

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
ORIGINATING SUMMONS NO. 7 OF 2013**

**IN THE MATTER OF LAND COMPRISED IN LRV 620 FOLIO 21 PLOT 5
TONGUE AVENUE TORORO MUNICIPALITY MEASURING 2.07 ACRES**

BETWEEN

**DR. NICHOLAS KAUTA..... APPLICANT/PLAINTIFF
AND
NATIONAL HOUSING AND CONSTRUCTION
COMPANY LIMITED..... RESPONDENT/DEFENDANT**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application was brought by way of originating summons under Order 37 rules 3 and 8 Civil Procedure Rules seeking that court determines the following question:-

1. That the respondent as vendor of the suit land has greatly prejudiced the rights and interests of the applicant as purchaser of the same by omitting, evading, neglecting, ignoring and/or refusing, without reasonable cause to give to the applicant/plaintiff a valid certificate of title for the property to confirm the applicant/plaintiff's proprietorship of the suit land or in the alternative, a refund of the prepaid consideration.
2. That the respondent as vendor be directed to compensate the applicant the prevailing market value of the suit property and damages for breach of contract.

When this application came up for hearing on 1/4/2014 Patrick Kabagambe counsel for the respondent raised a preliminary objection to the effect that the procedure followed is defective in that serious questions are raised for resolution that cannot be resolved by way of affidavit. Counsel relied on the cases of **J.P Nagemi T/a Nagemi and Co. Advocates vs. Ismail Semakula OS 8/13** and **Zalwango Elverson and Anor Vs. Dorothy Walusimbi and Anor OS 3/13**. In both cases it was held that originating summons should be limited to straight forward matters and that originating summons is not a procedure by which decisions on disputed

questions of fact can be obtained and that it is not appropriate where disputes involve considerable amount of evidence.

Counsel for the respondent, relying on the affidavit in reply of Henry Mangino further submitted that three questions are raised by the respondent which he deems contentious i.e. what was the status of the suit property at the commencement of the transaction and accordingly what could the respondent pass onto the applicant? Secondly, what rights accrued to each party and what necessary steps were taken by each party upon commencement of the transaction? Lastly, on what basis the applicant maintains the compensation sought. He concluded that those issues are contentious in nature and cannot be resolved by affidavit.

In reply, counsel Ms Betty Munabi for the applicant, contended that originating summons was a correct procedure because the facts in this case raise only one question i.e. whether the plaintiff ought to be compensated for the market value of the property. That question arises from the fact that the respondent sold the suit property to the applicant in 1996 without a lease and therefore title to the property. That they have failed to deliver title to the applicant since 2003 when they received final payment and subsequently, the controlling authority has taken over the property thus this suit seeking compensation of the market value of the suit property. She also argued that the respondent by their affidavit in reply have conceded to the fact that the lease in issue has expired.

In rejoinder, counsel for the respondent submitted that the questions he raised would assist both the applicant and the court to determine the one question by the applicant. He admitted that although the lease had expired, the applicant was aware of that fact at the time of the sale, which would thereby put into question the legal basis on which he relied on quote the value since there was no legal basis or document at the time he entered the sale. He further argued that the transaction was in fact based on an offer for sale and not sale agreement.

Order 37 rule 3 of the CPR provides that:-

“A vendor or purchaser of immovable property or their representatives may, at any time or times, take out an originating summons returnable before a Judge sitting in chambers, for determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or

connected with the contract of sale, not being a question affecting the existence or validity of the contract." (Emphasis mine).

The facts in the application show that the applicant expressed interest in purchase of the suit property which the respondent offered on various terms and conditions that were accepted by the applicant and a consideration of Shs.32,000,000/= was paid. However, at the time the suit property was sold to the applicant in 1996, the respondent who was a lessee had had an initial lease of two years that had expired in 1965 and was never renewed. This fact was known to both parties thus the issue of mistake of fact cannot arise. It appears that the defendant failed to complete the sale by handing over a title to the applicant who thereby sued prayed for compensation by way of damages for breach of contract.

However, before I can consider whether the remedy of compensation (as flowing from the contract is available), it may well be necessary to first ascertain whether there was a valid contract in the first place between the parties. This is because both parties agree that the lease which is the subject matter of the application had expired at the time the contract was made. Further, since it is a fact that the respondent's lessor had already expired, it is also essential to establish what rights or interests the respondent was passing on to the applicant. This set of facts is further complicated by the contest of the respondent that the transaction was not a sale but only an offer of a sale and the possibility that it would be the lessor and not the respondent who should compensate the applicant. Also, the applicant seeks damages for breach of contract which may require proof. I opine that all these facts affect the validity of the contract for the sale of the suit land that was made between the applicant and respondent and thus cannot be resolved by affidavit evidence under an originating summons.

The issue raised in this case are contentions and not simple and in my view, cannot be adequately determined by originating summons. The preliminary objection thus succeeds and the originating summons is dismissed under **Order** 37 rule 11 CPR. The plaintiff may if he so wishes file a suit in the ordinary course to address his claim.

The applicant will pay the costs of dismissal.

Iso order.

EVA K. LUSWATA
JUDGE
30/4/14