



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 32 OF 2010**

**TIMOI FARMS & ESTATES LTD.....PLAINTIFF**

**VERSUS**

**KIPNGENO A. NGENY.....DEFENDANT**

**RULING**

Timoi Farms & Estates Ltd is the plaintiff in this suit. It has sued Kipngeno A. Ngeny the defendant herein. The plaintiffs claim is based on a sale agreement entered into between the plaintiff and the defendant on 12/12/2008 for the sale of the defendant's property known as LR No. Nakuru Olenguruone/Amalo/314, 315, 316 and 321 (hereinafter referred to as the suit property).

The plaintiff claims that the sale was for a consideration of Kshs.23,500,000/- of which he paid Kshs.8.7 million. The agreement was received in October 2009 to allow for payment in three installments in October, November and December 2009 and on 12/11/09, the plaintiff desiring to complete the balance of the purchase price, requested for the current search certificate, original land certificate, Land Control Board consent, rates/clearance certificates from Country Council of Nakuru, but there was no response from the defendant. Meanwhile, the plaintiff had been put in possession and had made developments on the plots worth Kshs.7.5 million. The plaintiff has now learnt that the property has been put up for sale through one Mr. Joseph Bii. The plaintiff claims to be the legal owner of the suit property and that the defendant has no title to pass over to another. In the plaint, the plaintiff claims an order of injunction to restrain the defendant from selling his suit property until the suit is heard and determined, a declaration that the plaintiff has purchased the suit property, an order of specific performance, a declaration that the defendant holds the property in trust for the plaintiff and costs of the suit.

Filed simultaneously with the plaint was the Chamber Summons dated 10/2/2010, under certificate of urgency, for a temporary injunction to restrain the defendant from selling, leasing or in any way interfering with the suit property pending hearing of the suit. The application is based on the affidavit of Isaya Kiptonui Kimeiywo, the Managing Director of the plaintiff. The plaintiff contends that the defendant proposes to rely on the fact that the Land Control Board consent has not been obtained yet they are aware that the Land Control Board functions in Olenguruone area have been suspended. Mr. Kimatta, counsel for the plaintiff urged that the Land Control Board Act was meant to facilitate legal transaction and was not meant to be used to defraud or circumvent a party's obligations. He further submitted that the defendant should not be allowed to receive substantial sums, put the plaintiff in possession allow the plaintiff to carry out developments then turn round and start flagging the Land Control Board Act. That the Land Control Board Act can only be complied with once the parties comply with the terms of the contract. Counsel urged the court to protect the subject matter and not allow the defendant to benefit from his own omission.

The application is opposed by the defendant who filed a replying affidavit dated 10/3/2010. The defendant claims to be the sole registered owner of the suit land and that if any sale agreement was made

between him and the plaintiff, it is null and void because the suit land being agricultural land was subject to the provision of the Land Control Board Act and that the plaintiff was unable to fulfill his part of the contract. He denied that the plaintiff is in possession and that in any event the plaintiff would only be entitled to a refund of the money he has paid. He also urged that none of the prayers can be granted because they were not provided for in the sale agreement which was exhibited by the plaintiff as IKK-1. Mr. Siele, counsel for the defendant submitted that Section 8 of the Land Control Board Act provides that such transactions have to be completed within 6 months and that the agreement having been entered into on 12/12/08, lapsed on or about 12/6/09. Counsel relied on the decision in **GITHU V KATIBI (1990) KLR 63** where the Court of Appeal held that in a transaction which is void only the purchase price is refundable. J. Musunga adopted the said argument in **WAIRIMU GITUKIO MUCHUNO V ESTHER NJAMBI KIOI HCC 191/2004**. Counsel also submitted that the plaintiff is blowing hot and cold by pleading that he is the registered owner and in the affidavit it is deponed that the land is still registered in the name of defendant and held in trust for the plaintiff. It was also urged that paragraph 7 of the plaintiff's affidavit does not disclose the source of information and should be struck out.

Mr. Siele also submitted that the order of injunction cannot be granted because there is no prayer in the plaint for a permanent injunction.

Having considered all the pleadings, affidavits, and submissions made by counsel, it is evident that there is no prayer for permanent injunction in the plaint. The prayer for injunction that is sought in the plaint is supposed to lapse when the suit is heard. The order sought at this interim stage not having been anchored on any specific prayer in the main suit, cannot be granted.

The plaintiff exhibited a copy of the sale agreement 'IKK1' dated 12/12/08. At paragraph 6 of the agreement, the completion date was 30/4/2009. At paragraph 6 of the plaint, the plaintiff pleads that the sale agreement was reviewed so that the purchase price could be paid in October, November and December 2009 but no such variation of the agreement has been exhibited. The plaintiff has purported to rely on a letter dated 12/11/09 written on a "without prejudice basis" in which it is explained that the Land Control Board of the area was not sitting because the area is part of the Mau Forest complex. However, I do agree with Mr. Siele that the letter is not admissible since it offends **Section 23** of the **Evidence Act**. I also find that paragraph 7 of the affidavit in which the plaintiff's representative depones that there is a blanket restriction on all transactions in the area of Olenguruone to be offensive to **Order 18 Rule 3** of the **Civil Procedure Rules**, because the source of that information is not disclosed. That particular paragraph is hereby struck off. There is no good reason why the whole plaint should be struck off because of one offending paragraph.

In his submissions, Mr. Kimatta urged that the defendant was acting fraudulently having received money from the plaintiff, allowing it to take possession then turn round to hide behind the failure to comply with Land Control Board Act. I do agree with the respondent that the plaintiff has not pleaded any fraud in the plaint and cannot be heard to introduce it from the bar.

The injunction is an equitable remedy and utmost good faith is required of any party approaching the court for such order. At ground (b) found on the face of the application, the plaintiff states that the developments to the property is 10 million. At paragraph 13 of Kimeiywo's affidavit, it is deponed that the developments on the suit land have cost the plaintiff 7 million while paragraph 9 of the plaint indicates that the developments have cost Kshs.7.5 million. The question is how much has the plaintiff spent on the said developments.

For an order of injunction to be granted, the plaintiff has to demonstrate that it has a prima facie case with good chances of success and that if the order is not granted, the plaintiff is likely to suffer irreparably or if the court is not sure, it should decide the case on a balance of convenience (**GIELLA V CASSMAN BROWN (1973 EA 358)**). In the instant case, the land is still registered in the name of the defendant, the sale contract allegedly entered into in 2008 was not completed within the time agreed. It is not clear why it was not completed. There was no evidence of variation of the contract. The question to be ultimately answered is whether a contract still exists between the parties or was it frustrated and hence null and void. I take note of the decision in **GITHU V KATIBI** (supra) where the court held that in such case where a

contract is frustrated, one is entitled to claim the sale price. I find that the plaintiff has not demonstrated that he has a prima facie case or that it cannot be compensated by way of damages. The price paid so far is Kshs.8.7 million and the costs of development is between Kshs.7 million to 10 million which can be ascertained. The balance of convenience tilts in favour of this court declining to grant the order of temporary injunction. In addition the order could not be granted anyway, because the prayer for injunction is not anchored in the plaint. The upshot is that the Chamber Summons dated 10/2/2010 is dismissed with costs being in the cause.

**DATED and DELIVERED this 10<sup>th</sup> day of December, 2010.**

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

**PRESENT:**

Mr. Kimatta for the plaintiff.

N/A for the defendant.

Kennedy – Court Clerk.