



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 7 OF 2011**

**JULIUS K. WANJAU.....PLAINTIFF**

**VERSUS**

**MOSES MWEMA.....DEFENDANT**

**RULING**

On 24/1/2011, the plaintiff, Julius K. Wanjau filed this suit by way of plaint, against Moses Mwema seeking orders of permanent injunction to restrain the defendant from, in any way interfering with Land Parcel **NYANDARUA/KIRITI/1028**, to the prejudice of the plaintiff's rights and an order of specific performance of the agreement dated 30/6/2010, to compel the defendant to perform his obligation under the contract. In the plaint, it is pleaded that the plaintiff and defendant entered into a contract of sale of the land in dispute for Kshs.1,500,000/-. Kshs.40,000/- was payable upon signing of the contract, Kshs.400,000/- to be paid to Equity Bank to offset a loan which the defendant had, to enable discharge of the title, and the money would be deemed to be paid to the vendor. The balance would be paid upon the defendant obtaining the Land Control Board consent and transfer documents to the plaintiff (purchaser). The plaintiff paid Kshs.40,000/- to the vendor and Kshs.462,000/- to Equity Bank as agreed and an additional Kshs.30,000/-. The contract was to be completed within 90 days but the defendant failed to produce the necessary consents, rates and land rents certificates despite demand. The monies paid to the defendant were not refunded. The plaintiff then filed this suit alleging fraud and misrepresentation. Filed simultaneously with the plaint was the Notice of Motion application brought under **Order 40 Rule 1, 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, in which the plaintiff seeks a temporary injunction to restrain the defendant from in any way interfering with the suit land pending hearing and determination of the application and suit. The application is supported by the affidavit of the plaintiff in which he exhibited the Certificate of Search from the Lands Registry. The land is still registered in the names of the defendant. He also exhibited the sale agreement (MG2). He deponed that soon after executing the agreement, he moved and took possession of the suit land where he has been carrying on farming activities. Despite demand that the defendant effects the transfer and provide the title documents, the defendant has not complied. On 15/12/2010, the plaintiff learnt from his Farm Manager that the defendant, in company of one Simon Gicheha and others, had gone to the suit land and interrogated the workers. The plaintiff got suspicious, did a search at the Lands Registry only to find that the defendant had commenced transfer process in favour of one Simon Gicheha, as evidenced by transfer documents, MG3. On 17/1/2011, the plaintiff received a letter from Mwaura Kamau & Co. Advocate informing him that the land had been sold to another (MG5). He said he was always ready and willing to pay the balance but the defendant had failed to keep his part of the contract.

Though the defendant was served and an affidavit of service dated 10/2/2011 filed in court, he did not appear or file any reply to the application or defence to the plaint. The facts as pleaded by the plaintiff stand uncontroverted.

It is not in dispute that the defendant is the owner of the suit land as it is still registered in his name. There also exists a sale agreement dated 30/6/2010 with the defendant and it is not disputed that the plaintiff had made substantial payments towards the price and was waiting for the necessary consents to be obtained by the defendant. That is evidence that the plaintiff indeed has an interest in the suit land.

The plaintiff has also deponed that he had already taken possession of the suit land with permission from the defendant. In the **BOOK, MAUDSLEY & BURN'S** on Land Law, the author says at page 140:-

***“In my view, the test of residence propounded by the bank is too narrow. As the judge observed, what constitutes occupation will depend upon the nature and state of the property in question. I can see no reason, in principle or in practice, why a semi-derelict house such as Vincent Farmhouse should not be capable of actual occupation whilst the works proceed and before anyone has started to live in the building.*”**

***The bank further submitted that the presence of the builder and his men in the property could not constitute actual occupation by the defendants. I am unable to agree. I can detect nothing in the context in which the expression ‘actual occupation’ is used in paragraph (g) to suggest that the physical presence of an employee or agent cannot be regarded as the presence of the employer or principal when determining whether the employer or principal is in actual occupation. Whether the presence of an employee or agent is to be so regarded will depend on the function which the employee or agent is discharging in the premises in the particular case.”***

The plaintiff claims to be doing farming on the land, had kept workers thereon and had started improvements on the land. If that be the position he is in possession. These facts are not disputed.

From the foregoing, I am satisfied on a balance of probability, that a prima facie case has been established with chances of success. The plaintiff had performed his part of the bargain and it was left to the defendant to get the necessary consents and provide transfer documents. The defendant stands to suffer irreparably should he lose the land if the defendant's intentions are allowed to continue. Since the defendant was served and failed to attend this court, I find that the plaintiff has demonstrated that the plaintiff has a real interest in the land which requires protection. I therefore grant prayer 2 of the Notice of Motion restraining the defendant from in any way interfering with the suit land until this suit is heard and determined and prayer 4 directing the Land Registrar, Nyandarua District to register a restriction against the proprietorship of the land by way of prohibiting any further dealings with the suit land until this suit is heard and determined. Costs to be in the cause.

**DATED and DELIVERED this 8<sup>th</sup> day of April 2011.**

**R.P.V. WENDOH  
JUDGE**

**PRESENT:**

Mr. Munai for the plaintiff.

N/A for the defendant.

Kennedy – Court Clerk.