



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 32 OF 2010

TIMOI FARMS & ESTATES LIMITED.....PLAINTIFF

VERSUS

KIPNGENO A. NGENY.....DEFENDANT

RULING

The chamber summons dated 29th July, 2010 is expressed to be brought pursuant to **Order VI Rule 13 (b), (c), (d)** and **Section 1A, 1B and 3A of the Civil Procedure Rules and Act**. The same is filed by the Defendant, Kipngeno Arap Ngeny against Timoi Farms and Estates Limited. The applicant prays that the temporary order of injunction issued herein be set aside or recalled and the plaintiff's suit be struck out for being bad in law, scandalous, frivolous and an abuse of the court process; that the interim orders lapsed on 10th May, 2010 and that the land parcels **Olenguruone/Amalo/314,315,316 and 321** are agricultural land and are subject to the Land Control Act.

In his affidavit in support of the application, the defendant/applicant deponed that he entered into a sale agreement with the plaintiff/Respondent on 12th November, 2008 (**KK1**) and the same became unenforceable, null and void on 12th June, 2009 for want of the Land Control Board consent; that the land being agricultural land is subject to the provisions of the Land Control Act, which are mandatory. He denied that he holds the title to the said land in trust for the plaintiff and there is no cause of action to be determined at the full hearing.

In opposing the application, the Plaintiff filed grounds of opposition and what he titled as a "**further affidavit**" dated 14th February, 2011. In the grounds of opposition, the plaintiff contends that the application is bad in law, is made in bad faith considering the fact that it was the defendant's duty to seek and obtain the relevant consent, that the Land Control Board in the area is not operational and all transactions and dealings have been suspended by the Government and so was the Board and that the application for extension of time was then pending before the High Court. To the "**further affidavit**", the plaintiff exhibited the order of Justice Emukule in **Misc. Application No. 147 of 2010**, in which Justice Emukule extended the time within which to apply for consent of the Land Control Board in respect of **Olenguruone/Amalo/314; 315, 316 and 321**. He also exhibited a letter (**KK11**) from the Office of the President dated 15th December, 2011, which informed counsel that the Kuresoi District Land Control Board had been gazetted but that it had not been operational due the caveat placed by the Government on the land around Mau area until the State boundary is identified and marked. He was advised to retain the application until the Board is operational.

Mr. Siele, counsel for the Respondent who argued this application, asked the court to strike out the "**further affidavit**" filed by the plaintiff because there is no Replying affidavit filed by the Respondent and that in any case, the court's leave should have been sought to file it. In my view, the mere use of the

word **“Further Affidavit”** instead of **“Replying affidavit”** cannot be a ground for striking out the plaintiff’s affidavit in reply to the application. This court is enjoined to do substantive justice to the parties under **Section 1A and 1B of the Civil Procedure Act**. Striking out that affidavit would be unfairly locking out the plaintiff from the seat of justice for a mere technicality of a **“title”** of an affidavit used wrongly. That objection lacks merit and is dismissed.

The plaintiff has exhibited a court order issued by Justice Emukule in **Misc. Application No. 471 of 2010** extending the time for seeking the Land Control Board’s consent. It was granted ex-parte on application by the plaintiff. The Applicant has urged this court to ignore it because they were not party to the proceedings in Misc. Application No. 471 of 2010 and have just learnt of the order upon the filing of the **“Further Affidavit”**. There is no evidence that the said court order has been set aside. This court has no idea whether it was supposed to be granted ex-parte or the Defendant needed to be served. This court cannot question the validity of the order issued in Misc. Application No. 471 of 2010. Since it is a valid court order, this court cannot ignore it.

The plaintiff has exhibited a letter from the Office of the President indicating that the Land Control Board of Kuresoi area, where the suit land is situate, has not been operationalized that due to a caveat placed on the land around Mau by the Government until the boundaries of the forest are defined and ascertained. Counsel was asked to hold on to the documents till the Board is operationalised. If this is the scenario, then it was beyond any of the parties to obtain the Land Control Board consent. Ideally, it is the defendant who was supposed to obtain consent and must be aware of the impediment to obtaining the consent. One wonders why he is in a hurry to have the sale agreement declared as null and void.

It is true that this court did consider an application for injunction and declined to grant the same; The facts which have been disclosed by the affidavit filed by the plaintiff were not available then. In light of the letter from the Office of the President, I find that it would be unfair to strike out the plaintiff’s suit because there seems to be good reason for failure to comply with the provisions of Land Control Act, which can only be adduced and determined at a full hearing. The plaintiff claims to have paid the defendant a total of Kshs.8.7 million as part of the purchase price and carried out substantial developments on the land and has been in possession. The court cannot ignore that and strike out the suit before allowing the plaintiff to have its day in court. Striking out is a draconian measure and must be exercised sparingly. In this case, I will decline to take such a drastic action and allow the plaintiff a chance to present its case. I hereby dismiss the application dated 29th October, 2010 with costs being in the cause.

DATED and DELIVERED this 17th day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

Mr. Kimatta for Plaintiff

Mr Bosire holding brief for Mr Siele for Defendant

Kennedy – Court Clerk