



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 260 OF 2010**

**MWAURA KARUGA .....PLAINTIFF**

**VERSUS**

**EMBAKASI RANCHING COMPANY LTD. .... DEFENDANT**

**RULING**

1. The plaintiff moves court via the Motion dated 26<sup>th</sup> August 2014 anchored on the provisions of Order 13 Rule 2, Order 2 and Order 36 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 1A, 1B, and 3A of Civil Procedure Act and other enabling provisions of the law.

2. The Applicant/Plaintiff seeks the following orders of the Motion namely:

- a) That judgment on admission be entered for the Plaintiff against the Defendant as prayed in the plaint.
- b) That in the alternative the Defendant's defence herein be struck out and judgment be entered as prayed in the plaint.
- c) That the Defendant do bear the costs of this Application and grounds the Motion on the grounds on the face of the Motion namely:

i. The Defendant has in no uncertain terms admitted that the Plaintiff was the successful purchaser and indeed beneficial owner of all those properties known as **KAJIADO/KAPUTIEI NORTH/A11275, 11413 & 11420** (suit properties)

ii. The Plaintiff is in occupation and utilizes all the properties known as **KAJIADO/KAPUTIEI NORTH/11275, 11413 & 11420** to the exclusion of all others.

iii. The Plaintiff has placed cautions at the Lands Registry, Kajiado on all the properties (**KAJIADO/KAPUTIEI NORTH 11275, 11413 & 11420**) to protect his interests and the said cautions and the Possession has not been disturbed to date.

iv. It is absolutely clear that the Defendant has no reasonable or any defence at all to the Plaintiff's claim and the statement of defence filed herein is indeed a sham.

v. It is only fair and just in the circumstances of this case that the Defence

herein be struck out and judgment be entered as prayed in the plaint.

The application is supported by the Affidavit of **Mwaura Karuga** sworn on the 26<sup>th</sup> August 2014 and the 3 annexures attached thereto.

3. The Respondent/Defendant was served with the application herein on the 28<sup>th</sup> August 2014 but has not filed any Replying Affidavit nor attend court for hearing on the 23<sup>rd</sup> September 2014 when the matter came for hearing.

4. **Mr. Kirango** appeared for the Plaintiff/Applicant and submitted that the plaintiff's Supporting Affidavit paragraphs 4, 5, 6, 7 and 8 states that he purchased the subject matter herein and paid the requisite consideration in full.

He further submitted that the defence by the Defendant filed on 21<sup>st</sup> January 2011 and dated 18<sup>th</sup> January 2011 particularly paragraphs 4, 5, 6 and 7 admits in all uncertain terms that indeed the Plaintiff bought suit properties named in the plaint. The defence admitted payment of the consideration in full.

5. Further he submitted that at paragraph 6 of the Supporting Affidavit that the Plaintiff is in possession of the subject matter. In paragraph 10 of the same Affidavit, the Advocate submitted that the plaintiff registered cautions on the subject matters to safeguard his interests. He further submitted that, the Plaintiff is ready and willing to facilitate the transfer of the subject matter once the Defendant executes the transfers. He prayed for the judgment as prayed. He finally submitted that a party can apply for judgment on admission at any stage a defendant admits the claim. He concluded by submitting that no legal issue has been raised in defence to warrant matter to go for hearing.

6. The Plaintiff relies on the following authorities on the list of authorities filed namely:

- 3) Bakari Ali Kasmani Vs. Stanley Murma Wanguye (HCCC No. 538 of 1999).
- 4) Bullion Bank Limited Vs. James Kinyanjui & Anor (HCCC No. 1158 of 1999)
- 5) Joseph Kinuthia Vs. Barclays Bank of Kenya Limited & Another (HCCC No. 563 of 2003).

7. The issues for determination are:-

- 1) Whether there is admission of the plaintiff's claim disclosed by the Defendant's defence?
- 2) Whether the Plaintiff is entitled to the judgment as prayed in the plaint as the basis of the admission in the defence?

8. Order 13 of Civil Procedure Rules Cap 2 deals with admissions.

Rule (1) of Order 13 Civil Procedure Rule is to the effect that;

***“Any party to a suit may give notice by his pleading, or otherwise in writing that he admits the truth of the whole or part of the case of any other party.”***

Order 13 Rule 2 states that;

***“Any party at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admission, he may be entitled to without waiting for the determination of any other question between the parties;***

***and the court may upon such application make such order, or give such judgment, as the court may think just.”***

9. The defence filed 21<sup>st</sup> January 2011 paragraphs 4 admits an agreement was entered for sale of **LR KJD/KAPUTIEI NORTH/11275** on 15<sup>th</sup> July 2005 and the deposit of the purchase price was paid on or before 15<sup>th</sup> August 2005. However, the Defendant proceeds in the same paragraph to plead that the Plaintiff failed, refused and or neglected to pay the balance until 30<sup>th</sup> November 2009. In paragraph 5 of the defence, the Defendant pleads that, due to the Plaintiff's breach of payment of purchase price, he has sold same suit property to one **Walter Otiso** and the property is not available for the purposes of transfer to the plaintiff.

10. On paragraph 6 of the defence, the Defendant pleads that the purchase price agreed was paid for **LR KJD/KAPUTIEI NORTH/11413** and Defendant is seen capable, ready and willing to transfer the property to the Plaintiff but the Plaintiff has not been keen to have the property transferred in his name.

11. In respect to parcel No. **LR KJD/KAPUTIEI NORTH/11420** the Defendant also pleads that the agreed purchase price was paid in full and that he is and has been capable, ready and willing to transfer to the Plaintiff. However, the Plaintiff has not been keen to have the property transferred in his name; refer to paragraph 7 of the defence.

On the face of it, the contents of paragraphs 4, 5, 6 and 7 amount to the notice of admission referred to in Order 13 rule 1 Civil Procedure Rule.

12. Though the Defendant alleged in paragraph 5 of the defence to have sold **LR KJD/KAPUTIEI NORTH/11275** to one **Walter Otiso** same has not been demonstrated by the documents or replying affidavit.

In the authority of **Bakari Al Kasmani versus Stanley Murma Wanguye MSA HCC 538/1999, Mwera J.** replying on the authority of **Lalchand Choitram & Others versus Herta Nazari - Civil Appeal No. 8/82** stated:

***“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract.”***

13. In the second authority cited **Milimani Commercial HCC 1158/99 Bullion Bank Limited Versus James Kinyanjui and Another - Kasango J.** relying on authority of **Cassam versus Sachania (1982) KLR 191** which states:

***“Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.”***

The Plaintiff also cited **HCC 563/03 Milimani Commercial - Joseph Kinuthia versus Barclays Bank Limited and Another** which also reiterated the contents of Order 13 Rule 2 of the Civil Procedure Rules.

14. The defence by the Defendant clearly admits the claim in terms of the provisions of Order 13 Rules 1 and 2 of the Civil Procedure Rules Cap 21 and the cited authorities.

There is no legal issue raised by the Defendant to warrant the matter to proceed for trial.

15. The Plaintiff is also in possession of the subject herein and has cautioned them to protect his interest.

16. The court thus holds and makes a finding that the Motion dated 26<sup>th</sup> August 2014 is merited and ought to be allowed. The court makes the following orders:

- 1) Judgment be and is hereby entered against Defendant as prayed in the plaint prayers 1 and 2.
- 2) The applicant/Plaintiff will also get costs of the suit and the Motion herein.

17. Orders accordingly.

**DATED, SIGNED and DELIVERED** this 17<sup>TH</sup> day of **OCTOBER**, 2014.

**CHARLES KARIUKI**

**JUDGE**