



FREDRICK MURIUKI KABITAPLAINTIFF

VERSUS

CHIIRA NDINWA..... DEFENDANT

RULING

This is the chamber summons dated 2/3/2010 filed by the Defendant/Applicant. It's brought under Section 3A of the Civil Procedure Act and order 36 Rule 8 and 12 (old CPRs) for orders:-

- 1. That a consent letter dated 10/6/2009 be struck out and declared null and void from the Court record.**
- 2. That the Respondent be allowed to file his replying papers to the Originating Summons and the case be listed for directions.**
- 3. That the Respondent be allowed to refund the Plaintiff the amount he paid to him to date as part payment of the purchase price of [...] and interest as per the sale agreement dated 4/5/1888 all totaling to KShs.21,600/= and the Plaintiff do vacate the land upon payment and each party to bear its costs.**

The Application is supported by the applicant's affidavit and the grounds. The gist of his grounds is that he was cheated into signing the consent. The Plaintiff/Respondent filed a replying affidavit saying the consent was voluntarily entered into.

Counsels agreed to file written submissions within 30 days. However after two mentions, I fixed the matter for Ruling without the Respondent's submissions. Ms. Thungu in her submissions cited the case of **MERU CIVIL SUIT NO. 120/88 LAWRENCE KINYA MWAI VERSUS NYARINGINU FARMERS CO. LTD. & ZAKARIA NKAABU** where grounds for setting aside a consent were discussed.

From the originating summons filed herein, the parties entered into an agreement for sale and purchase of 1 acre of land. The Plaintiff is in possession of the said portion. There is a sale agreement CN2. Even a reading of the supporting affidavit and replying affidavit gives the impression that this is a very straight forward matter which the parties can without influence settle.

I refer to paragraph 4 of the Defendant/Respondent's affidavit.

“That the occupation of the Plaintiff on the land is with my permission and consent and that is why I have never sent him away”.

In fact the whole affidavit is very clear that the Applicant is willing to give out the land upon payment of the balance.

The contentious document is a consent dated 10/6/2009 and filed here in Court on 15/7/2009. When this letter was received in court the Deputy Registrar directed that the parties to appear in court for recording and adoption of the consent. There is no evidence that the parties appeared in court for that purpose. I am clear in my mind that the Deputy Registrar wanted to satisfy herself that indeed the parties had agreed to what appeared in the letter. To date the purported consent has not been adopted as an order of this court. And therefore there is nothing for this court to set aside.

My finding therefore is that the purported consent does not serve any purpose being on record. I expunge it from the record. The Applicant/Defendant is granted leave to file a replying affidavit out of time and the replying affidavit sworn on 1st February 2010 and filed on the 2/3/2010 is deemed as filed on time. The same must be served on the Plaintiff/Respondent. The parties may take a date for directions.

I therefore grant prayer 1 and 2 of the chamber summons dated 2/3/2010. Prayer 3 is dismissed.

Each party to bear his own costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 5TH DAY OF JUNE 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Muthike for Nganga for Respondent

Mr. Kahiga for Thungu for Applicant

Parties present

Njue CC