



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.19 OF 2013

LEWNARD OLUOCH AJALA.....PLAINTIFF

VERSUS

LAWRENCE OCHIENG NAUM.....DEFENDANT

RULING

1. This is a ruling on a Notice of Motion filed here on 6/5/2013 and dated 3/5/2013. The motion was heard interpartes on 31/7/2013 and is brought under Order 40 Rules 1a of Civil Procedure Rules and Sections 1A & B, 3A and 63(e) of Civil Procedure Act (Cap 21).
2. Prayers 1 and 2 are already spent and what is sought now are prayers 3 and 4 which are as follows:

Prayer 3: That a temporary injunction do issue directed at the defendants, their employees, workers, agents and/or whomsoever jointly and severally restraining them from trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, dealing and/or interfering with the plaintiff's land parcel No. **KISUMU/MANYATTA "A"/2511** pending hearing and determination of the suit.

Prayer 4: That the costs of this application be provided for.

3. The grounds advanced in support stipulate that the plaintiff is the equitable and/or bonafide owner of land parcel No. **KISUMU/MANYATTA "A"/2511** having purchased the same from 1st defendant and that the 1st defendant is now hellbent on selling it to the 2nd defendant. The plaintiff says he will suffer irreparable harm.
4. The supporting affidavit tells a story. The gist of the story is that the plaintiff – **LEONARD OLUOCH AJALA** – agreed with the first defendant – **LAWRENCE OCHIENG ALWATI** – vide an agreement dated 1/ 4/2011 to buy and sell parcel No. **KISUMU/MANYATTA "A"/2511**. The plaintiff was the purchaser and the 1st defendant was the buyer. The consideration or purchase price was 710,000/= of which the 1st defendant paid 200,000/=
5. Thereafter three more payments were made by the plaintiff as follows:-
 - Ksh.35000 to assist the plaintiff in his own upkeep.
 - Kshs.25000/= to offset some burial expenses.
 - Kshs.78,500 to offset a loan due from defendant's sister – Margaret Obiero – to the Ministry of Trade.
6. The plaintiff later received a letter from the 1st defendant alleging that he had refused to pay the

- balance and intimating the 1st defendant's willingness to refund the amount already paid. The plaintiff responded to that later denying refusal to pay the balance and explaining that he was awaiting completion of the Succession Cause already pending concerning the same property.
7. The plaintiff further addressed willingness to pay 450,000/=, which was the balance remaining. The 1st defendant didn't respond.
 8. The plaintiff then came to learn that the 1st defendant was selling the land to 2nd defendant – **BENARD OCHIENG AGWATI**. That necessitated the filing of this suit.
 9. The 1st defendant filed a replying affidavit and accepted that he had agreed to sell the land to the plaintiff. The plaintiff, he said, paid 260,000/= and the balance was to be paid on 14/1/2011. Also intimated is that the amounts paid later – Kshs.35,000 and Kshs.25,000/= were to be deducted from the remaining balance.
 10. The 1st defendant said the plaintiff didn't pay Kshs.78,500/=. He instead paid it himself after the plaintiff applied pressure on him to settle it. The 1st defendant said he paid that amount from the amount already paid to him by the plaintiff.
 11. The 1st defendant also said he obtained letters of administration concerning the suit property. And after obtaining the letters, he approached the plaintiff several times to settle the balance but the plaintiff failed to do so.
 12. The 1st defendant further said that consent of the Land Control Board was not obtained and that being the position, the plaintiff's only recourse is to get a refund of the money he has already paid.
 13. I heard the matter inter partes on 31/7/2013. The plaintiff reiterated generally what the supporting grounds and the supporting affidavit contain. It was not very different for the 1st defendant also. His response was generally along the contents of the replying affidavit.
 14. I have considered what was laid before me by the parties. It appears to me that this is a land transaction gone sour. It appears that the plaintiff amended his plaint but as I write this ruling the amended plaint is not in the Court file. Other records in the Court file seem to show that the amendment brought the 2nd defendant on board. As I have not seen the amended plaint I am not able to know what else may have been amended.
 15. The suit as now in the Court file is asking for a permanent injunction against the 1st defendant, his agents, servants or employees from disposing of the suit property. It also asks that the defendant be compelled to accept the balance of 450,000/= and to transfer the suit property to the plaintiff.
 16. I think the plaintiff's suit as filed faces a formidable legal hurdle namely: Lack of Land Control Board consent. It is difficult to see how the plaintiff will surmount this problem. The 1st defendant is clearly aware of this and intends to use the necessary legal provision to good effect. This is one factor that makes me hesitate in accepting that a prima facie case is made. I take the position that such case is not established.
 17. And will the plaintiff suffer irreparable loss? The answer to this is no. There is no intimation that the plaintiff has developed the land. The amount paid by the plaintiff seem to stand at 260,000/=. The 1st defendant is willing to refund it. The law only allows him to recover what he has paid as a civil debt. It is difficult to see what irreparable harm will come to the plaintiff.
 18. The plaintiff also seems to be less than honest. He said he paid 35,000/=:, 25,000/=:, and 78,500/=: . These payments are over and above the initial 200,000/= he paid earlier. When this latter amounts are added to the initial amount, the calculation goes thus: 200,000 + 25,000+35,000+78,500= 338,500/=: .

The implication here is that the plaintiff had paid 338,500/=: . When you deduct this from 710,000/=: , which is the agreed purchase price, the calculation is as follows: 710,000-338,500 = 371,500/=: . So the

ultimate balance that should be owing is 371,500/= yet the plaintiff says the balance is 450,000/=.

19.If we go by the balance of 450,000/=, the alleged payment of 78,500/= is left out. That then, makes us believe the 1st defendant assertion that the plaintiff didn't pay this amount. The plaintiff would certainly be claiming it if he paid it. His allegation that he paid it is therefore a lie. The plaintiff is seeking an equitable remedy and Ringera J. was spot on in the decided case of **MOSES NGENYE KAHINDI VS AGRICULTURAL FINANCE CORPORATION: HCC NO.1044/2001, NAIROBI**, when he said:-

“And of course it requires no stressing that as an injunction is a discretionary and equitable remedy, if the applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a Court of equity, the relief may not be granted however meritorious the case may otherwise have been”.

20.It is for all these reasons that I find the plaintiff's application unmeritorious and I dismiss it with costs.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Dianga George – C/C

No party present

Interpretation: English/Kiswahili

Odeny for plaintiff

Lore for Kowino for defendant

COURT: Ruling on Notice of Motion filed on 6/5/2013 and dated 3/5/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013