOKO WERE.....PLAINTIFF/APPLICANT**

**VERSUS**

**SIMON MATERE.....DEFENDANT/RESPONDENT**

**RULING**

This application is dated 2<sup>nd</sup> September 2016 and brought under order 36 rule 1 (1) (b) (c) of

Civil Procedure Rules seeking the following orders;

1. THAT the present application be and is hereby certified urgent and be heard on priority basis.
2. THAT summary judgment be entered against the defendant/respondent for recovery of the suit land herein.
3. THAT costs hereof be provided for.

The applicant submitted that, he is the registered owner of the suit property herein. (Annexed and marked "SW-1" is a copy of the lease). That originally the land was allocated to one SAMUEL LIPEYA MULAMULA. That he bought the parcel of land from him and used documents from him to register the suit land. That he found the respondent on the suit land as he had been allowed to stay on the suit land as a tenant of the previous owner. That he duly served him with notice to vacate the premises. (Annexed and marked "SW-2" is a copy of the notice) The respondent has no defence against his claim. That the tenancy agreement has elapsed and the respondent is a mere trespasser. That the respondent has not paid him rent since being registered owner thereof.

The following are the plaintiff's written submissions in support of the Notice of Motion application dated 2<sup>nd</sup> September, 2016. The plaintiff is the registered owner of the parcel known as Kakamega/Municipality Block IV/386, a copy of the certificate of lease has been annexed as (SW1) in evidence of the foregoing. The need for this application arose when the plaintiff having purchased the suit property Kakamega/Municipality Bloc IV/386 was denied vacant possession by the defendant who was residing in the suit premises as a tenant and /or with the consent of the previous owner. The defendant has refused to quit and deliver up possession of the property and has continued to be in possession of the property illegally and unlawfully as a trespasser to the detriment of the plaintiff.

The plaintiff holds title to the suit land. Section 24 (a) of the Land Registration Act 2012 provides as follows:- Subject to this Act:- the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:

Further as an absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by section 25 (1) of the Land Registration Act which provides as follows:- 25 (1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

- a. To the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and
- b. To such liabilities, rights and interests as affect the same and are declared by section 28 and to require noting on the register, unless the contrary is expressed in the register.

In addition, Section 26 of the Land Registration Act, Act No. 6 of 2012 protects title and provides that such title is only impeachable if obtained by fraud for which the title holder must be proved to have been a party, or if such title was received illegally, unprocedurally or through a corrupt scheme. The said provision is drafted as follows:- (1) the certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person

named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easement, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate or title has been acquired illegally, unprocedurally or through a corrupt scheme.

Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all the alleged equitable right of title. Infact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy. The defendant in his replying affidavit has not pleaded fraud and NO attempts have been demonstrated to impeach the title of the plaintiff and as such he cannot challenge the title of the plaintiff. In an attempt to defeat the plaintiffs claim the defendant has annexed in his replying affidavit an agreement purported to have been executed in 2000 which agreement is a forgery and a close perusal of the same the signature for the seller and the witness bears similarity. Further it is suspicious and no sufficient reason has been presented before court as to why since 2000 more than sixteen years (16) when the purported agreement is alleged to have been made the suit property was never transferred to him and as such the said agreement cannot override the certificate of lease issued to the plaintiff. This position was buttressed in the case of **Njuwangu Holdings Ltd. Vs. Langata KPA Nairobi & 5 others (ELC No. 139 of 2013)** where the court held that:-

*“As matters now stand, the plaintiff who has a registered title over the suit property has a superior title to that of the 1<sup>st</sup> defendant who only holds a letter of allotment. I am in agreement with the decision of the Court of Appeal in the case of Satya Investments Ltd vs. J.K. Mbugua Civil Appeal No. 164 of 29004, where the court held that a temporary occupation licence could not override a registered title under the Registration of titles Act Cap 281 laws of Kenya (repealed). Equally, it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystallize.”*

The structures alleged to have been built by the defendant and marked as (SM2) in his replying affidavit were indeed built by the previous owner of the parcel one SAMUEL LIPEYA and who is also a cousin of the defendant and who allowed the defendant to reside therein. By virtue of the defendant being a tenant on the suit property could not at any given point in time have been allowed to construct therein any structure unless its temporary. This kindness has been extended over a long-period of time and the defendant, acting on very misplaced advise from third parties intends to claim the land. In the case of **Katsuri Limited vs. Nyeri Wholesalers Limited (2014) eKLR the Court of Appeal** quoting **E.H. Lewis and Son vs. Morelli (1948) 2 ALL ER 1021** where the court found that a tenant who has been put in possession cannot challenge the title of the landlord. In the case of Kasturi Supra, the Court of Appeal held;

*“That a tenant has no triable issue in the counter-claim for vacant possession. It is the duty of the courts to ensure that no individual is prevented from taking possession or enjoying their property. A tenant cannot impose or force himself on a landlord”.*

A similar jurisprudence was observed in the case of **Peter Mwangi Mbutia & Another vs. Samow Edin Osman [2014] eKLR** where the Court of Appeal disallowed an appeal while stating that

*“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by order 35 subject to there being no triable issue which would entitle the defendant 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 defence raised is a sham.”*

Article 40 of the Constitution guarantees property rights of every person and specifically under article 40 (3) provides that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property. However where property is found to have been unlawfully acquired protection is waived under Article 40 (6) of the Constitution

Thus, it is patently clear that in the instant case unless it is established that the plaintiff's title is challengeable under section 26 (1) (a) (b) of the Land Registration Act or is found to fall within the exemption of protection under Article 40 (6) of the Constitution the title is indefeasible. No fraud has been pleaded by the respondent in his replying affidavit to which the plaintiff can be said to have been a party. In view of the above precedents and principals of justice, we urge the honourable court to allow the application as prayed.

The respondent submitted that, vide an agreement dated 10<sup>th</sup> November 2000 he purchased the suit parcel of land from one SAMUL LIPEYA MULAMULA (attached is the sale agreement marked S.M. 1). That out of the agreed purchased price of a sum of Ksh.120,000/= he paid SAMUL LIPEYA MULAMULA a sum of Ksh. 10,000/= would be used for transfer purposes. SAMUEL LIPEYA MULAMULA surrendered to him possession of the land in the year 2000. He has stayed on this land as my home since the year 2000. He has fenced this land, built two (2) permanent houses among other developments and stay here as his home with his family (Attached are photographs marked S.M. 2 confirming this). That whenever he has approached SAMUEL LIPEYA MULAMULA with a view to transferring this property into his name, he has always promised to do so and assured him he has no problem since he is firmly in occupation of this land. That his occupation of this land since the year 2000 has been open, peaceful, continuous and uninterrupted. That he approached the applicant and after having a discussion the applicant agreed to look for time and meet SAMUEL LIPEYA MULAMULA so that they can resolve this issue. That the said SAMUEL LIPEYA MULAMULA has failed to turn up and has now become evasive.

The defendant's/respondent's in his written submissions in relation to the Notice of Motion application dated 2<sup>nd</sup> September, 2016 submitted that, he kept reassuring the defendant/respondent that he would execute the transfer in due course but this never happened. The

defendant/respondent has clearly deposed in his replying affidavit that his occupation of the suit land since the year 2000 has been open, peaceful, continuous and uninterrupted, that he has made huge investments on the same and also stays there with his family. The suit against the defendant/respondent has only been filed in 2016, and thus the defendant's/respondent's counter claim beats the very logic of a request for summary judgment. The applicant has merely presented to this court a copy of certificate of lease bearing his names. How was this certificate obtained? Where are the relevant transfer documents showing/demonstrating the transfer of lease transaction from the original allottee to the applicant? None, has been presented to this honourable court. Indeed, the certificate of lease indicates the date of transfer as 5/5/2016, sixteen (16) years after the defendant/respondent entered occupation of the suit land. It is for these reasons that they pray that the application be dismissed and urge the court to allow the defence and counter-claim so that this matter is heard and determined on merit.

Indeed, the respondent questions the title of the plaintiff at paragraph 6 and 7 of the defence and counter-claim, such that the said SAMUEL LIPEYA MULAMULA could not have had any good title to the transfer to the plaintiff, hence the alleged registration over the suit property is unlawful. The plaintiff's/applicant's claims that the sale of land agreement as presented by the defendant/respondent is a forgery has no basis and remain unsubstantiated. Infact, the sale of land agreement stands uncontroverted and should be taken as it is since the plaintiff/applicant has not presented to this court an adverse/similar agreement between him and the original allottee. How did he then obtain this title if he has not presented any supporting evidence to this honourable court? It is in this regard, that he maintains that the alleged registration stands questionable.

Further, the defendant/respondent intends to institute third-party proceedings to have SAMUEL LIPEYA MULAMULA a party to these proceedings so that the truth can come out. The applicant's allegations that the said SAMUEL LIPEYA MULAMULA is the respondent's cousin and that he is the one who built the two houses on the said parcel of land are baseless and made in bad faith. He indeed admits that there are permanent structures on the suit land. But who do they belong to? This is a question that can only be determined if the matter is heard and determined on merit.

The defendant/respondent has at no point been a tenant on the said suit property but a bonafide purchaser for value and hence entitled to the same. The plaintiff/applicant cannot purport to rely on section 24 (a) of the Land Registration Act, 2012 if he has not, even in the very least, attempted to demonstrate to this honourable court how he obtained title to the said suit property. The applicant has reiterated the provisions of the constitution, Article 40 (3) to be specific which provides that no person shall be deprived of property or of any interest in or right over property .....” this right, however, is waived of the property is acquired unlawfully. Indeed, the applicant has not demonstrated to this honourable court how he acquired this property. Could it be by fraud? And so specifically the reason why he is concealing such pertinent facts to this honourable court. The defendant/respondent faults the processing of the transfer in favour of the plaintiff since no records have been presented to this court to that effect. They pray that the plaintiff's application for summary judgment does fail and the case be heard on merit. He has not brought any evidence which in the least demonstrate that he might have bought the land from the original allottee. This alone, casts doubt on the alleged registration. Lastly, the defendant/respondent has clearly demonstrated that he has a counter-claim, and humbly seeks for leave to defend the suit as a prima facie triable issue has been established. The application for summary judgment against the defendant/respondent is barred by the defence and counter claim on record. In any event, the plaintiff/applicant has not sought to strike out the defence and counterclaim as they are on record and there is an arguable case on the face of it. It is in view of the foregoing and on the principles of justice as buttressed in the constitution of Kenya, 2010 that the court dismiss the application dated 2<sup>nd</sup> September, 2016 in its entirety and set the matter down for hearing and full determination in terms of the defence and counter-claim filed.

This court has carefully considered the applicant's and the respondent's submissions and the annexures therein. The applicant is seeking for summary judgment to be entered against the defendant for recovery of the suit land herein. The grounds the applicant is advancing in support of the application are that; the applicant is the registered owner of Kakamega/Municipality Block IV/386. The respondent stays on the land by the consent given to him by the original allottee. The respondent was a tenant of the original allottee. Notice to give vacant possession has been duly served.

This application is premised under order 36 rule 1 (1) (b) which provides; - in all suits where a plaintiff seeks judgment for (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 ..... where the defendant has appeared but not filed a defence the plaintiff may apply for judgment ..... or recovery of the land and rent for mesne profits”*.

It is grounded on the annexed affidavit of SILVANUS LUKOKO WERE, the applicant and the following grounds. The applicant is the registered owner of Kakamega/Municipality Block IV/386. That the respondent stays on the land by the consent given to him by the original allottee. That the respondent was a tenant of the original allottee. That notice to give vacant possession has been duly served. The defendant has no defence against this claim. Therefore in summary the applicant seeks summary judgment to be entered against the defendant/respondent for recovery of the suit land herein, being kakamega/Municipality/Block/386. The application is opposed by the defendant/respondent through his replying affidavit dated 26<sup>th</sup> April, 2017 on the grounds outlined on the face of it and deposes that the application does not meet the criteria for entry of summary judgment. They submit that defendant/respondent's claim is that he purchased the suit land vide an agreement dated 10<sup>th</sup> November 2000 from one SAMUEL LIPEYA MULAMULA and a copy of the Sale of Land Agreement has been annexed as “(SM-1)” as evidence of the afore going. That the said SAMUEL LIPEYA MULAMULA then gave the defendant/respondent absolute possession of the whole of the suit land since the year 2000 up-to date. The defendant/respondent deposes that he immediately took possession and occupation of the said suit land and has since stayed on it, developed it and has even built two permanent houses on it as per the annexed photographs marked SM-2. This is the only place he calls home and an eviction order against him would render him and his family destitute. That in view of the afore-mentioned sale of land agreement, the defendant/respondent approached the said SAMUEL LIPEYA MULAMULA with a view of transferring the property into his names but he became evasive and unco-operative.

**In the case of UAP Provincial Insurance Limited v Lenny M. Kivuti Civil Appeal No. 216 of 1996, the court stated as follows;**

*‘In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.’*

In another court of appeal case of **Kenya Trade Combine Ltd vs M Shah (Civil Appeal No.193 of 1999)** the court said:

*“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”*

*These are the principles that ought to guide the court while considering a decision on an application for summary judgment under Order VI Rule 13.”*

I find that the respondent has raised triable issues which can only be determined at the full hearing. I find this application has no merit and dismiss it with costs to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6<sup>TH</sup> DAY OF MARCH 2018.**

**N.A. MATHEKA**

**JUDGE**