



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 785 OF 2015

KIBUCI MURITHI.....PLAINTIFF

VERSUS

IZAAK MWANGI KURIA.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant on 14/8/2015 seeking the following reliefs:

- (i) An eviction order;
- (ii) Mesne profits from January, 2015 until possession is delivered;
- (iii) Costs of the suit.

In his plaint dated 11th august, 2015, the plaintiff averred that he was the registered proprietor of all that parcel of land known as Nairobi/Block 82/4880 (hereinafter referred as "the suit property"). The plaintiff averred that the defendant was a tenant of the previous owner of the suit property, one, Loise Nyambura Ngumo. The plaintiff averred that even after the suit property was sold and transferred to him by the said Loise Nyambura Ngumo, the defendant refused to hand over possession of the same to him even after being asked to do so.

There is no memorandum of appearance or statement of defence on record. The defendant has contended however that he entered appearance and filed a statement of defence. Copies of these documents have not been made available to verify the defendant's claim. What is before me is the plaintiff's Notice of Motion application dated 28th April, 2016 seeking summary judgment against the defendant as prayed in the plaint. The application was brought on the ground that the defendant has no defence to the plaintiff's claim. The application was supported by the affidavit of the plaintiff sworn on 28th April, 2016. The application was opposed by the defendant through grounds of opposition dated 6th January, 2016 and replying affidavit sworn by Moses Onyango Otongo on the same date. In the grounds of opposition, the defendant contended that the plaintiff's application was misconceived and amounted to an abuse of the process of the court. The defendant contended that he had filed a defence and that the plaintiff had not sought to strike out the said defence. Moses Onyango Otongo who swore the replying affidavit in opposition to the application was a court clerk. He stated that he received a memorandum of appearance and statement of defence from the defendant's advocates on record with instructions to file and serve the same upon the plaintiff's advocates. He stated that he filed the said documents and served the same upon the plaintiff's advocates as instructed. He stated that since the documents were filed when the defendant's advocates' law firm had closed for December holidays, he kept the served copies with him for delivery to the said advocates when they re-opened after the holidays. He stated that when he sought to deliver copies of the said documents to the defendant's advocates, he did not find the same.

The application was argued on 15th November, 2017 when Mr. Benchi appeared for the applicant and Mr. Onindo for the defendant. Mr. Benchi submitted that the plaintiff purchased the suit property from Loise Nyambura Ngumo and after the property was transferred to him, he wrote to the defendant demanding possession. He submitted that in response to the said demand, the defendant asked to be given time to vacate the suit property. Counsel submitted that the defendant did not honour his promise to vacate the suit property and that the defendant had no defence to the plaintiff's claim.

In his submissions in reply, Mr. Onindo submitted that the defendant had expressed a desire to defend the suit and as such should be given opportunity to do so. He argued that the defendant entered into an agreement for sale with Loise Nyambura Ngumo in respect of the suit property and paid over a half of the purchase price. Counsel submitted that Loise Nyambura Ngumo had no right to enter into another agreement for sale with the plaintiff while the earlier agreement with the defendant was subsisting. Counsel submitted that the defendant had filed an application seeking to join the said Loise Nyambura Ngumo to the suit and that this is not an appropriate case for summary determination.

In a rejoinder, Mr. Benchi for the plaintiff submitted that Loise Nyambura Ngumo sold the suit property to the plaintiff after the defendant failed to honour the agreement for sale that he entered into with her. He submitted that the attempt to join Loise Nyambura Ngumo to the suit was an afterthought.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit that was filed by the defendant in opposition to the application. What I need to determine is whether the defendant should be granted leave to defend this suit. In the case of 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”.

The onus was upon the defendant to show that he has a defence to the plaintiff's claim which he should be allowed to put forward at the trial. The plaintiff case is straight forward. The plaintiff purchased the suit property from Loise Nyambura Ngumo. He paid the purchase price after which the property was transferred to him. He thereafter wrote to the defendant who was in occupation of the suit property as a tenant of Loise Nyambura Ngumo to deliver vacant possession of the property. The defendant asked for more time to make arrangements to move out. The defendant was given time as he had requested but failed to honour his promise to vacate the suit property making the filing of this suit necessary. The plaintiff annexed to his affidavit in support of the application, copies of, the agreement for sale dated 27th May, 2014 between him and Loise Nyambura Ngumo, the instrument of transfer of lease in his favour dated 20th June, 2014, certificate of lease dated 26th June, 2014 in his name, an email dated 27th May, 2013 from the defendant to the plaintiff's advocates (who appears also to have been acting for Loise Nyambura Ngumo) requesting to be given up to 31st July, 2013 to vacate the suit property and a letter dated 27th June, 2013 from the plaintiff's advocates confirming to the defendant that Loise Nyambura Ngumo had agreed to give him up to 31st July, 2013 to vacate the suit property.

The defence put forward by the defendant is that he was the first to enter into an agreement for sale with Loise Nyambura Ngumo in respect of the suit property and that Loise Nyambura Ngumo had no right to enter into another agreement for sale with the plaintiff. The defendant has not placed any material before the court showing that the agreement for sale between him and Loise Nyambura Ngumo was completed. The agreement for sale dated 15th May, 2010 that he entered into with Loise Nyambura Ngumo provided for a completion period of 90 days from the date of the agreement. There is no evidence that the said completion period was extended by Loise Nyambura Ngumo. The defendant placed before the court a copy of a letter dated 13th July, 2012 through which he forwarded to the said Loise Nyambura Ngumo a sum of Kshs.1.8 million in postdated cheques being the balance of the purchase price. This payment was made 2 years after the completion date and there is no evidence that the payment was accepted by Loise Nyambura Ngumo. The defendant has not denied that he had been asked to vacate the suit property on account of his failure to complete the said agreement for sale and that he had asked for time to vacate.

Due to the foregoing, it is my finding that the defendant has no defence to the plaintiff's claim. I have noted that Loise Nyambura Ngumo had agreed to refund to the defendant a sum of Kshs.3,700,000/= that he had paid on account of the purchase price for the suit property. I am of the view that this claim lies as against Loise Nyambura Ngumo and the plaintiff has nothing to do with it.

The upshot of the foregoing is that the Plaintiff application dated 28th April, 2016 is well founded. Summary judgment is hereby entered for the plaintiff against the defendant in terms of prayer (a) of the plaint. The defendant shall vacate and hand over possession of the suit property to the plaintiff within sixty (60) days from the date hereof in default of which the plaintiff shall be at liberty to apply for his forceful eviction from the suit property. The plaintiff shall fix the suit for hearing in respect of his claim for mesne profits. The plaintiff shall have the cost of the application but the costs of the suit shall await the determination of the mesne profits claim.

Delivered and Dated at Nairobi this 12th day of July 2018

S. OKONG'O

JUDGE

Ruling read in open court before:

N/A for the Plaintiff

N/A for the Defendant

Catherine Court Assistant