



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 122 of 2008

1. STEPHEN NDELEVA MUASYA

2. MALIA NDULU WAMBUA

3. SAMMY KISILA WAMBUA

4. MUASYA WAMBUA

5. HELEN MUNYIVA NGULI

6. ISAAC WAITA NGULIPLAINTIFFS

VERSUS

PETER MWANGI WAITITU.....DEFENDANT

JUDGMENT

By a plaint filed in court on 25th October, 2007, the Plaintiffs seek as against the defendant an injunction to restrain him from dealing in whatever manner with all that piece or parcel of land known as L.R. No. 12715/658(*Syokimau Farm*), hereinafter “*the suit premises*” recession of the agreement dated 1st February, 2005, eviction of any person and demolition of structures unlawfully erected and standing on the suit premises at the defendant’s cost, costs and interest.

The suit is informed by the fact that by virtue of a sale agreement dated 1st February, 2005 made between the 1st, 2nd and 6th plaintiffs and the defendant, the defendant agreed to purchase the suit premises. The purchase price was Kshs. 5,250,000/=. The terms of the sale agreement were explicit. Among them was that the defendant was obligated to pay a deposit of Kshs. 4,000,000 on or before 15th February, 2005 and the balance thereof of Kshs. 1,250,000/= would be paid by the defendant upon being supplied with completion documents. Default on the part of the defendant to pay the initial deposit as agreed would entitle the defendant to a further 15 days and on subsequent default, the plaintiffs would be at liberty to sell the suit premises to any other willing buyer.

It is apparent from the documentation on record that the defendant was unable to keep pace with the timelines set out in the sale agreement. Nonetheless the Plaintiffs indulged him. On the day when he was supposed to make payment of Kshs. 4,000,000/= the parties met and agreed in writing that the defendant would now pay the said amount on 23rd March, 2005. Again the defendant failed to honour his part of the bargain. Instead he only remitted Kshs. 500,000/=. Though the sale agreement was explicit that the defendant shall not commence any construction on the suit premises until he had been given a go ahead

by the plaintiffs, he had in breach of the said condition apparently, authorized third parties to commence developments on the suit premises, hence the suit.

Contemporaneously with the filing of the suit the plaintiffs took out a chamber summons application seeking interim injunctive orders. The said application was served on the defendant who on 1st November, 2005, appointed **Messrs Ogessa & Co. Advocates** to act for him. The parties appeared before court severally for the hearing of the application *inter partes*, but could not proceed as apparently there were ongoing negotiations with a view to settling the dispute outside court. This was however, not to be. The court then fixed the application for *inter partes* hearing on 20th March, 2008. In the meantime on 6th March, 2008, **Mr. Mbindyo**, learned counsel for the Plaintiff's served the defendant with the summons to enter appearance, plead and verify affidavit. The defendant accepted service, signed at the back of a copy and imprinted its stamp.

On 28th March, 2008, the Plaintiff's counsel aforesaid filed a formal request for interlocutory judgment on the grounds that the defendant had failed to file a defence. The request was ultimately granted and the suit set down for formal proof a couple of times but it never took off.

When the defendant belatedly came by the information that judgment had been entered against him, he on 25th June, 2008 filed an application seeking to set aside the interlocutory judgment as well as leave to file a defence out of time. The application as expected was vehemently opposed by the Plaintiffs before **Ngugi, J.** However in a ruling delivered on 27th February 2012, **Ngugi, J.** dismissed the application holding thus:-

“...considering the conduct of the defendant here especially seen in the light of their proposed statement of defence, I find little reason to exercise the court's discretion to set aside the interlocutory judgment entered herein. While refusing a defendant an opportunity to present his defence is a draconian measure, the court cannot utilize its discretion to aid a party to delay the course of justice...”

With that, the fate of the defendant in this suit was sealed. Thereafter the case came before me for formal proof on 10th May, 2012. Only the 2nd Plaintiff testified on his own behalf and on behalf of the rest of the plaintiffs. Her evidence was along the same lines as pleaded in the pleadings. Suffice to add that the 1st plaintiff was her brother in law, 3rd and 4th plaintiffs were her sons whereas the 5th and 6th plaintiffs were her nephew and niece respectively. The suit premises were registered in the name of her husband, **Philip Wambua Muasya**, jointly with his brothers, **John Nguli Muasya** and **Stephen Ndeleva Muasya**. Among the brothers, only the latter is surviving. Letters of administration had been issued to her in respect of her husband and 5th and 6th plaintiffs in respect of their father, **John Ngulo Muasya**, deceased. She maintained that the defendant never fulfilled the terms of the agreement of sale. The foregoing notwithstanding, the defendant had entered the suit premises. The plaintiffs' counsel had issued and served on the defendant completion notice dated 13th September, 2007 to no avail. She prayed therefore that given the foregoing, this court grants the prayers sought in the pleadings.

Following the closure of the plaintiffs' case, their counsel opted to file written submissions which I have carefully read and considered.

It should be noted that on the date the formal proof hearing the defendant had been served with the hearing notice. Despite such service neither the defendant nor his counsel attended court. Having entered appearance the defendant and or his counsel were entitled to participate in the proceedings. In her evidence, the 2nd Plaintiff tendered amongst other documents a certified copy of the certificate of title in respect of the suit premises. It showed that the same was still registered in the names of **John Nguli Muasya (deceased)**, and for whom a confirmed grant was tendered in evidence, **Philip Wambu Musya (deceased)** again in respect of whom a confirmed grant was tendered in evidence and **Stephen Ndeleva Muasya**, the 1st Plaintiff. The evidence of the plaintiffs was neither challenged nor rebutted. There was evidence of agreement of sale and the explicit terms therein. There was evidence of non-compliance by

the defendant of the said terms and In particular those in relation to the payment of consideration. It was pleaded and proved by the Plaintiffs that despite-breaching the agreement entered into wrongfully and without any colour of right the defendant had proceeded to alienate the suit premises. The defendant has no right either law or fact to deal in any manner with the suit premises. It does not belong to him. Nor does he have a defence to the plaintiffs' claim. His occupation of the suit premises is in the nature of a trespasser. The same would apply to his agents and those who are in occupation of the suit premises under his name.

The defendants and his cohorts having occupied the suit premises on account of non-existent right such occupation must be brought to an end forthwith. According, I grant prayers 1,2,3 & 4 in the plaint.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA

JUDGE