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Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Ruling
Judge:	Daniel Kiio Musinga
Citation:	MADARA EVANS OKANGA DONDO v KIARIE NGANGA [2006] eKLR
Advocates:	-
Case Summary:	
Court Division:	-
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
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Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 119 of 2006

MADARA EVANS OKANGA DONDO.....…PLAINTIFF/APPLICANT

VERSUS

KIARIE NGANGA…….....……DEFENDANT/RESPONDENT

RULING

By an application dated 9th June 2006, the plaintiff applied for a temporary injunction to restrain the defendant, his servants and/or agents from trespassing upon, breaking into, taking possession of, alienating, charging, selling, disposing of or in any other manner dealing with a property known as **NAKURU/LANGALANGA BLOCK 1/330**, hereinafter referred to as ***"the suit premises"*** pending the hearing and determination of a suit which he had filed against the defendant.

The application was made on the grounds that on 30th December 1980, the plaintiff was registered as lessee of the suit premises for a term of 66 years from 1st January, 1978. The defendant was subsequently registered as the lessee of the suit premises on 2nd February, 2006 as a result of fraud, misrepresentation or mistake. Further grounds were that the plaintiff was in occupation of the suit premises and was likely to suffer irreparable harm unless the orders prayed for were granted.

The application was supported by the plaintiff's affidavit. He deposed that sometimes in December 1996, he obtained a loan of Kshs.1,092,000/- from Housing Finance Company of Kenya Limited to complete the construction of a residential flat on the suit premises. He said that he executed a charge which he later learnt was improperly drawn and executed. The suit premises were sold by public auction through instructions of a company known as **HOUSING FINANCE OF KENYA LIMITED**. The defendant had acquired them and proceeded to obtain breaking orders as against the plaintiff. The plaintiff pointed out that there were several anomalies in the defendant's purported acquisition of the suit premises. He even deposed that no public auction had been conducted in respect of the suit premises. He urged the court to grant the orders sought.

The defendant opposed the said application and also filed his own application by way of a notice of motion. He prayed for summary judgment against the plaintiff. He urged the court to order immediate vacant possession of the suit premises and payment of mesne profits at the rate of Kshs.19,600/- per month from December 2005, todate. In his affidavit in support of the said application, the defendant deposed that on 16th December 2005, he purchased the suit premises in a public auction and paid

Kshs.2,100,000/- to Housing Finance Company of Kenya, the registered chargee, who had instructed M/S Nguru Enterprises Auctioneers to sell the property. The suit premises were thereafter transferred to him and he was registered as the absolute proprietor of the leasehold interest thereof on 2nd February 2006. The plaintiff had filed a suit against Housing Finance Company of Kenya Limited and sought an injunction to restrain the chargee from selling the suit premises. The suit was **HCCC No. 262 of 2005** and on 25th November 2005, the application for injunction was dismissed with costs. The defendant further deposed that he desired to take possession of his property and refurbish the same but the plaintiff had adamantly remained in occupation of the same. He urged the court to order eviction of the plaintiff as well as payment of mesne profits at the rate of Kshs.19,600/- per month with effect from December 2005.

Mr. Okeke and Mr. Opande appeared for the plaintiff and Mr. Murimi appeared for the defendant. All the advocates made able submissions in support of their respective client's applications and in opposition to the other side's application. I have taken into consideration all those submissions and the various authorities that were cited by counsel. I have also considered the pleadings and the affidavits that were filed by the parties herein.

The plaintiff's advocates said that there were some irregularities in the defendant's acquisition of the suit premises. The said irregularities can be summarised as follows:-

(a) The defendant produced two different transfers.

(b) The purchase price for the suit premises was not indicated in the certificate of sale that was given to the defendant by the auctioneer.

(c) The stamp duty was paid on 3/4/06 whereas the defendant was registered as the proprietor of the suit premises on 16th February 2006.

(d) The defendant had sworn that the suit premises were transferred to him by Housing Finance Company of Kenya Ltd but the transfer form was signed by Housing Finance of Kenya Ltd.

(e) The charge was defective because the borrower's signature was not attested to as required.

The plaintiff's advocates submitted that the balance of convenience was in favour of the plaintiff who was in occupation.

Regarding the defendant's application for summary judgment, it was submitted that under **Order XXXV rule 1(b)**, the rule only applied where the title to the property in dispute would not be subject to challenge. Further, the rule could only be invoked where the relationship of a landlord and a tenant existed which was not the case in the matter herein. It was further submitted that there were several triable issues.

Mr. Murimi responded by stating that the plaintiff had not established a prima facie case with high chances of success to entitle him to a grant of an injunction. He further submitted that Housing Finance Company of Kenya Ltd was not a party to these proceedings and the irregularities that had been alleged could not be raised in these proceedings. That issue was re judicata in view of the fact that the plaintiff had filed **HCCC No. 262 of 2005** against the Housing Finance Company of Kenya Ltd where the issue ought to have been raised in. The plaintiff had brought the present action as against the defendant alone, Housing Finance Company of Kenya Ltd and the Auctioneer had not been sued. Mr. Murimi cited several decisions and I will refer to some of them later on.

It is not in dispute that the property in question had been charged by the plaintiff to Housing Finance Company of Kenya Ltd. The plaintiff defaulted in servicing his loan and the chargee exercised its statutory right of sale. The suit premises were duly advertised for sale by public auction. The plaintiff unsuccessfully tried to stop the said sale by public auction. During the auction, the defendant was declared as the highest bidder and he paid a sum of Kshs.2,100,00/- for it. It is trite law that a chargor's right of redemption is extinguished at the fall of the hammer, see ***MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER, Civil Appeal No. 11 of 1986***. Any claims that the former owner of the suit premises could only be compensated by way of damages as against any party found to be liable.

In ***KITUR & ANOTHER VS STANDARD CHARTERED BANK & ANOTHER (No.2) [2002] 1 KLR 640*** it was held that:-

"The law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneer, shall be compensated by an award of damages (see Section 77(3) of the Registered Land Act and Section 26(1) of the Auctioneers Act)".

In the circumstances all the allegations of fraud, misrepresentation and/or mistake that were made by the plaintiff against the defendant in the plaint can only succeed if Housing Finance Company of Kenya Ltd and the Auctioneer were parties to the suit.

Regarding the plaintiff's prayer for an interlocutory injunction to restrain the defendant from entering, disposing of the suit premises for dealing with the same in any other manner prejudicial to the plaintiff, the plaintiff did not show that he had a prima facie case with a likelihood of success as against the defendant. The defendant is duly registered as the absolute proprietor of the leasehold interest comprised in the suit premises. The plaintiff did not also show that he stood to suffer irreparable loss unless the orders sought were granted. In the event that the plaintiff were to succeed in his suit against the defendant, he would be entitled to damages. The value of the suit premises is known or can be easily assessed. I need not consider where the balance of convenience falls as I am not in doubts as regards the first two tests as enunciated in ***GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 358.*** The plaintiff's application for an injunction must therefore fail.

With regard to the defendant's application for summary judgment, he ha shown that he is the absolute proprietor of the leasehold interest comprised in the suit premises. He has also shown that he expended a considerable amount of money in acquisition of the same. The plaintiff has, however, refused to grant the defendant vacant possession thereof. As earlier stated, if the plaintiff has any lawful claim over the suit premises, the same is in damages only.

It would be unjust to continue to keep the defendant out of his lawfully acquired property.

However, the application is unsustainable because under **Order XXXV** of the **Civil Procedure Rules**, summary judgment can only be entered in a suit where a plaintiff seeks judgment for:-

(a) a liquidated demand with or without interest.

(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 has 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.

The relationship between the plaintiff and the defendant is not one of a landlord and tenant. Even

though the defendant purchased the suit premises when the plaintiff was in occupation thereof, he was not occupying the premises as a tenant of anybody, the premises belonged to him. The plaintiff never paid rent to the defendant at any time. The defendant is therefore outside the ambit of **Order XXXV rule 1(1)** of the **Civil Procedure Rules**. Perhaps the defendant should have filed an application to strike out the plaint and the defence to his counter-claim if he believed that the plaintiff's suit lacked merits or disclosed no reasonable cause of action. The defendant's application is bad in law and consequently I dismiss the same. In view of the fact that the two applications by the plaintiff and the defendant have been dismissed, I will make no orders as to costs.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Okeke for the plaintiff and Mr. Murimi holding brief for Mr. Ngure for the defendant.

D. MUSINGA

JUDGE

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