



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 90 of 2008 & 203 of 2009**

**DOUGLAS MWANGI MUTERU.....PLAINTIFF**

**-VERSUS-**

**HOSEA NDERI KAREITHI.....DEFENDANT**

**-AND-**

**HOSEA NDERI KAREITHI.....PLAINTIFF**

**-VERSUS-**

**DOUGLAS MWANGI MUTERU.....DEFENDANT**

**RULING**

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In the first of the two suits, the plaintiff filed his plaint dated 22<sup>nd</sup> April, 2008 on the same date; and in the second suit, the plaintiff filed his plaint dated 22<sup>nd</sup> June, 2009 on even date. On the representation of learned counsel, **Mr. Oruko**, for the plaintiff/applicant in Civil Suit No. 203 of 2009 and with the concurrence of learned Counsel **Mr. Waithera** (holding brief for **Mr. Kadima**) for the plaintiff/applicant in Civil Suit No. 90 of 2008, that the two suits be consolidated, for the reason that the parties were the same persons and the subject-matter was the same, this Court made orders on 10<sup>th</sup> March, 2010 consolidating the main causes and the applications under them.

Falling for hearing this time were two applications: in Civil Suit No. 90 of 2008, the Notice of Motion dated 25<sup>th</sup> November, 2009; and in Civil Suit No. 2009 of 2009, the Chamber Summons of 22<sup>nd</sup> June, 2009.

As counsel were in agreement that the plan of submissions should first focus on the application under the later suit, I will start by setting out the premises of the Chamber Summons of 22<sup>nd</sup> June, 2009. This application was brought under Order **XXXIX**, rules 1, 2, 3 and 9 of the Civil Procedure Rules and ss. 3A and 63 (c) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The substantive prayer in the application was that an injunction do issue to restrain the defendant/respondent (i.e. the plaintiff in civil suit No. 90 of 2008) by himself, his servants, agents, employees or any other person or otherwise howsoever, from interfering/harassing/intimidating/frustrating or in any other manner dealing with the plaintiffs/applicants (i.e., the defendants in Civil Suit No. 90 of 2008) on Plot No. 2471/VI/M.N pending the hearing *inter partes* of this application and/or until further orders of the Court.

The general grounds founding the application were as follows:

- (i) ***the plaintiff/applicant is the registered owner of a freehold interest on all that parcel of land known***

as Plot No. 2471/VI/M.N.;

- (ii) **on 8<sup>th</sup> December, 2008 the plaintiff/applicant and the defendant/respondent executed an agreement for sale of the suit premises to be completed within 90 days of the execution;**
- (iii) **the defendant/respondent subsequently breached the agreement, compelling the plaintiff/applicant to rescind the same and subsequently eject the defendant/respondent on 10<sup>th</sup> June, 2009;**
- (iv) **subsequently, on 11<sup>th</sup> June, 2009 the defendant came in the presence of 30 other persons, and forcefully entered the suit premises by cutting the chain and lock and ejecting the plaintiff's security personnel who were guarding the suit premises, though subsequently leaving when the plaintiff secured Police intervention.**

In the plaintiff's Notice of Motion in Civil Suit No. 90 of 2008, of 25<sup>th</sup> November, 2009 the foundation is the very **agreement** which the applicant in Civil Suit No. 203 of 2009 claims to have lawfully revoked.

The prayers in the plaintiff/applicant's Notice of Motion in Civil Suit No. 90 of 2008 are as follows:

- (i) **that there is a consent order/judgment binding the parties, dated 8<sup>th</sup> December, 2008, and the same is against the defendant/respondent;**
- (ii) **that the Court do order stay of proceedings/suit in HCCC No. 203 of 2009, pending the hearing of the application and/or further orders of the Court.**

The application is founded on the following general grounds:

- (a) **this application is the only avenue available for the Court to enforce the consent order/judgment entered on 8<sup>th</sup> December, 2008;**
- (b) **the defendant/respondent has refused to comply with the consent order/judgment entered on 8<sup>th</sup> December, 2008;**
- (c) **by clause II of the sale agreement dated 8<sup>th</sup> December, 2008 (executed the same day with the consent order/judgment), the defendant (vendor in the sale agreement) should have handed over vacant possession on 31<sup>st</sup> January, 2009 to the plaintiff (purchaser in the sale agreement);**
- (d) **the completion period of the transaction was 90 days, and therefore, the last day should have been 8<sup>th</sup> March, 2009;**
- (e) **sometime in June, 2009 the defendant made a complaint to Changamwe Police Station, Mombasa leading, on 11<sup>th</sup> June, 2009, to arrest, detention and arraignment in Court of the plaintiff's workmates, employees, servants, agents, friends and relatives, on grounds of trespassing upon private land contrary to s. 3(i) and (ii) of the Trespass Act (Cap. 294, Laws of Kenya);**
- (f) **the accused persons entered a plea of not guilty and were released on bond; the case against them, CMCR Case (M) No. 774 of 2008, Mombasa, was commenced on 12<sup>th</sup> June, 2009 and withdrawn on 16<sup>th</sup> November, 2009;**
- (g) **the said consent order/judgment has not been subject to judicial review/stay/variation/discharge/setting aside/appeal and in the circumstances, is still in force;**
- (h) **the matter is purely civil; but the defendant is using extra-judicial methods to protect his claims; and the plaintiff has paid the balance of the purchase price;**
- (i) **the defendant's civil Suit (No. 203 of 2009) is res judicata under s. 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya);**
- (j) **the defendant's suit (No. 203 of 2009) contravenes the provisions of order VII (1) (e) of the Civil Procedure Rules;**

***(k) the defendant will not suffer any prejudice if the orders prayed are granted.***

Learned counsel, **Mr. Oruko** submitted that the instrument at the base of the two suits and applications, is the agreement for sale between the parties, made on **8<sup>th</sup> December, 2008**; and the subject is the suit premises, L.R. No. 2471/VI/M.N. Prior to the sale agreement there was another agreement, dated **20<sup>th</sup> September, 2007** which is now spent. The agreement of 8<sup>th</sup> December, 2008 rescinded the earlier one, and provided for a purchase price of Kshs.4,000,000/= payable by the plaintiff in Civil Suit No. 90 of 2008. The sum of Kshs. 400,000/= had been paid and duly acknowledged by the vendor, at the time the agreement was executed; the balance of Kshs. 3,600,000/= remained outstanding; and the completion date was agreed to be 90 days following the date of execution. It was the vendor's position that the purchaser had failed, or neglected to complete the terms of the agreement as set out between them. Counsel submitted that by the time the defendant in Civil Suit No. 90 of 2008 came to Court (by plaint of **22<sup>nd</sup> June, 2009**), the plaintiff in that suit had yet to pay up the balance of purchase price. By the time of the agreement of **8<sup>th</sup> December, 2008** the plaintiff in Civil Suit No. 90 of 2008 was already in part-possession of the suit property and had movable property on the suit property. On **13<sup>th</sup> March, 2009** the vendor through his advocates wrote to the purchaser (through his advocates), revoking the agreement:

***“We refer to the agreement for sale dated 8<sup>th</sup> December, 2008 and to our letter of 6<sup>th</sup> February, 2009.***

***“As the sale has not been completed on the completion date through no fault of our client, our instructions are to notify you, which we hereby do, that our client treats the said agreement as rescinded and the deposit paid by your client forfeited.***

***“Kindly return to us the original certificate of title No. C.R. 13975 within seven (7) days from the date hereof”.***

Counsel stated, on the basis of the affidavit evidence, that the purchaser did not return the document of title as requested, but instead started using the suit property: and this caused the vendor to attempt a re-entry, which, however, was resisted by the purchaser's workers. So the vendor is coming to Court, by the Chamber Summons of **22<sup>nd</sup> June, 2009** asking this Court to restrain the purchaser (plaintiff in Civil Suit No. 90 of 2008) and his employees.

Learned counsel urged that the applicant had met the conditions for the grant of injunctive relief as prayed: the vendor has a ***prima facie*** case, with high chances of success; the sale agreement was breached, as there was no evidence of payment; vendor is the proprietor of the suit property; he has shown that if injunction is not granted the plot will be misused by the purchaser; if injunction is not granted the proprietor will suffer prejudice; all the property documents are in the hands of the purchaser and he could misuse them; the apprehended loss not capable of being compensated in monetary terms; the purchaser is most unwilling to pay up.

**Mr. Oruko** urged that the purchaser's suit, No. 90 of 2008 had no basis; because it was already marked as settled; that suit was filed on **22<sup>nd</sup> April, 2008**, and the parties came before the Court and made a compromise on **8<sup>th</sup> December, 2008**, the details of the compromise being set out in the consent order issued on **24<sup>th</sup> April, 2009**; in the consent order, the matter was marked as settled in terms of the written agreement dated **8<sup>th</sup> December, 2008** and each party to bear own costs. The consent order, counsel urged, became an order of the Court, and the suit was marked as settled, as provided for under O.XXIV of the Civil Procedure Rules, which regulates the compromise of suits; the effect was that a judgment had been entered, and so the Court became ***functus officio***. Counsel urged that the parties had not applied to vary or set aside the judgment so entered; there was no application to review the consent order; and no appeal was filed. Counsel submitted that the position as at the time of recording the order obtains to-date and that the vendor's suit, HCCC No. 203 of 2009 is premised on that state of affairs. Since matters were settled on that basis, counsel urged,

the parties were now bound by a different agreement.

Learned counsel urged that the purchaser's Notice of Motion of **25<sup>th</sup> November, 2009** had no foundation in any suit, as the compromise/judgment of 8<sup>th</sup> December, 2008 terminated Civil Suit No. 90 of 2008; and so the only orders that can be made on that suit, in the terms of Order **XXIV**, rule 6(2) of the Civil Procedure Rules, are orders of implementation and execution of the terms of the decree: but now there already **was** a decree. Counsel urged that the purchaser's application, the Notice of Motion of **25<sup>th</sup> November, 2009** was an abuse of the process of the Court, and should be dismissed with costs. Counsel asked that the vendor's Chamber Summons of 22<sup>nd</sup> June, 2009 be allowed, the injunction sought granted, and the Court should move on to a hearing of Civil Suit No. 203 of 2009.

Learned Counsel **Mr. Kadima**, for the purchaser, contested the fact-statement relied upon by the vendor: that the payment of purchase price for the suit property was not completed; he shows as an annexure to the supporting affidavit of the purchaser (to the Notice of Motion of 25<sup>th</sup> November, 2009) copy of a cheque in the sum of **Kshs. 3,600,000/=** (deponed to have been issued on **4<sup>th</sup> March, 2009**); counsel submits that the said cheque remains uncollected from the advocate who had prepared the sale agreement since **19<sup>th</sup> March, 2009**; and he notes that the vendor's suit was filed several months **after** the issuance of the said cheque (suit filed on **22<sup>nd</sup> June, 2009**).

On the foregoing facts, **Mr. Kadima** urged that the submissions made for the vendor, asking for equitable relief on the principles in **Giella v. Cassman Brown** [1973] E.A. 358, had no basis.

Learned counsel submitted that the **decree** issued by the Court on 20<sup>th</sup> May, 2009, while concluding the claims in Civil Suit No. 90 of 2008, attached the subsequent obligations of the parties to the terms of the written agreement dated **8<sup>th</sup> December, 2008**, and the purchaser duly complied with the written agreement.

**Mr. Kadima** submitted that in view of the fact that, by the said decree the obligations of the parties are defined by the written agreement of 8<sup>th</sup> December, 2008, the party at fault is the **vendor**, having failed to comply with clauses 10 and 11 of that agreement, as regards vacant possession.

Clause 10 of the written agreement thus provides:

***"The property is sold with vacant possession free of squatters and encroachments".***

And clause 11 provides:

***"...there is an existing tenant on the said premises; the vendor hereby agrees and undertakes to secure vacant possession of the premises on or before the 31<sup>st</sup> of January, 2009 and thereupon hand over the said premises to the purchaser with vacant possession free of any squatters and/or encroachments".***

Learned counsel submitted that the plaintiff in HCCC No. 203 of 2009 had not shown in the pleadings or in the evidence to his Chamber Summons of 22<sup>nd</sup> June, 2009 or in his replying affidavit to the purchaser's Notice of Motion of 25<sup>th</sup> November, 2009 that he had complied with the said two clauses of the written agreement of 8<sup>th</sup> December, 2008. Evidence of such non-compliance, counsel urged, was given by the fact that, to-date, the vendor's tenant is still on the suit premises. Such failure to abide by the terms of the consent decree of 20<sup>th</sup> May, 2009, counsel urged, showed the vendor as a person in breach of a Court order – and he would thus not be entitled to orders of injunction.

Counsel urged that since the agreement of 8<sup>th</sup> December, 2008 placed obligations on both parties, the vendor had no basis for demanding payment of the balance of purchase price when he had not performed his obligations under clauses 10 and 11; he had not complied with the consent order and the decree of the Court.

Learned counsel raised ethical issues, when he submitted that a vendor who had failed to comply with the Court's decree had resorted to improper use of members of the police force, to arrest those for whom the purchaser was responsible, and to have these persons subjected to the inconvenience of prosecution – and such efforts had turned out to

be futile when the charges laid in Court were subsequently withdrawn.

Learned counsel, as regards the performance of the purchaser's obligations, urged that the purchaser had demonstrated payment by himself of the balance of the purchase price, apart from showing that the vendor had failed to comply with the terms of the agreement. So long as the vendor had not yet complied with his obligations under the decree issued on 20<sup>th</sup> May, 2009, counsel urged, the purchaser's suit, HCCC No. 90 of 2008, remained alive, and the vendor's suit, HCCC No 203 of 2009 should be stayed pending the enforcement of the consent order and decree.

Counsel urged that the date of the agreement between the parties was **8<sup>th</sup> December, 2009**; and the date of the vendor's "rescission" was **13<sup>th</sup> March, 2009**; and that since the agreement had already been made a Court Order, it could not be rescinded unilaterally by the vendor. Since making the said Order, **Mr. Kadima** urged, the Court could not have become **functus officio**, because its order and decree had not yet been executed. Counsel urged that the vendor's application by Chamber Summons dated 22<sup>nd</sup> June, 2009 offends Order **VII**, rule 2 and should be struck out.

Counsel submitted that the vendor's prayer for an injunction was not available as the mother-suit itself was incompetent and merited being struck out.

**Mr. Oruko**, in his reply, submitted that the consent order and decree issued by the Court on 20<sup>th</sup> May, 2009 should not be upheld because it could not "oust the owner's powers over his property".

On the question whether or not the purchasers did pay the balance of the purchase price to the vendor, learned counsel contended that the payment may have been made to advocates, but not to the vendor in person and that the vendor never knew such payment had been made.

A comprehensive review of the relevant documents, the facts and the submissions shows that the purchaser's suit of 22<sup>nd</sup> April, 2008 had progressed to the decree of the High Court issued on 20<sup>th</sup> May, 2009. The decree was, of course, a normal decree intended for execution. The decree remains to be executed to-date. The aspect of the decree not yet executed, is that which incorporates the written agreement made between vendor and purchaser on 8<sup>th</sup> December, 2008 – and specifically what is to be executed in that agreement is clauses 10 and 11: the vendor is to deliver to the purchaser the suit property with vacant possession, free of squatters and encroachments. So long as the vendor has not performed that obligation, he lacks the competence, in law, to rescind the agreement for some perceived failure on the part of the purchaser; if there is such, then the vendor must place the matter before the Court for determination. But in this case the vendor's only gravamen is that he has not been paid the balance of purchase price. This is not a valid grievance, as there is evidence that a cheque to pay off the balance of purchase price was issued by the purchaser on **19<sup>th</sup> March, 2009**, well before the vendor filed suit on **22<sup>nd</sup> June, 2009**. Since the said suit addresses matters already resolved under the decree of 20<sup>th</sup> May, 2009 as it incorporates the written agreement of 8<sup>th</sup> December, 2008 it follows that the execution of the said decree is likely to render spent an element of the vendor's suit. Consequently, the vendor's suit of 22<sup>nd</sup> June, 2009 should abide the completion of enforcement under the purchaser's suit of 22<sup>nd</sup> April, 2008.

For reasons emerging in the review conducted in this ruling, the vendor-applicant in the Chamber Summons of 22<sup>nd</sup> June, 2009 is not entitled to the orders of an equitable nature which he seeks: he has not complied with the Court's decree issued on 20<sup>th</sup> May, 2009; he has purported to unilaterally rescind an agreement the obligations of which are incorporated into a formal Court Order; he has resorted to influences outside the civil, judicial process to subject other parties to unjustified criminal process; he has feigned grievance, regarding the rendering of payments to him; he has shown a reluctance to be guided by the prescribed rules of civil procedure.

I will make **orders** as follows:

- (1) **I hereby dismiss the Chamber Summons of 22<sup>nd</sup> June, 2009, with costs to the respondent in that**

**matter.**

(2) ***I hereby allow the Notice of Motion dated 25<sup>th</sup> November, 2009, with costs to the applicant in this matter.***

(3) ***I hereby order and direct that the hearing of Civil Suit No. 202 of 2009 shall be held in abeyance, abiding the execution of the Orders and Decree of the Court in HCCC No. 90 of 2008.***

**DATED and DELIVERED at MOMBASA this 14<sup>th</sup> day of May, 2010.**

**J. B. OJWANG**

**JUDGE**

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Plaintiff/Applicant in HCC 90 of 2008: ***Mr. Kadima***

For plaintiff/Applicant in HCCC 203 of 2009: ***Mr. Oruko***