



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT 112 OF 2008

ALICE WAMBUI NJOROGE.....PLAINTIFF

VERSUS

JACKSON KAMAU NDEGWA.....DEFENDANT

RULING

Both counsel for the parties herein have completely missed the point in this matter and laboured in vain. As it could appear that both counsel have not bothered to peruse the court file I will give a brief statement of the facts of this case in the hope that the parties will know how to proceed after this ruling.

On 30th June 2008 the plaintiff filed this suit claiming that by an agreement in writing dated 18th December 2007 she had bought from the defendant a piece of land situate in Nakuru Municipality and known as **Title No. Nakuru Municipality/Block 12/224** (the suit land) for Kshs.1,600,000/-. This was a subdivision that was being excised from **Title No. Nakuru Municipality/Block 12/170**. On execution of the agreement a sum of Kshs.300,000/- was paid to the defendant as down payment to enable him pay the outgoing charges like ground rent, rates and other charges in respect to the suit land and obtain the requisite clearance certificates. As that sum was far in excess of the 10% of the purchase price usually paid as down payment in such transactions, the plaintiff demanded and obtained from the defendant a duly executed transfer of the suit land, a copy of his VAT PIN Certificate and a passport photograph of the defendant to enable him register that transfer. She further claimed in her plaint that later the defendant reneged and did not want to complete the transaction. She therefore filed this suit and prayed for an order of specific performance of the contract, a permanent injunction to restrain the defendant either by himself, his servant and/or agents from interfering with her occupation, use and quiet enjoyment of the suit land and a further order of injunction to restrain the defendant by himself, his servants and/or agents from collecting or in any other way removing the Title Deed relating to the suit land from the Commissioner of Lands' office or the District Land Register's office Nakuru.

Contemporaneous with the filing of the plaint the plaintiff also filed an application under **Order 39 Rules 1, 2 and 9** of the **Civil Procedure Rules** as well as under **Sections 3 and 3A** of the **Civil Procedure Act** and prayed for inter alia orders of injunction as those prayed for in the plaint. Upon being satisfied that the plaintiff had made out a prima facie case with a probability of success I granted prayer two of that application and issued an order to restrain the defendant by himself, his servants and/or agents from collecting or in any other way removing the Title Deed relating to the suit land from the Commissioner of Lands' office and/or the Nakuru District Land Registrar's office pending the hearing and final determination of the suit.

This suit has not been heard and no decree has been issued. As a matter of fact not even interlocutory

judgment in default of appearance or defence has been entered. What has happened is that as the injunction order I granted restrained the defendant from removing the Title Deed relating to the suit land from the Commissioner of Lands' office and/or the Nakuru District Land Registrar's office, the plaintiff apparently got the transfer which the defendant had executed registered and she was issued with the Title Deed.

Upon learning of the transfer of the suit land to the plaintiff on 29th October 2008 the defendant filed a Chamber Summons under **Section 3 and 3A** of the **Civil Procedure Act** and **Order 9A Rules 10 and 11** of the **Civil Procedure Rules** and sought several orders. In his affidavit in support of the application the defendant claimed that he was and could never have been served with summons to enter appearance in this case or the orders of injunction issued at 2.30 a.m. as claimed in the affidavit of service as he does not open his office at night. He also contended that his daughter, Helen, who is alleged to have ushered the Process Server into his office at the time of service was at the material time on study leave and away from the office. He annexed to that affidavit a draft defence which he seeks leave to file out of time.

To show why I said that counsel have missed the point in this matter I will like to set out verbatim the orders sought in this application. The defendant prayed inter alia for orders:-

“THAT this Honourable court be is hereby pleased to stay its orders/decrees dated 28th day of July 2008 pending the hearing and determination of this application.

THAT this Honourable court be is hereby pleased to set aside or vary its judgment, decree, ruling and/or orders dated 28th day of July 2008 and any other consequential decree or order upon such terms as are just.

THAT this Honourable court be and is hereby pleased to summon one Peter Muchina for cross examination on his two affidavits dated 30th of June 2008 and 15th July of the same year.

THAT the Commissioner of Lands, the District Registrar, Nakuru and/or any other office (sic) serving under either of them be and are hereby severally jointly (sic) restrained from registering any dealing or other transactions in the defendants/applicants (sic) parcels of lands most specifically known as LR No. Nakuru Municipality/Block 12/224/ LR No. Nakuru Municipality/Block 12/170 and LR No. Nakuru Municipality/Block 12/223 until further orders of this court.

THAT this honourable court be is hereby pleased to extend time, and allow/grant leave to, the defendants/applicants to file and serve his defence out of time.”

Both counsel's submissions and the authorities they cited are as though this suit has been heard and judgment delivered and a decree issued.

As I have said the suit land has been transferred to the plaintiff and a Title Deed issued to her. In the circumstances I agree with counsel for the plaintiff that setting aside my order of 28th July 2008 will be an exercise in futility. Equally futile will be granting the aspect of prayer (f) of the defendant's application seeking the restraining of any dealings involving the defendants/applicants parcel of land known as LR No. Nakuru Municipality/Block 12/224 as that piece of land is now in the plaintiff's name. If the defendant wished to restrain the Plaintiff from any further dealings with the suit land he should have prayed for an appropriate order. The plaintiff is not interested in the other pieces of land mentioned in that prayer. The parties opted to proceed by way of written submissions. I do not see the purpose of summoning the Process Server after I have decided on the application. For these reasons I find no merit in the application and I accordingly dismiss it with costs.

DATED and delivered this 25th day of June, 2009.

D. K. MARAGA

JUDGE.