



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO.167 OF 2008

IN THE MATTER OF REGISTRATION OF LANDS ACT CAP 300 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF PLOT NO.20 MEASURING 40 ACRES IN LAND REFERENCE NO.548
KERINGET ESTATE, MOLO, OTHERWISE KNOWN AS LAND TITLE NO.
OLENGUGUONE/KERINGET BLOCK 1/20**

BETWEEN

**AARON KIPLAGAT
KAMOING.....PLAINTIFF/RESPONDENT**

AND

**MAJOR WILSON KOITABA.....1ST
DEFENDANT/APPLICANT**

JOEL KIBET KOECH.....2ND DEFENDANT/RESPONDENT

RULING

By an amended Originating Summons, the plaintiff Aaron Kamoing has asked the court to:

- i) nullify the transfer of plot No. Olenguruone/Kiringet Block 1/20 to the 2nd defendant, Joel Kibet Koech by the 1st defendant, Major (Rtd.) Wilson Koitaba as the said transfer was fraudulent;
- ii) issue an order compelling the two defendants to execute a transfer of the said plot to the plaintiff upon the latter depositing Kshs.70,000/= in court for onward payment to the 1st defendant.

In the alternative, that the court orders; the Deputy Registrar or the Executive Officer to execute the transfer by signing the necessary consents and documents to facilitate the transfer of the suit property. And in further alternative that:

- i) the court orders the 1st defendant to refund to the plaintiff Kshs.50,000/= with interest at Commercial rate of 20% per annum from 30th April, 1982 till payment in full;
- ii) the 1st defendant be ordered to pay general and special damages for the breach of contract entered into between the plaintiff and the 1st defendant on 30th April, 1982.

This claim is based on agreement executed between the 1st defendant as the seller and the plaintiff as the

vendor, whereby the former agreed to sell to the latter the suit land at a consideration of Kshs.120,000/= in 1982.

It is common ground that Kshs.50,000/= was paid upon execution of the agreement leaving a balance of Kshs.70,000/= which has not been paid to this day. There is also no dispute that the 1st defendant has since transferred the suit property to the 2nd defendant and title duly issued to him on 16th November, 2005, hence this originating summons. In the meantime, the 1st defendant has brought the present application dated 30th January, 2009 for orders that the originating summons be struck out for the reasons that:

- i) the claim is statute barred;
- ii) the agreement in question is null and void for lack of Land control Board consent
- iii) the plaintiff is guilty of laches and;
- iv) the suit property is no longer in the hands of the 1st defendant.

Arguing these ground, learned counsel for the 1st defendant submitted that the agreement having been entered into in 1982, it cannot be enforced due to limitation of time by statute and further that the 1st defendant repudiated it on 16th August, 1984; that the suit land was subject to Land Control Board's consent which was not granted within the prescribed time and; that the relief of specific performance is not available to the 1st defendant, the property having been transferred to the 2nd defendant.

The plaintiff in response has deposed that it was a term of the agreement that the balance of the purchase price – Kshs.70,000/- would be paid upon transfer and after the 1st defendant has taken all the steps to ensure this; that there were no title deeds in the area where the suit land is located until in 2001; that it is in the same year that the plaintiff learnt that the 1st defendant had transferred the property to the 2nd defendant, prompting the plaintiff to lodge a caution; that it is the 1st defendant who is in breach of the agreement; that the cause of action arose in 2001 when the 1st defendant transferred the property to the 2nd defendant.

Learned counsel for both parties filed written arguments and authorities which I have duly considered. I reiterate that the instant application seeks that the originating summons be struck out. The application is expressed to be brought under **order 6 rule 13** of the revoked **Civil Procedure Rules** which provides that at any stage of the proceedings, the court may order either to be struck out or amended any pleadings or any or any one or more of the following grounds:

- i) where the pleading does not disclose reasonable cause of action or defence or;
- ii) where the pleading is scandalous, frivolous or vexatious or;
- iii) if the pleading may prejudice, embarrass or delay the fair trial of the action or;
- iv) if it I an abuse of the process of the court.

This rule applied by dint of **Order 6 rule 13(3)** of the revoked **Civil Procedure Rules** to petitions and originating summons. The application has not specified on its heading which of the four grounds it is brought. There is however an averment in paragraph 7 of the summons to the effect that all the four grounds are relied upon. What a court must consider in an application like this is now settled by a long line of decided cases and summarized as follows in the case of **D.T. Dobie & Company (K) Limited V. Joseph Muchina**, (1982) KLR 1:

“The court ought to act very cautiously and carefully and consider all facts of the case without

embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed as to deal with merits without discovery, without oral evidence tested by cross-examination in the ordinary way. No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by an amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

The question posed by the instant application is whether the originating summons is so weak, so hopeless that it is only for striking out, or whether it raises issues that ought to go to trial

In answering these questions, the court is cautioned not to delve into the merits of the dispute to avoid embarrassing the court that will ultimately hear the case.

For that reason, I will only say the following: The agreement will form the basis of the trial. It is clear as to who was to ensure that all steps are taken to actualize the agreement. The agreement is clear as to when and upon the happening of what event the balance of Kshs.70,000/= would be paid. There is also the issue that title deeds for this area did not come out until 2001. All these questions will be answered at the trial. Whether or not the action was statute barred, who was in breach of the agreement, whether the transfer to the 2nd defendant was fraudulent and the effect of failure to obtain consent from the Land Control Board as between the parties are all triable issues which in my view cannot be decided by a summary procedure.

For the reasons stated, the application to strike out fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 16th day of December, 2011.

**W. OUKO
JUDGE12**