REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO.38 OF 2012

BENJAMIN KIPKETER TAI.....PLAINTIFF

VERSUS

JAN CHEROTICH CHEPKWONY.....DEFENDANT

R U L I N G

1. The defendant filed an application here on 14/12/2012 seeking that the injunctive orders issued on 28/9/2012 in favour of the plaintiff be discharged and the plaintiff's suit be struck out with costs. It was also sought that the plaintiff be ordered to vacate the suit land which is L.R. No.24076/18 LR No.107926. The defendant is also asking for costs of both the application and the suit.

2. The defendant's application is a Notice of Motion dated 5/12/2012 and brought under Section 6 and 22 of Land Control Act (Cap 202), Section 55 of Land Registration Act, 2012, Section 39 and 41 of the Land Act, 2012, Sections 1A, 1B and 3A of Civil procedure Act and order 40 Rule 7 and Order 36 Rule 1(b) of the Civil procedure Rules.

3. The grounds advanced in support of the application stipulate that the suit is based on a void transaction due to failure to obtain the requisite consents; that the plaintiff breached clause 2 (b) of the sale agreement dated 20/3/2002; and has therefore come to Court with unclean hands.

4. The supporting affidavit filed together with the application stated inter alia, that the plaintiff is being economical with the truth, that the plaintiff has failed to pay a remaining balance of 2000000/= despite being aware that the defendant has had title since year 2007, that the payment period was 60 days and the period was meant to enable the parties obtain consent from Land Control Board, that such consent was not obtained and has not been obtained to date and the intended sale has become void, that the plaintiff went into possession of the land and started commercial farming and has therefore recovered the money he paid ten-fold, and that the defendant no longer wishes to sell the land as her children are now grown ups and need a place to settle.
5. The defendant further stated that when the injunctive orders were issued, she was scheduled to leave the country and she actually left and was thus unable to instruct her lawyers.

6. The plaintiff filed a replying affidavit saying, inter alia, that it was mutually agreed that he goes into possession of the suit land after making initial deposit pending conclusion of the transfer process. The balance, plaintiff further said, was supposed to be paid upon successful transfer of title to the plaintiff. The defendant is said to have failed to ensure such transfer.

7. The plaintiff said he is still willing to pay the balance but the defendant has to fulfil her part of the contract. The defendant's application was said to be an abuse of the court process and the court

was told to await the full hearing of the case in order to address the remedies available to the parties.

8. The application never went for hearing. Submissions were filed instead. It appears from the defendant/applicant submissions that the position taken is that the plaintiff/respondent didn't meet the threshold of the earlier application whose orders are sought to be discharged.

9. The plaintiff/respondent said the defendant/applicant's application is not made in good faith, lacks merit and is an abuse of the court process. The applicant, it was said , was afforded an opportunity to oppose the earlier application but failed to do so. The present application is said to be a vain attempt to re-institute the earlier determined application.

10. I have considered the application, the response made, and the submissions. I am constrained to agree with the plaintiff's counsel's observations to a large extent. The defendant's application is trying to revive the earlier application. She failed to respond to the earlier application. She deponed that she had trips to make outside the country and therefore could not get time to instruct her lawyers. But was it even impossible to tell a lawyer to seek an adjournment or explain her absence? The defendant chose to travel. The earlier application was allowed. The orders given in the earlier application are interlocutory, not permanent. The Court is not persuaded that they should be discharged. The reasons given by the defendant are not good enough and I reject them.

11. There is also another good reason to consider. The defendant's application herein, if granted, would serve to determine the whole suit. This is so because the plaintiff's suit is sought to be struck out and the plaintiff is supposed to vacate the suit land. It is the plaintiff who brought the defendant here in the first place. The plaintiff came to be heard. The application herein, if granted, precisely seeks to block such hearing. That, if allowed, would violate the plaintiff's constitutional right to have his dispute resolved in a fair and public hearing before a court of law. I have considered the provisions of law sought to be relied upon by the defendant. None of them would dis-entitle the plaintiff from having his case heard by a court of law.

12. The upshot is that the defendant/applicant's application herein is completely lacking in merit and the same is dismissed with costs.

A.K. KANIARU – JUDGE

21/1/2014

21/1/2014

A.K. Kaniaru – Judge

Dianga – C/C

No party present

Ouma for Respondent/Plaintiff

Okungu (absent) for defendant

Interpretation – English/Kiswahili

COURT: Ruling on application filed on 14/12/2012 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

21/1/2014