REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 26 OF 2004

BETWEEN

PETER MWANGI MBUTHIA.....1ST APPELLANT

NAFTALI RUTHI KINYUA.....2ND APPELLANT

AND

SAMOW EDIN OSMAN.....RESPONDENT

(*Appeal from the Judgment/Decree of the High Court at Nairobi (J.B. Ojwang, J) delivered on 19th December, 2003*

in

H.C.C.C. NO. 600 OF 2003)

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JUDGMENT OF THE COURT

1. The appellants appeal from the judgment and decree of the High Court (Hon. Mr. Justice J. B. Ojwang, Ag Judge, as he then was) given on 19th December 2003 allowing the respondent's motion for summary judgment for delivery of vacant possession of immoveable property and awarding mesne profits.

Background

2. The appellants were until 25th March 2003 registered as proprietors of the property known as Land Reference Number 36/111/218 Section III Eastleigh Nairobi (the property). The property was charged to Kenya Commercial Bank Limited to secure bank facilities extended by that bank to the appellants. In exercise of its statutory power of sale, the bank sold the property to Samow Edin Osman, the Respondent, who purchased it at a public auction conducted on 7th March 2003. The respondent was subsequently registered as owner of the property on 25th March 2003.

3. Having encountered difficulties in obtaining possession of the property, the respondent commenced

suit in the High Court at Nairobi on 16th July 2003 against the appellants seeking an order for vacant possession of the property as well as *mesne profits* from 25th March 2003, the date the respondent became registered as owner, until the date when possession would be obtained. The respondent averred in his plaint that the appellants had refused to quit and deliver up possession of the property; that they had continued in possession of the property illegally and unlawfully as trespassers and that they illegally continued to collect rent from property.

4. In their defences, the appellants denied that the respondent was the registered owner of the property. They asserted that they had challenged the public auction allegedly held on 7th March 2003 in proceedings in the High Court; and that any transfer in favour of the respondent was illegal null and void. The appellants further pleaded that on 13th June 2003, the respondent distrained their moveable property that was situated on the property under the Distress for Rent Act for purported non payment of rent; that the respondent thereby acknowledged the appellants as tenant; and that the appellants are protected tenants under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

5. The respondent took the view that the defences filed by the appellants were not *bona fide*. On 14th October 2003 the respondent presented an application for summary judgment to the High Court under the provisions of the then Order XXXV of the Civil Procedure Rules seeking immediate delivery of possession of the property; *mesne profits* and or damages for the period of occupation from 25th March 2003 until the date of delivery of vacant possession at the rate of Kshs. 150,000.00 per month, interest and costs. The application was supported by the respondent's affidavit in which he exhibited the duly registered Conveyance of the property in his favour. The appellants opposed the application.

6. After hearing the parties, the High Court allowed theapplication in the impugned ruling delivered on 19th December 2003. The learned judge proceeded to order the appellants to immediately deliver vacant possession of the property to the respondent. The judge also ordered the appellants to pay *mesne profits* at the monthly rate of Kshs. 150,000.00 unless they agreed on different amounts.

The appeal and submissions by counsel

7. The appellants complain that the judge erred in summarily ordering delivery of vacant possession under Order XXXV of the Civil Procedure Rules when the relationship of landlord and tenant did not exist; that the order for payment of *mesne profits* of Kshs. 150,000.00 was not supported by any evidence; that in view of the fact that a previously instituted suit between the same parties, namely HCCC 173 of 2003, was pending in court, the judge had no jurisdiction to hear and grant judgment as he did; that the determination by the judge is prejudicial to the determination of that suit; and that the matter was not suitable for disposal summarily without a trial.

8. Before us, counsel relied on written and oral submissions. Mr. P. Kingara learned counsel for the appellants submitted that this was not a suitable case for granting summary judgment; that the relief of mesne profits at the rate of Kshs. 150,000.00 was granted without proof or assessment; that there were other cases pending before the court where the sale was being contested; that the finding by the judge that after the auction only the remedy of damages is available is wrong when in fact the validity of the sale was a matter pending determination; that the judge failed to take into account that despite the relationship of tenant landlord having been denied, the respondent had purported to levy distress for rent and that the appellants were either tenants or trespassers and could not be both.

9. Mr. Kingara referred us to several past court decisions including **Nairobi Golf Hotels (Kenya) Limited vs. Lalji Bhimji Sanghani Builders and Contractors, Civil Appeal No. 5 of 1997**; **Industrial and Commercial Development Corporation vs. Daber Enterprises Ltd Civil Appeal No. 41 of 2000**; **Continental Butchery Ltd vs. Samson Musila Nthiwa Nai C.A. No. 35 of 1997** and submitted that summary judgment should not have been given especially because a defence that raised triable issues had already been filed by the time the application for summary judgment was made; that the court should have granted the appellants unconditional leave to defend the suit; and that by granting the application for summary judgment the learned judge breached the established principles of law and that the judgment

should therefore be set aside.

10.Regarding the award of *mesne profits* counsel referred us to **Kenya Commercial Bank Limited vs. Sheikh Osman Mohammed [2013] eKLR**; **Provincial Insurance Company of East Africa Limited vs. Modekai Mwanga Nandwa Civil Appeal No. 179 of 1995** and submitted that the award of Kshs. 150,000.00 was not supported by any evidence; that it is not evident how the assessment of that amount was arrived at and that the judge erred in granting that award. Counsel also urged that the respondent was not entitled to seek mesne profits having previously initiated rent recovery proceedings.

11.Counsel further urged that the issue whether the sale leading up to the registration of the respondent, as the owner of the property was valid was *sub judice* under section 6 of the Civil Procedure Act and the judge should therefore not have proceeded with the summary judgment application. He cited **Beth Kaari & Anor vs. M'nyeri M'rimunya [2013] eKLR** for the proposition that the learned judge ought to have addressed himself to the question of possible irregularity and nullity of the sale in favour of the respondent.

12.Regarding the contention that the appellants' remedy if any lay in damages only, Mr. Kingara submitted that the courts do, in suitable cases, set aside sales and that it is not the case that the only remedy available is in damages.

13.Opposing the appeal Ms Asli Osman learned counsel for the respondent submitted that the appellants ceased to be owners of the property on the fall of the hammer at the auction and that upon the respondent becoming the registered proprietor of the property the appellants became trespassers; that the cases that were pending determination in the High Court include HCCC No 1843 of 2002 in which the appellants sought to restrain the bank from exercising its power of sale and HCCC No 127 of 2003 where the appellants sought to restrain the transfer of the property; that even if those suits were heard to their conclusion, the only remedy available to the appellants would be an award for damages.

14.According to Ms Osman, this was a proper case for the learned judge to have granted summary judgment under the provisions of Order XXXV of the Civil Procedure Rules, which permits recovery of land summarily from a trespasser and considering further that there were no triable issues to warrant a trial.

15.Ms Osman submitted that it is a well established principle that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the Chargor is extinguished and the only remedy available for the Chargor who is dissatisfied with the conduct of the sale is to pursue a remedy in damages. In that regard counsel referred us to the case of **Jacob Ochieng Muganda vs. Housing Finance Company of Kenya Limited Civil Application No. NAI 453 of 2001,** among other decisions.

16.Regarding the award of mesne profits, counsel submitted that the amount claimed and awarded amounting to Kshs. 150,000.00 was not challenged; that in the absence of a replying affidavit to the respondent's application for summary judgment, the learned judge was entitled to award the uncontested amount claimed by the respondent.

Determination

17.We have considered the appeal and the submissions by learned counsel. There are three main issues for consideration. The first is whether the matter before the learned judge was appropriate for disposal by summary judgment under Order XXXV of the Civil Procedure Rules. The second issue is whether any evidence supported the award for mesne profits of Kshs. 150,000.00 per month. The third issue is whether the application for summary judgment was barred on account of the previously instituted suits.

18.We start with the question whether the matter before the High Court was appropriate for disposal by summary judgment. Rule 1 and 2 of Order XXXV of the then Civil Procedure Rules provided that:

"(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 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[1].

[1] The Rule has since been amended and currently reads "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 made by motion 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.

2. *(1) The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit*."

19.Those provisions, in our view, permit a plaintiff who seeks to recover possession of land from a trespasser to apply for summary judgment subject, of course, to there being no prima facie bona fide triable issues raised by the defence. The respondent's claim against the appellants as set out in amended plaint presented to the High Court was founded on the contention that appellants are trespassers on the suit property and accordingly Rule 1(b) of Order XXXV was properly invoked.

20.As to whether the circumstances warranted the granting of the order for vacant possession summarily, this is what the learned judge stated:

"From the facts of this case, it is abundantly clear that the true and valid owner of the suit premises, L.R. No. 36/111/218 SECTION III EASTLEIGH NAIROBI is the Plaintiff/Applicant and that the owner bought his property at a public auction conducted under the instructions of the Kenya Commercial Bank, which Bank, on 25th March, 2003, transferred the property to the name of the Plaintiff/Applicant.

The Defendants/Respondents' attempt to constitute themselves into tenants of the Plaintiff/Applicant, on account of alleged distress for rent levied by the Plaintiff/Applicant, will not avail the Defendants/Respondents. The Defendants/Respondents have been requested to vacate the suit premises by the new owners, and the Defendants/Respondents' continued stay on the suit premises amounts to a trespass. The fact that the Defendants/Respondents have filed a case at the Milimani Commercial Courts (NO. 173/2003) has no relevance to the ownership rights of the Plaintiff/Applicant, as under the law, the only remedy available in Suit No. 173/2003 is, in all probability, going to be damages and will not affect the Plaintiff/Applicant's title rights."

21.We are unable to fault either the approach or the decision of the learned judge in that regard. This Court sitting in Nyeri recently had this to say in **Kasturi Limited vs. Nyeri Wholesalers Ltd [2014] eKLR**:

"In an application for summary judgment under Order XXXV rule 1, it is the duty of the

defendant/respondent to demonstrate that he should have leave to defend the suit; the duty is limited to showing that there is a prima facie existence of bona fide triable issues or that there is an arguable case. On the other hand, the person applying for summary judgment under Order XXXV has the duty to show that the defence is a sham. In the case of <u>Continental Butchery Ltd-v- Samson Musila Nthiwa</u>, Civil Appeal No. 35 of 1977, this Court stated **003A**

"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."

22.Clearly the learned judge considered the defences filed by the appellants. He was not satisfied that they raised *bona fide* triable issues. The denial of ownership of the property in the appellants' defences was answered to the satisfaction of the judge through the production of the duly registered Conveyance in favour of the respondent. In the judges mind that Conveyance settled the question of ownership of the property. The judge was also entitled to take the view on the material placed before him that the appellants' remedy, if any, for the alleged wrongful exercise of statutory power of sale lay in a claim for damages.

23.The grant of leave to defend under Order XXXV of the Civil Procedure Rules involved an exercise of judicial discretion. We can only interfere with the exercise of that discretion if, as Sir Charles Newbold P. stated in **<u>Mbogo & Another V</u> <u>Shah 1968 EA</u>** 93 at page 95 we are satisfied:

"That the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice..."

That requirement has not been met in relation to the summary award of the order for vacant possession.

24. Regarding the award of *mesne profits* to the respondent we think there is merit in the appellants' complaint. When making that award summarily, the learned judge stated:

"The Defendants shall pay mesne profits for the period that they have remained in occupation contrary to the demands of the Plaintiff/Applicant, from 25 th March, 2003 until the date of delivery of vacant possession, at the rate of Kshs. 150,000.00 per month with interest thereon at Court rates, unless they agree on different amounts with the Plaintiff or unless a proper application is made regarding these amounts and a different order is given by court."

25.That award for Kshs. 150,000.00 was not based on any evidence at all. In his affidavit in support of the application for summary judgment, the respondent deposed that "*as an absolute owner of the property, I am entitled at common law to evict the trespasser to my property, mesne profits, and to self help remedy*." Apart from the reference in the demand letter before action that was exhibited to the respondent's affidavit in support of the summary judgment application, there was not the slightest indication how that figure was arrived at. Indeed counsel for the respondent had difficulty defending that amount merely stating that the figure was not challenged. We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.

26.Regarding the issue whether the application for summary judgment was barred on account of the previously instituted suits, reference was made to High Court Civil Suit No. 127 of 2003. We have perused the plaint in that suit on the face of which other parties, in addition to the parties in the suit leading up to this appeal, were involved. The pleadings in High Court Civil Suit number 1843 of 2002 are

not part of the record before us but it would appear, as submitted by counsel for the respondent that the respondent was not privy to that suit. We do not therefore think that section 6 of the Civil Procedure Act, was a bar to the High Court entertaining as it did the application for summary judgment.

27.The result is that we uphold the judgment of the learned judge of the High Court granting summary judgment for possession of the property to the respondent. The award for *mesne profits* of Kshs.150, 000.00 per month cannot however be sustained and is hereby set aside. We shall not interfere with the award for costs in the High Court.

28.As the appellants have partially succeeded in the appeal, we think each party should bear its own cost of the appeal. We so order.

Dated and delivered at Nairobi this 7th day of November 2014.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR