



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 8 OF 2017**

ROBERT OSIKE AGERI .....PLAINTIFF

**VERSUS**

KENNETH MULONGO OJWANG .....DEFENDANT

**RULING**

1. This ruling is on a Notice of Motion filed here on 18/4/2017 by the Plaintiff - **ROBERT OSIKE AGERI** - against the Defendant - **KENNETH MULONGO OJWANG**. It is brought under Order 13 Rule 2 of Civil Procedure Rules, Section 7 of Land Control Act, and Sections 1, 1A and 3A of Civil Procedure Act. Two prayers are sought as follows:

Prayer 1: That the honourable Court be pleased to enter judgement on admission against the Respondent for the sum of Kshs.300,000/=.

Prayer 2: Costs be provided for.

In the application, the Plaintiff is the Applicant while the Defendant is the Respondent. The two are tussling over a failed land sale transaction, with the Plaintiff blaming the Defendant for failing to ensure successful transfer of ownership while the Defendant blames the Plaintiff for failing or refusing to pay the balance of the purchase price.

2.This application itself is about an alleged admission by the Defendant to pay back Kshs.300,000/= paid by the Plaintiff as consideration for the failed transaction. The alleged admission is said to be contained in a letter written to the Plaintiff by the Defendant's advocate.

3.The Defendant responded to the application vide grounds of opposition filed on 2/5/2017. According to the Defendant, the application is totally defective and the prayers sought are at variance with the pleadings. The Court was also said to lack jurisdiction to grant the prayers.

4.The application was canvassed by way of written submissions. The Applicant's submissions were filed on 19/6/2017. According to him, the application is not opposed as it can only be properly opposed vide a replying affidavit, not grounds of opposition. The Plaintiff was said to be entitled to refund of the money paid and the Defendant cannot be heard to say that it is not prayed for in the suit as there is prayer (c) which is seeking any relief the Court may deem fit.

5. The Defendant's submissions were filed on 11/7/2017. He emphasized that he has a right to be heard. His position is that he is entitled to relief for breach of contract.

6. I have considered the application, the response made, rival submissions, and the pleadings as filed. The letter said to contain the admission pre-dates the suit itself. The letter is dated 4/1/2017. The suit was filed on 17/1/2017. It is clear therefore that the letter was not in response to the suit. The response to the suit is a defence filed on 17/2/2017. That defence consists of denials. There is no admission of the claim. What is more, that letter is not part of the defence. The defence was filed without any accompanying documents. The letter is only introduced in the application.

7. The approach of the Plaintiff is wrong. The admission that the law envisages is one that is made in response to the suit or claim. It can be in the defence or in documents accompanying the defence. As things stand, the letter referred to is not part of the case. It was only introduced for the purposes of the application. It was a tactical blunder on the part of the Plaintiff.

8. The Plaintiffs also seems unable to differentiate between judgement on admission and summary judgement. To him, the two seems to be the same. In the prayers, the Plaintiff talks of judgement on admission. In the supporting affidavit accompanying the application, he talks of summary judgement. He talks of summary judgement again in the submissions. The two are different. One, the judgement on admission, refers to a situation where the suit or claim is admitted. The admission can be express and/or unequivocal or can be discernible by very clear implication. The other, summary judgement, occurs where the Defendants purports to deny but the denial is *prima facie* totally ineffective. It is sometimes called “a mere denial” or “a sham”. Summary judgement can be forced on a Defendant if he has no meaningful defence; Judgment on admission cannot. Summary Judgement comes under Order 36 of Civil Procedure Rules; Judgement on admission comes under Order 13. The rules applying to both are totally different.

9. The application herein is misplaced. There can be no admission where the defence consists of denial. There can be no admission when the document said to contain it is not made part of the case. And there can be no judgement on admission where the Defendant insists he wants to be heard.

10. It is for all these reasons that the application herein is found unmeritorious. It is hereby dismissed with costs.

**Dated, signed and delivered at Busia this 27<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: .....

Defendant: .....

Counsel: .....