



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 193 OF 2011

SAMMY KURIA NDUNGU.....PLAINTIFF

VERSUS

SAMUEL MBUGUA IKUMBU.....DEFENDANT

RULING

By the Notice of Motion dated 26th July 2011, the Plaintiff/Applicant, **Sammy Kuria Ndung'u** seeks an order of injunction to restrain the Defendant/Respondent, **Samuel Mbugua Ikumbu**, his servants or agents from entering, remaining, cultivating, evicting, selling or charging, transferring or in any other manner dealing with **Plot No. 4B, Parcel No. Nakuru Municipality Block 10/92**, pending the hearing and determination of this suit.

The Notice of Motion is premised on grounds found in the body of the application, a supporting and supplementary affidavits sworn by the Applicant on 26/7/2011 and 5/9/2011 respectively. The grounds are *inter-alia* that on 2/10/2010 the Applicant and Respondent entered into a sale agreement whereby the Respondent sold to the Applicant, **Plot No. 4B, Nakuru Municipality Block 10/92** for a sum of Kshs.7,250,000 of which Kshs.5,000,000 was paid on the same date and Kshs.2,250,000 was to be paid in two installments by 31/12/2011. After the Respondent received the first installment, he refused to accept the two other installments and returned the cheques to the Advocate, **(SKN.4)**. The reasons for the Respondent returning the cheques was that the Kshs.5,000,000/= had not been paid and that the Respondent had changed his mind about the sale because the price agreed on was not a fair market price; That the Respondent had given to him a copy of the title from which the parcel was to be excised and it was registered in the Respondent's names. The Applicant claims to have fulfilled his part of the contract but the Respondent has failed to and even failed to let the applicant use the land as agreed nor has he surrendered a clean title to the Applicant. The applicant further averred that he had the Kshs.5,000,000/= in cash, he met with the Respondent for purposes of depositing the money at HFCK, Nakuru Branch but the Bank could only accept one million. Then, the Respondent had already received the 5 million and thereafter, they drove to the Respondent's home to keep the money in safe custody and later went back to the offices of **Kanyi Ngure Advocate** to sign the agreement. He said that he had been keeping the money for about a week in anticipation of the agreement. He denied having written a cheque to withdraw Kshs. 5 million from Barclays Bank. It is the Applicant's contention that he had withdrawn Kshs.5,000,000/= from the Barclays Bank account on 4/10/2010 but it was for purchasing of sugar from Sony Sugar Company Ltd and the Applicant came to know of the withdrawal from CID Police investigations. The Applicant also contended that he has come to learn that the title in respect to the land was charged to Kenya Commercial Bank on 25/5/2010. It is the Applicant's contention that since the land was charged, the Respondent misrepresented to him that he was in a position to sell the land and further that the Respondent used his surveyor, misrepresented to him that the parent title was with the lands registry for

purposes of sub-division which was not true.

In opposing the application, the Respondent swore a replying affidavit dated 10/4/2011, in which he admits being the owner of Nakuru Municipality Block 10/92 and a small portion known as Plot 4B, which comprises the suit land herein. He conceded to have entered into a sale agreement with the Applicant on 2/10/2011 for the sale of a small portion of his Plot Nakuru Municipality Block 10/92. He agreed that he signed that he had received Kshs.5,000,000/= as deposit and they agreed to go to Barclays Bank, Nakuru Branch to withdraw the said cash and deposit it in an account at HFCK, Nakuru.

They went to Barclays Bank, the Respondent withdrew the money and they moved to HFCK to deposit it in an account but the bank could only accept Kshs.1,000,000. As a result, the Applicant took the money back to Barclays Bank. He exhibited the Applicant's statement of account **SM102(a), (b), (c) and (d)**. The Applicant's statement of account were supplied following a court order in **Misc. Application No. 282 of 2011**. The Respondent contends that the above statement of account and banking in slip does indicate that the date the cheque was paid is the same date the same amount was deposited back in the Applicant's account in Barclays Bank; That though the transactions were done on 2/10/2011; a Saturday, the date reflected is 4/10/2011, the next Monday as is the practice in the banks.

It is the Respondent's contention that he had the right to rescind the contract since the Applicant failed to pay the first deposit, a fact of which he informed Kanyi Ngure Advocate, but he was surprised when the advocate forwarded to him the installments relating to the balance; that he has now obtained approval plans in respect of his Plot and has borrowed Kshs.12,000,000/= from HFCK to develop it.

Having considered the rival arguments, the question that stands out is whether or not the Respondent was paid the initial deposit of Kshs.5,000,000/=. Whereas the Applicant maintains that he did pay the money, the Respondent denied having received it. The statement and pay-in slip exhibited by the Respondent seem to tally with the Respondent's explanation that HFCK refused to accept the 5 million as being against the rules and practice of the banks and the money was deposited back in the Applicant's account in Barclays Bank (**SMI.2(a) (b) and (d)**). The Respondent's explanation and the Applicant's allegation that he paid 5 million to the Respondent do raise triable issues. If the initial deposit of Kshs.5 million was not paid, then it means that the Respondent did not comply with the terms of the contract. That is an issue which can only be determined at the full hearing.

The Applicant also alleges that the Respondent had no title to pass to him as at 2/10/2011 when the contract was entered into because he has found out that there was a charge over the sane property with HFCK. If that be the case, then it means that the contract was *void ab initio* and the court would not grant an order of injunction in respect of the said property because the bank to which the property is charged, is not party to these proceedings. If an injunction were granted at this stage, the bank would be prejudiced.

Since either party blames the other for breach of contract, this court would not issue any order of injunction against the Respondent at this stage because the issues raised can only be determined at a full hearing. Besides, the sum in issue is specific i.e. the Shs.5,000,000/=. If the court finds that the Respondent is in breach of the contract, the money recoverable as damages.

For the above reasons, I decline to grant the prayer of injunction sought. The application is dismissed with costs abiding the outcome of the main suit.

DATED and **DELIVERED** this 21st day of February, 2012.

R. P. V. WENDOH
JUDGE

PRESENT

Mr. Njogu for Plaintiff/Applicant

Tombe holding brief for Mrs Ndeda for Defendant/Respondent

Kennedy – Court Clerk