REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND CASE NO. 89 OF 2014

DUNSTAN OMOKE OWICH.....PLAINITFF

VERSUS

HILLARY KIPLANGAT KOSKEI.....DEFENDANT

RULING

1. The plaintiff - **DUNSTAN OMOKE OWICH-** filed this suit here against the defendant - **HILLARY KIPLANGAT KOSKEI** – on 1/4/2014. Together with the suit was also filed a Notice of Motion. This ruling is about that motion.
2. The application was brought Under sections 1A, 1B, and 3A of Civil Procedure Act (cap 21) and order 40 rules 1 & 2 of Civil Procedure Rules, and all enabling law. The parties are disputing over land parcel No. **KER/KUNYAK/281**, with the plaintiff alleging he is the registered owner but the defendant, who was buying it, had threatened to move into the land with a view to cultivating and building on it.
3. The plaintiff felt aggrieved, especially given that he had voided the intended purchase by the defendant and was willing to refund the money already paid. That is why the suit was filed but as the suit awaits hearing, temporary orders were deemed necessary, hence the application

4. The application has 4 prayers but prayers 1 and 2 are moot, having been dealt with at the *ex parte* stage. The remaining prayers are now 3 and 4. And they are as follows:

> **Payer 3**: Pending hearing and determination of the suit, there be a permanent injunction restraining the respondent (defendant), of his own, agents, servants and/or employees from trespassing, developing, alienating, disposing off, (sic) or in any other way interfering with the plaintiffs land designated as **KER/KUNYAK/281.**
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> **Prayer 4:** Costs of this application be provided for.

5. The grounds advanced stipulated that the plaintiff is the registered owner of **KER/KUNYAK/281** (Suit Land) and the defendant, who was purchasing it, had failed to complete payment. The defendant was supposed to take possession of the land upon completion of payment but now threatens to move into the suit land despite not having completed the payment.

6. The defendant filed a replying affidavit, grounds of opposition, and preliminary objection. It was denied that the plaintiff is the registered owner of the suit land. It was denied also that the defendant has refused to complete payment.

It was averred that the plaintiff has frustrated completion of payments and that it is

the plaintiff who has frustrated the sale contract.

7. Parties filed submissions in lieu of hearing. For the plaintiff, it was reiterated that the defendant failed to honour his side of the bargain. He didn't pay as agreed.

   That being the case, the plaintiff voided the agreement and is willing to refund the money paid.

8. The plaintiff was said to have established a prima facie case, and shown that the balance of convenience lies in his favour. It was also said that his loss would not be quantifiable and all this is said to constitute the threshold set in the case of **GIELLA VS CASSMAN BROWN & CO LTD (1973) E.A 358**. The submissions of the defendant were faulted for raising trivial issues of technical nature. They were said to have avoided delving into the substance of the application.
9. The defendants submissions were filed on 20/6/2014. It was submitted that the plaintiffs application fails to meet the threshold set in Gella's case (supra). A technical point was raised too that the supporting affidavit was not endorsed with the name and address of the drawer. This is said to contravene the mandatory provisions of Section 35 (1) of the Advocates Act (cap 16). The decided case of **SHUVJI NATHA PATEL VS SEIFFEE SPARES & HARDWARE LTD: HCCNo.265/1999**, was availed to illustrate the legal position.

10. I have read and considered the application, the response made, and the rival submissions from both sides. I have had a look too at both the plaint and the defence.
11. The plaintiff says he is the registered owner of the suit land. Nothing however is availed to demonstrate this. The plaintiff needed to do more than allege. The fact of him being the registered owner was denied by the defendant both in the replying affidavit and the defence.

12. On its part, the court observed this omission when the plaintiff came to it seeking *Ex parte* orders after filing the suit. One would have thought that after this observation the plaintiff would try to rectify the situation. This was not done however and this works against the plaintiff.

13. It appears to the court too that the plaintiff's suit is proceeding on the basis of the first agreement of sale dated 16/4/2007. But the defendant managed to show a subsequent agreement together with banker's cheques he drew in a bid to clear the remaining purchase balance.

14. From all this, it appears to me that the plaintiff was not making a full disclosure. The information availed to court was selective and did not therefore disclose the whole story. That again works against the plaintiff.

He is seeking equitable orders and full honesty is required. Needless to say, such honesty consist in full disclosure. The need for full disclosure was emphasised in the decided cases of **REV Madara EVANS DONDO Vs Housing FINANCE COMPANY**

OF KENYA: HCC NO.262/05, UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA: CA NO.140/1995 (UR.62/95), and Andrew Ouko VS Kenya COMMERCIAL BANK LTD & 3 others: HCC No.558/04, MILIMANI NAIROBI. In all these cases parties failed to get what they wanted after the court found they had not made full disclosure and/or had concealed material facts.

15. I need to say something about the defendants submissions. As observed by the plaintiff, they are technical. The cases availed – Shuvji's case (supra) – was decided before the new constitutional dispensation and before the enactment of the Environment & Land Court Act, 2011. The approach in the case was strictly technical. The new constitution and the Environment & Land Court Act enjoins de-emphasis on procedural technicalities while dispensing justice. I therefore don't agree with the defendant.

16.But, this is not to say that the plaintiffs application will succeed. The omissions by the plaintiff pointed out in this ruling are the undoing of the application.

The application therefore fails not because of any strength contained in the defendants submissions but because of the weakness arising in its presentation.

17.The upshot, in light of the foregoing, is that the plaintiffs application is found unmeritorious. The application is therefore dismissed with costs.

HON. A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

20/8/2015