

STEPHEN NDELEVA MUASYA & OTHERS....PLAINTIFFS/RESPONDENTS

VERSUS

PETER MWANGI WAITITU.....DEFENDANT/APPLICANT

RULING

1.The Plaintiffs in this case filed their plaint on **25/10/2007**. In it, they ask for a rescission of an agreement dated **01/02/2005** (“Sale Agreement”) between themselves and **Peter Mwangi Waititu**, the defendant (“Defendant”). That agreement was for the sale of Land Parcel No. **LR No. 12715/658** (“Suit Property”). The Plaintiffs, therefore, also seek for vacant possession: a permanent injunction against the Defendant or his agents or anyone claiming or acting under him from in any way interfering with all the incidents of Plaintiffs’ ownership of the Suit Property as well as an order of eviction and demolition of any structures placed there by or under the direction of the Defendant.

2.The Plaintiffs’ claim is a straightforward one. The purchase price was **Kshs. 5,250,000/=**. Kshs. 648,000/= was acknowledged to have already been received. The terms of the Sale Agreement obligated the Defendant to pay a “deposit” of **Kshs. 4 Million** on **15/02/2005**. In the event that the Defendant defaulted to pay this “deposit”, the Plaintiffs prospectively granted him **15 extra days** to make good. At the conclusion of those **15 days**, the Plaintiffs permitted themselves the right to sale the land to any other willing buyer. The remaining sale amount of **Kshs. 602,000/=** were to be paid upon the Plaintiffs supplying the Defendant with all the necessary documents to transfer the Suit Property to the name of the Defendant. All these can be gleaned from the Sale Agreement.

3.However, along the way, the Defendant was unable to keep up with the timeline demanded by the Sale Agreement. The Plaintiff indulged him. On **15/02/2005** – that is the day he was supposed to make his payment of **Kshs. 4 million** – the parties met and agreed in writing that the Defendant would now pay the **Kshs. 4 Million** on **23/03/2005**. It is the Plaintiffs’ claim that the Defendant failed to adhere to this new schedule of payment. Instead, he has only paid a grand total of **Kshs. 500,000/=** (in addition to the acknowledged sum of **Kshs. 648,000/=** as per the Sale Agreement).

4.The Plaintiffs further say that although the Sale Agreement is quite explicit in its terms that the Defendant shall not commence any construction on the property until he has been given a go-ahead by the Plaintiffs upon payment of the “deposit” of **Kshs. 4 Million**, he has, apparently, authorized third parties to commence constructions – hence the prayer for demolition in the Plaint.

5.To safeguard their interests during the pendency of the suit, the Plaintiffs filed a Chamber Summons seeking interim injunctive relief simultaneously with the Plaint. Since this application (“Injunction Application”) was filed under certificate of urgency, it was given a date soon thereafter. The Plaintiffs’ counsel served the Injunction Application on **25/10/2007**. That much is not denied by the Defendant. Indeed, on **01/11/2005**, **Ogessa & Co. Advocates** came on record for the Defendant. On the same day, the Defendant’s Advocates also filed a Notice of Preliminary Objection.

6.The parties appeared before the Court on **01/11/2007** and again on **09/11/2007** where they indicated that out of court negotiations were under way. Any ray of hope of resolution presented by these negotiations was effectively flicked out on **23/11/2007** when the Plaintiffs’ Advocate reported to the Court that no settlement had been forthcoming from the Defendant. He proposed to proceed with the Injunction Application. A date of **20/03/2008** was set in Court. However, it turned out that was during vacation. In the meanwhile, on **28/03/2008**, the Plaintiffs’ Advocates filed a formal request for judgment on the grounds that the Defendant had failed to file a defence , **interlocutory judgment was entered**

g.On 09/07/08, the parties appeared before Justice Osiemo who entertained arguments on proper registry of filing. He gave a ruling date of 22/07/2008. He also noted that the defendant’s counsel

was not properly on record. It is not clear why. The Defendant's counsel learnt on that day about the interlocutory judgment.

h. On 24/07/2008, the Defendant entered appearance through their present advocates.

i. On 22/07/2008, *Justice Osiemo* directed that the case be transferred to the Machakos registry and that it be set for mention for 01/08/2008.

j. On 01/08/2008, the Plaintiffs' lawyer was present but neither the Defendant nor his advocates were present. The Court set the matter for formal proof on 18/11/2008.

k. On 18/11/2008, with only the Plaintiffs' advocate present, the case was stood over to 11/03/2009. It is not clear what happened on that latter date.

l. On 30/06/2009, the case was back in Court before Justice Lenaola who stood it over for formal proof on 17/09/2009. In the meanwhile, the Defendant's Advocate, who was not in Court again on 30/06/2009, had filed the present Application on 25/02/2009. Still, there was no appearance from the Defendant's side on 30/06/2009. The Defendant's Advocate had not yet served the Plaintiffs' lawyers with the Application.

m. and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI

JUDGE