



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 143 OF 2011

ARTHUR AMOS AJWA BONDE.....PLAINTIFF

VERSUS

KENYA NATIONAL ASSURANCE COMPANY
(2001) LIMITED.....DEFENDANT

RULING

Pursuant to the provisions of *Order 40 rules 1, 2 and 3* of the Civil Procedure Rules, Arthur Amos Ajwa Bonde, the Plaintiff herein, took out the Motion dated 11th October 2011 in which he applied for the following orders:

- (1) That the Application be certified as urgent and service of this application be dispensed with in the first instance.***
- (2) That the defendant herein be restrained by this court from bidding/selling house No. 30 BLOCK 15 ON L.R. NO. NANYUKI/MUNICIPALITY BLOCK VIII/898.***
 - (I) Initially pending and hearing of this application interpartes.***
 - (II) Thereafter pending and hearing and determination of this suit.***
- (3) That the defendant and or his agent herein be restrained by this court from evicting the plaintiff/applicant from House No. 30 Block 15 on L.R. NO. NANYUKI/MUNICIPALITY BLOCK VIII/898 (i) pending hearing of this application (ii) pending hearing and determination of this suit.***
- (4) That the cost of this application be provided for.***

The Motion is supported by the affidavit of the Applicant. When served, Kenya National Assurance Company (2001) Ltd., the Defendant, filed grounds of opposition and the replying affidavit of Tabitha Mwaniki to oppose the Motion.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed for and against the Motion. I have further considered the grounds of opposition and the rival oral submissions made by learned counsels. The substantive suit is expressed in the Plaintiff dated 11th October 2011 in which the Plaintiff/Applicant, seeks for judgment in the following terms:

(a) The sale of House No. 30 advertised in the local newspaper on 28th September 2011 be stopped and the Plaintiff allowed to pay the balance of 90% within 90 days from the date of advertisement.

(b) The Defendant be restrained from selling House No. 30 at Nanyuki Housing Scheme on L.R. No. Nanyuki/Municipality/Block VIII/898.

(c) Costs of the suit.

It is the submission of the Plaintiff had been accorded the opportunity to purchase House No. 30 and that he has not rescinded the acceptance of the offer. The Plaintiff avers that a deadline to pay the 10% deposit was set but the same was not communicated to him. He stated that he was capable of paying the purchase sum. The Plaintiff avers that the Defendant did not give him notice of the deadline and that he only came to learn of the same through the advertisement in the local newspapers of 28th September 2011. The Plaintiff avers that since he met the conditions contained in the letter of offer by depositing 10% of the deposit with the Defendant, House No. 30 should be removed from undergoing the bidding procedure. The Plaintiff said that when he saw the advertisement, he immediately paid the deposit required of 10%.

The Defendant on its part is of the view that the Motion should be dismissed for various reasons. It is argued that the Plaintiff had no right to file a fresh suit under *Order I rule 8(3)* of the Civil Procedure Rules while the representative i.e. **Nyeri H.C.C.C. No. 21 of 2008** was pending for hearing. The Defendant is of the view that the suit and the Motion are *res-subjudice* and *resjudicata* respectively.

The Defendant averred that the Plaintiff had accepted the offer and retracted the same vide a letter dated 2nd April 2011. It is the argument of the Defendant that the Plaintiff was further accommodated by the Defendant to pay the requisite deposit by 31st July 2011 in a letter dated 20th June 2011 but he failed to heed the same. It is alleged that the Plaintiff deposited the 10% of the purchase price on 3rd October 2011 when the time to do so had lapsed.

After a careful consideration of the material placed before me plus the oral submissions made by learned counsel, there are salient issues which appear to be undisputed. First, it is not in dispute that the Plaintiff/applicant herein was among the tenants who authorized Paul Ngobia Njoroge, James Maina Weru and Francis Gitonga Kimeria to institute **Nyeri H.C.C.C. No. 21 of 2008** as a representative suit. The Plaintiff admits this fact in paragraph 8 of the Plaint herein. The preliminary issue which this Court must grapple with is whether or not this Motion is *resjudicata*. In **Nyeri H.C.C.C. No. 21 of 2008**, the Plaintiffs filed the Motion dated 10th March 2011 in which they sought for near similar orders as those sought in the Motion the subject matter of this ruling. This Court considered the Motion and came to the conclusion that the same has no merit and proceeded to dismiss the same in its ruling delivered on 23rd September 2011. The Plaintiffs in **Nyeri H.C.C.C. No. 21 of 2008** had wanted the Defendant to be restrained from selling the houses pending a comprehensive valuation of the houses. The Plaintiff in this suit is seeking for an order of injunction to restrain the Defendant pending the hearing of this suit. In the substantive suit, the Plaintiff is basically praying for more time to complete the transaction. In my view, I think the current Motion should be determined on the basis of the preliminary issue. The question of whether a matter is *res-subjudice* or *resjudicata* cannot be categorized as technical. It is a legal point which goes to the root of the suit. A critical consideration of *Order I rule 8 (3)* of the Civil Procedure Rules will reveal that the Plaintiff herein having been part of those parties who authorized the institution of **Nyeri H.C.C.C. No. 2 of 2008**, was not allowed to file a separate suit but to instead seek for leave to be made a party to the suit. What the Plaintiff has done herein is to ignore the previous suit and institute a fresh suit. It is obvious the Plaintiff has raised new grounds in support of the application for injunction. In my view that will not assist the Plaintiff because the law requires a party to bring out the issues of his case in one suit and not to litigate in piecemeal. The issues raised in the Motion dated 11th October 2011 were supposed to have been raised in the Motion dated 10th March 2011 but the Plaintiff decided to circumvent the principle of *resjudicata* by avoiding **Nyeri H.C.C. No. 21 of 2008** and by purporting to file this suit. I do not intend to consider the merits of the Motion lest I prejudice the available remedies the Plaintiff may seek herein after. I dismiss the Motion on the ground that the same is *resjudicata* with costs to the

Defendant.

Dated and delivered at Nyeri this 17th day of October 2011.

J. K. SERGON
JUDGE