



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.100 OF 2014

ALLAN NGINYA GATHIMBA.....PLAINTIFF

VERSUS

JEREMIAH KIOKO MUTUNGA.....1ST DEFENDANT

THE CHAIRMAN, SECRETARY AND TREASURER,

KATELEMBO ATHIANI MUPUTI &

RANCHING CO-OPERATIVE SOCIETY LTD.....2ND DEFENDANT

R U L I N G

1. The Applicant filed instant suit on 30.9.2014 vide Plaintiff dated 29.9.2014 seeking the following reliefs.
 - a. Refund by the 1st Defendant of KShs.850,000/- with interest at commercial rates as published by the Central Bank of Kenya from 25th February, 2013 or ALTERNATIVELY
 - b. An order of specific performance directed at the 2nd defendant to register the suit property that is half an acre plot 650 within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd in the name of the Plaintiff.
 - d. Costs of this suit with interest at court rates.
 - d. Any other relief that this Honourable Court may deem necessary to grant to the Plaintiff in the interest of justice.
2. . Upon being served with the summons, the Defendant No.1 filed appearance and defence dated 21.10.2014. The defence lodged on 21.10.2014 was served upon the Applicant prompting the Applicant to file Notice of Motion on 28.10.2014 principally under order 2 Rule 15 and order 13 Rule 2 Civil Procedure Rules. The motion seeks the following reliefs:
 1. That this Honourable court be pleased to strike out the defence herein for the 1st defendant and enter judgment as prayed in the Plaintiff.
 2. That this Honourable court be pleased to enter judgment on admission by the 1st Defendant.

3. That costs of this application be borne by the Defendants.

The application was based on the following grounds:

- a. The defence discloses no reasonable cause of action or defence in law; and
- b. The defence is scandalous, frivolous or vexatious; and
- c. The defence is meant to prejudice, embarrass or delay the fair trial of the action and
- d. The defence is otherwise an abuse of the process of the court,
- e. Judgment has been requested against the 2nd Defendant for failing to enter appearance.

3. The Application is not supported by any Affidavit in line with order 2 Rules 15 (2) Civil Procedure Rules. The Respondent filed grounds of opposition on 19.11.2014 to oppose the motion. Order 2 Rule 15(1) stipulates that at any stage of the proceedings the court may order to be struck out or amended any pleadings on the grounds that:

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court

And may order the suit to be stayed or dismissed or judgment to be entered accordingly.

Order 13 Rule (2) states that:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleading or otherwise, apply to the court for such judgment or order as upon such admissions 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”.

The defence filed state that

“the first Defendant admits that he sold the subject parcel of land to the Plaintiff but did not have knowledge that it was sold to someone else”.

4. In his statement under order 11 Civil Procedure Act, he states that he sold land to the Plaintiff and transferred the same to him. In his grounds of opposition to the motion he states that the Plaintiff cannot claim for a refund of money and at the same time claim suit premises.

5. From the pleadings it is clear that the land subject matter was sold to the plaintiff as admitted at a consideration of KShs.850,000/- which was paid in full. The land however had already been sold and transferred to a third party who is not enjoined herein.

6. The 1st Defendant admits that he got the money but the land was transferred to somebody else. He is unjustly enriching himself and in fact defrauding the Plaintiff by taking his money while aware that the land was disposed to a third party.

7. In the circumstances of the case, the relief of specific performance cannot be available. On the issues of refund, the Defendant No.1 does not deny or oppose it other than saying that the Plaintiffs should

select either refund or specific performance reliefs.

8. The 1st Defendant having not only admitted the claim but also filed a frivolous, vexatious, scandalous defence, the court finds that the Defence filed is unreasonable and an abuse of the court process and cannot stand. The plaintiff has established that he is entitled to reliefs sought in the motion dated 24th October, 2014 and the court makes the following orders:

1. The Defence filed on 21.10.2014 is struck out.

2. Judgment is entered for Plaintiff against the 1st Defendant for KShs.850,000/- with interest from 25.2.2013 date of sale to date of payment in full.

3. Costs against 1st Defendant.

4. No orders as to costs against 2nd Defendant.

Signed and Delivered at Machakos this 11th day of December, 2014.

CHARLES KARIUKI

JUDGE