



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 131 OF 2007

PETER NYAGA IRERI.....PLAINTIFF

VERSUS

STEPHEN KINGORI MWANGI.....DEFENDANT

R U L I N G

This is the Ruling in respect of the applicant's application dated 5.02.2010. The same is brought under **Order VI Rule 13 (1)b, C and d of the Civil Procedure Rules**. It seeks to have the defendant's statement of defence struck out and also prays that the court enters judgment for the plaintiff as prayed in the plaint. The same is supported by the applicant's affidavit dated 5.02.2010. It was served on the Respondent's counsel and the same is opposed vide the replying affidavit dated 17.11.201. Although the application was duly served on counsel for the Respondent he failed to appear on the assigned hearing date. The application was therefore heard in his absence. The Respondent was present in person and the court undertook to consider the replying affidavit along with the rest of the pleadings when preparing this ruling.

I have carefully considered the contents of the rival affidavits, the annexures thereto and also the pleading herein. From the sale agreement marked PNI'1' it is clear that the land in question is registered under the Registered Land Act. As deponed by the Applicant in paragraph 5 of the supporting affidavit, no Land Control Board consent was applied for and none was therefore ever granted. That is actually a fact that is not denied in the Respondent's statement of defence or in his replying Affidavit. That transaction was therefore avoided – or became voidable 6 months after the date of the said agreement after the consent of the Land Control Board was not applied for within 6 months as stipulated under Section 8(1) of *Order (4) of the Land Control Ac Cap 302 of the Laws of Kenya. The same is not therefore enforceable. By dint of Section 22 of the same Act the defendant/respondent is a trespasser on the said plot. His only recourse is to sue for a refund of the purchase price. In this case, he has not counter claimed for such a refund. The issue of whether the land was free from any encumbrances therefore becomes moot in the light of the cited provisions of Cap 302 of the Laws of Kenya.

The Respondent refers to a pending application dated 16.11.09 which application is nonetheless not annexed to the affidavit. There is therefore nothing for me to refer to. The only valid counter claim that the Respondent would make is one for a refund of the 500,000 Sh. he paid as part of the purchase price. Even if I was to go out of my way to consider the application dated 16.11.09 as it is in the court, the same is clearly irredeemably defective as it is filed under the wrong provisions of the law and it is not even accompanied by a draft counter claim to enable court to determine whether the same would raise any triable issues. In my considered view, the defendant herein has no defence at all and the said chamber summons or any other intended application is only meant to delay the conclusion of this suit. The delay is certainly in his favour as he is the party in possession of the suit premises.

In allowing this application to strike out the defence, I am not at all driven by the fact that counsel for the respondent did not appear to defend it. I have considered the replying affidavit and the law applicable. It would not have made any difference even if counsel for the Respondent was in court. The law is clearly not on the Respondent's side. As stated earlier, his only recourse is to sue for the refund of the 500,000 Sh. There are no triable issues raised in the defence and dragging this matter to full hearing will only be delaying it and this will be very prejudicial to the plaintiff herein.

I will therefore allow this application and strike out the defendant's defence. I will enter judgment in favour of the plaintiff/applicant in terms of prayers (a) and (c). I will not allow prayer (b) and (d). Those can be argued in the suit the defendant might file for refund of the 500,000 Sh. or in the suit pending before the High Court sitting in Nyeri IN Nyeri HCC No. 82 of 2007.

I also award the plaintiff herein the costs of this suit plus interest thereon at courts rate.

W. KARANJA

JUDGE

Signed by the above but Delivered and dated by undersigned at Embu this 31ST day of JANUARY 2011

H. M. OKWENGU

JUDGE