



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL CASE NO. 121 OF 2011**

**GREENLANDS AGRO PRODUCERS LTD..... PLAINTIFF**

**VERSUS**

**ERASTUS MUTWIRI RUTERE.....DEFENDANT**

**RULING**

This ruling is the outcome of two applications, namely, the Motion dated 8<sup>th</sup> September 2011 and another dated 13<sup>th</sup> September 2011. Those applications were argued together at the interpartes stage. In the Motion dated 8<sup>th</sup> September 2011, **Greenlands Agro Producers Ltd.**, the Plaintiff herein sought for the following orders:

1. *That this application be certified urgent and that for reasons to be recorded it be heard ex-parte in the 1<sup>st</sup> instance.*
2. *That this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant by himself, his servants, employees or agents or otherwise howsoever from interfering with the plaintiff's peaceful occupation of Laikipia Kalalu/658 pursuant to lease between the parties hereto by illegally interfering with the plaintiff's entry and exit from the said land or evicting the plaintiff, its directors employees and agents from Laikipia/Kalalu/658 or in any other way interfering with the plaintiff's rights to the said land under the lease pending the hearing and determination of this application.*
3. *That this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant by himself his servants, employees or agents or otherwise however from interfering with the plaintiff's peaceful occupation of Laikipia Kalalu/658 pursuant to lease between the parties hereto by illegally interfering with the plaintiff's entry and exit from the said land or evicting the plaintiff, its directors employees and agents from Laikipia/Kalalu/658 or in any other way interfering with the plaintiff's rights to the said land under the lease pending the hearing and determination of the suit.*
4. *That the costs of this application be borne by the defendant.*

In the Motion dated 13<sup>th</sup> September 2011, **Erastus Mutwiri Rutere**, the Defendant herein, applied for the following orders:

0. *That the application be certified as urgent and be heard ex-parte in the first instance.*
0. *That the Honourable court be pleased to stay and or suspend execution of the interim injunction orders granted ex-parte on the 9<sup>th</sup> September 2011 pending inter-parties hearing of the application herein.*
0. *That an urgent date be set for the inter partes hearing of this application.*
0. *That the Honourable Court be pleased to set aside the interim injunction orders granted ex-parte on the 9<sup>th</sup> September 2011.*
0. *That both the Plaint and application thereto dated 8<sup>th</sup> September 2011 and filed on the same date be dismissed.*
0. *That a mandatory injunction do issue compelling the Plaintiff whether by itself and or through employees, agents, representatives or anybody whosoever to deliver up to the Defendant the Original Copy of Certificate Title to all that parcel of land known as title No. Laikipia/Kalalu/658 forthwith.*
0. *That the Honourable Court be pleased to grant and any further orders and directions as may be just and expeditious disposal of the application.*
0. *That the costs of this application be granted to the Defendant.*

Both applications were strenuously opposed.

Let me start by considering the Motion dated 8<sup>th</sup> September 2011. I have already set out the kind of orders the Plaintiff sought in the aforesaid Motion. The Motion is supported by the affidavit of Mutegi Murungi. It is opposed by the Defendant who filed a replying affidavit he swore on 27<sup>th</sup> September 2011. When the Motion came up for interpartes hearing, learned counsels appearing in the matter were permitted to file written submissions but they later appeared before Court to make oral highlights of the salient issues raised in their submissions. It is the submission of Mr. Gaita, learned advocate for the Plaintiff, that the Applicant has shown it has a *prima facie* case with high chances of success. He argued that the Applicant had a valid option to renew the lease under clause 7.1 of the lease agreement. Mr. Gaita further pointed out that the agreement further gave the Plaintiff the option to purchase **L.R. NO. LAIKIPIA/KALALU/658** pursuant to clause 8 of the agreement. It is alleged that the Defendant offered the property for sale to the Plaintiff and that the Plaintiff expressed its intention to purchase the property. The Plaintiff further argued that the Defendant later changed his mind due to a disagreement over the sale price. This turn of events prompted the Plaintiff to take the option to renew the lease which offer the Defendant flatly rejected. It is alleged that the Defendant directed the Plaintiff to vacate the land in dispute. It is the submission of the plaintiff that their agreement has a mechanism of solving disputes over rent and the purchase price. The Defendant opposed the application claiming the lease agreement between him and the Plaintiff expired on 31<sup>st</sup> August 2011. The Defendant averred that the Plaintiff never exercised the option to renew the lease. It is argued that the Plaintiff specifically expressed its intention not to renew the lease. The Defendant stated that there was no acceptance of the belated offer to buy and for the renewal of the lease. I have carefully considered the material placed before me plus the rival submissions. The facts leading to the filing of this suit and the Motion appear to be short and straightforward. The Plaintiff Company leased the Defendant's parcel of land known as **L.R. NO. LAIKIPIA/KALALU/658** for a term of five years with effect from 1<sup>st</sup> September 2006. The lease agreement is dated 2<sup>nd</sup> September 2006. The lease agreement has clauses stating that the lessee had the option either to renew the lease at its expiry or to take the option to purchase the same. Both sides annexed to their respective affidavits various correspondences they exchanged before the commencement of this suit. The whole saga started when the Defendant wrote to the Plaintiff making inquiries regarding the renewal of the lease and the option to purchase the land in dispute vide the letter dated 27<sup>th</sup> July 2010. By its letter dated 8<sup>th</sup> March 2011, the Plaintiff expressed its intention to purchase the land. The

proposal to renew the lease was expressly rejected by the Defendant who in turn stated that the land was available for sale. A dispute over the purchase price arose. The Plaintiff claimed that the selling price fixed by the Defendant was exorbitant hence unrealistic. At this juncture the Plaintiff told the Defendant that it was willing instead to take the option to renew the lease as from 2<sup>nd</sup> September 2011. The Defendant rejected the later offer for renewal of lease on the basis that the Plaintiff had forfeited the same. The Defendant demanded from the Plaintiff to vacate his land. The Plaintiff was unwilling to vacate the land. On 1<sup>st</sup> September 2011, the Defendant stationed guards at the gate(s) of the suit land with threats of eviction. The Plaintiff was then prompted to file this suit.

The Plaintiff's application dated 8<sup>th</sup> September 2011 seeks to restrain the Defendant from interfering with the Plaintiff's peaceful possession and or interfering with the Plaintiff's ingress and egress of the property. In the substantive suit the Plaintiff prays for judgment against the Defendant in the following terms *inter alia*

**(a) An order for declaration that the Plaintiff is entitled to automatic renewal of the lease on the suit land for a further term of 5 years from the date of the expiry of the original lease executed on 2<sup>nd</sup> October 2006.**

It is in the opinion of the Defendant that the Plaintiff has no *prima facie* case with high chances of success, in that it had not exercised its option to renew the lease nor that of purchase before the expiry of the lease. In a nutshell, the Defendant avers that at the time of filing this suit the Plaintiff had no legal interest on the suit property. It is obvious from the pleadings and the facts deponed in the rival affidavits that the lease binding the parties lapsed at the expiry of five years i.e. by the 3<sup>rd</sup> day of September 2011. The Plaintiff on the other hand is of the view that it had an automatic right of renewal of lease in terms of clause 7.1 of the expired lease. I have carefully perused Clause 7.1 of the lease which provides as follows:

***“The Lessor shall grant to the Lessee a further Lease of the Demised Premises for a period equivalent to the Term commencing on the day following the last day of the Term upon the same terms and conditions as this Lease (save as to the rent payable during such renewed term which shall be agreed by the parties failure of which they will get an agriculture valuer to assess the rent payable) and this option for a further lease. The lessor hereby acknowledges the lessee's right to register such option in the Lands Office, Nanyuki against the title Deed in respect of the Land PROVIDED THAT a failure to register such option shall not prejudice or otherwise detrimentally affect the Lessee's right to exercise such option.”***

The above clause clearly shows that the Plaintiff had an automatic right of renewal of lease. However, the Plaintiff's conduct may have affected that automatic right. The correspondences exchanged by the parties appear to have changed the scenario. There is affidavit evidence that the Defendant wrote to the Plaintiff through his advocates inquiring whether the Plaintiff was interested in renewing the lease. That letter is dated 27<sup>th</sup> July 2010. In the same letter the Defendant requested from the Plaintiff whether it was interested to purchase the land. It would appear there was no response from the Plaintiff until 8<sup>th</sup> March 2011 when the Plaintiff expressly intimated in its letter dated 8<sup>th</sup> March 2011 that it was not interested in renewing the lease but was for the option to purchase. It would appear negotiations began over the purchase of the land by the Plaintiff but yielded no positive results due to the disagreement over the price. With respect, I agree with the Defendant that the Plaintiff had expressly waived its right to the automatic renewal of the lease. The main question in dispute is whether or not the Plaintiff is entitled to automatic right of renewal of the lease for five years. The Plaintiff does not deny that it wrote to the Defendant through its advocates the letter dated 8<sup>th</sup> March 2011. In the letter, the plaintiff stated in part as follows:

***“They will not be renewing the lease but if your client is interested in selling, can he discuss the price with our client.”***

The parties went into negotiations on the selling price of the land but could not agree. The

correspondences shows the Defendant gave the Plaintiff priority to exercise its option to purchase the land as per clause 8 of the lease but could not agree on the price. It is clear in my mind that the Plaintiff has not shown that it has a *prima facie* case with any chances of success hence it is not entitled to the orders of injunction. In sum, I will dismiss which I hereby do, the Motion dated 8<sup>th</sup> September 2011 with costs to the Defendant.

As regards the Motion dated 13<sup>th</sup> September 2011, it is not difficult to decide the same. Prayers 2, 3, 4 and 5 have been taken care of by the decision on the Motion dated 8<sup>th</sup> September 2011. The remaining prayer is prayer No. 6 in which the Defendant is seeking for a mandatory order of injunction to force the Plaintiff to surrender the certificate of title in respect of L.R. NO. LAIKIPIA/KALALU/658 to the Defendant. The Plaintiff urged this Court to dismiss this prayer of the Motion on the basis that the same is premature. It is said that there is no prayer in the defence on or a counter-claim for a mandatory order of injunction hence the same cannot be issued in vacuum. The Plaintiff admits that the aforesaid title is in its custody with the consent of the Defendant and that the same has never been demanded for. It would appear from the Plaintiff's submissions that the Plaintiff has no difficulty in releasing the title to the Defendant if demanded. There is therefore no harm in making the order to direct it to surrender the title to the Defendant now that it no longer has any interest in seeking for the renewal of the lease. With respect, I agree with the Defendant that the Plaintiff has no basis to continue withholding the certificate of title yet the lease has already expired. In such a case a party does not have to plead in the defence or by way of a counter-claim for such an order. I grant the order to the Defendant. Since the Defendant had not made a demand to the Plaintiff, I will not give him costs of the Motion dated 13<sup>th</sup> September 2011. I order that each party bears his or its own costs.

***Dated and delivered at Nyeri this 20<sup>th</sup> day of January 2012.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Mayeka for the Respondent and Mr. Muchiri holding brief for Murimi for the Applicant.

**Muchiri:** I apply for stay pending the filing of a formal application for stay. The Plaintiff intends to appeal against the decision.

**Mayeka:** We shall object to the prayer for stay.

**COURT:** I have considered the oral application for stay made by Mr. Muchiri, learned advocate for the Plaintiff/Applicant. I have further considered the oral submissions presented to oppose the application. There is no doubt that the court has the discretion to grant the order on the basis of an oral informal application. This court has made two main orders namely:

(i) It dismissed the application for injunction sought for in the Motion dated 8<sup>th</sup> September 2011. Can an order for stay be issued in the circumstances? I do not think so. The nature of the order cannot lead to execution. In short the same is not an executory order. Perhaps, the Applicant if well advised may seek for other available remedies.

(ii) The court gave a mandatory order of injunction as prayed for in prayer 6 of the Motion dated 13<sup>th</sup> September 2011. The Court basically issued an order directing the Plaintiff to surrender the title deed. The order for stay will be granted if the applicant shows the substantial loss it would suffer if the order is denied. In my view, the Applicant has not shown the substantial loss it would suffer if the order is denied. I decline to grant the order at the *ex parte* stage. Let the applicant file a formal application.

**J. K. SERGON**

**JUDGE**