



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 406 OF 2014**

**GEOFFREY KAMAU KIRATU.....PLAINTIFF**

**VERSUS**

**LAWRENCE NGINYO KARIUKI.....DEFENDANT**

**RULING**

1. The application before me is for an interlocutory injunction to restrain the defendant from harvesting; selling; receiving or collecting any money in relation to or otherwise alienating; interfering or dealing with the Eucalyptus trees on the 100 acres portion of the **MAKUYU-KWEGA ESTATE** which the plaintiff had purchased from the defendant.

2. There was an Agreement between the two parties in this case. The said Agreement is dated 21<sup>st</sup> June 2014.

3. The following are the pertinent parts of the Agreement;

“1) *The Buyer will harvest the Eucalyptus trees at Makuyu-Kwega Estate of approximately 100 acres within a period of 4 months at agreed price of Kshs. 10,000,000.00 (Kenya shillings Ten Million Only).*

2. *The buyer to deposit Kshs. 1,000,000.00 (Kenya shillings one million only) and issue posted cheques of Kshs. 3,000,000.00 (Kenya shillings Three Million Only) each month for 3 months. Enclosed are the cheques numbers and amount breakdown from Family Bank Kikuyu Branch from the buyer.*

3. *The buyer will cater for his own security during harvesting of the Eucalyptus trees.*

4. *The seller to monitor the harvesting of the eucalyptus trees and may demand earlier payment should the rate of trees harvested are more than payment done.*

5. *The seller has a right to stop the harvesting of Eucalyptus trees in case payments are not honoured or postponement of the date of deposit of the issued post-dated cheques”.*

4. It is plaintiff’s case that he paid to the defendant the deposit of Kshs.1,000,000/-. He was then permitted to start the harvesting of the trees.

5. However, on 21<sup>st</sup> July 2014 the defendant suddenly stopped the plaintiff from harvesting any more trees. The reason given by the defendant was that the plaintiff had already harvested about 70% of the trees whereas he had only paid for much less.
6. On the other hand, the plaintiff was of the view that he had only harvested 15% of the trees.
7. Obviously, there was a very large disconnect between the parties.
8. Nonetheless, the defendant was said to have been holding security, in the form of post-dated cheques. Therefore, it is the plaintiff's contention that the defendant had no cause for any worries.
9. In response to the application, the defendant pointed out that by 24<sup>th</sup> November 2014, when the application was being canvassed, the contract period had already lapsed.
10. The court deems it necessary to put the issue of dates within the proper perspective.
11. The contract was dated 21<sup>st</sup> June 2014, and it specified that the plaintiff would have four (4) months to harvest the trees.
12. However, the defendant stopped any further harvesting on 21<sup>st</sup> July 2014. That means that the plaintiff was stopped after he had only harvested the trees for one month. He therefore had 3 more months within which he should have been allowed to harvest the trees.
13. If the court should find that the defendant was not entitled to stop the plaintiff from harvesting the trees, that would mean that the defendant could not then leverage on the issue of time as a justification for bringing the Agreement to an end.
14. But the defendant did not literally terminate the contract on 21<sup>st</sup> July 2014. He gave conditions to the plaintiff, that unless further payment was made, the plaintiff would not continue with further harvesting. The further payments were not sums that were in excess of the agreed amount, but portions thereof.
15. When the defendant demanded more money, the plaintiff paid Kshs. 1,200,000/-. As far as the defendant was concerned, that payment implied that the plaintiff had acknowledged that he had already harvested more trees than he had paid for.
16. To my mind, the said payment did not necessarily imply that the plaintiff had admitted having harvested more trees than he had already paid for. It is possible that the plaintiff was trying to achieve a practical solution, which could enable him meet his obligations to the persons who were buying the products from him.
17. In the Agreement between the parties, the defendant was permitted to monitor the harvesting of the trees. He was also authorized to demand earlier payment if the plaintiff had harvested more trees than he had already paid for.
18. Therefore, when the defendant stopped the plaintiff, he was acting in accordance with the express terms of the contract.
19. Regrettably, the parties had not specified, in the Agreement, how they were to resolve disputes relating to the value of the trees already harvested vis-à-vis the amount of money already paid by the plaintiff.
20. In the result, either party was convinced that he was right. The plaintiff believed that he had only harvested 15% of the trees, yet he had already paid for almost 50%; but the defendant's view was that the plaintiff had already harvested about 70% of the trees.

21. The defendant made available a report compiled by Mr. S.K. Cheruiyot, a forester, confirming that the plaintiff had harvested 70% of the trees which he was entitled to.
22. Although that report was not put together until after the plaintiff was stopped from further harvesting, that does not reduce its value.
23. On his part, the plaintiff did not make available any report to the court or to the defendant. There was thus no material to counter the report of Mr. Cheruiyot.
24. The plaintiff contends that the title in the goods had already passed on to him.
25. Even if that were the position in law, that did not entitle the plaintiff to get the trees without paying for them.
26. Meanwhile, the defendant alleges that he had now sold the goods to another person. No Agreement was provided to this court to prove the defendant's said contention.
27. In any event, if the defendant made a decision to sell the trees to another person whilst he was well aware that the dispute between him and the plaintiff was still unresolved, that means that the defendant was taking a risk. The said risk cannot then be a basis for determining this application.
28. In my considered opinion, there cannot be an injunction that stops the defendant from selling the trees or dealing with them in any other way until the suit was determined.
29. However, the justice of the case demands that the plaintiff be accorded one opportunity to pay for the trees and to then harvest them. Therefore, the plaintiff is now allowed sixty (60) days from today to pay the balance of the purchase price, and to then harvest the remaining trees. In effect, an injunction is now issued to stop the defendant from selling the remaining trees to any other person for the next 60 days.
30. If the plaintiff does not pay the balance of the purchase price within the 60 days, the injunction will automatically lapse.
31. Each of the parties will pay his own costs of the application dated 17<sup>th</sup> September 2014.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Miss Mabele for Thuo for the Plaintiff.

Tugei for the Defendant.

Collins Odhiambo – Court clerk.