



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc. Civ. Appli. 738 of 2008

WILLIAM KIARITHA APPLICANT

VERSUS

DR. BONIFACE KEVIN OOKO GANDA 1ST RESPONDENT

PHILIP ONDITI 2ND RESPONDENT

RULING

This is an application by the Plaintiff under the provisions of Section 3A and 18 of the Civil Procedure Act and Order 50, Rule of the Civil Procedure Rules. It seeks, inter alia, the following orders:-

(a)

(b) There be a stay of any further proceedings in ELD. CMCC No. 700 of 2008, Dr. Boniface Kevin Ooko Ganda – Versus – Philip Onditi and William Kiaritha pending the hearing and determination of this application inter partes.

(c) ELD. CMCC NO. 700 of 2008, Dr. Boniface Kevin Ooko Ganda – Versus – Philip Onditi and William Kiaritha be transferred from the Subordinate Court at Eldoret to the High Court of Kenya for hearing and final determination.

The application is based on the following grounds:

(i) The 1st Respondent sued the applicant and the 2nd Respondent before the Subordinate Court in the above suit.

(ii) The Substantive prayer in the said suit was for rescission of an agreement allegedly entered into between the said parties on the ground that a balance of Kshs. 80,000/= being the purchase price had not been paid by the 2nd Respondent to the 1st Respondent.

(iii) The Applicant purchased the suit land namely Plot No. 4/506 at Langas for valuable consideration without notice and paid the entire purchase price.

(iv) The Applicant commenced construction of a one-storey building on the land.

(v) The Applicant therefore intends to defend the suit and file a counterclaim.

- (vi) The counterclaim may take the suit outside the jurisdiction of the lower Court.
- (vii) It is therefore necessary that this suit is transferred to the High Court.
- (viii) The Applicant will be severely handicapped in the Defence of his suit if the Order is not made.
- (ix) The Respondent will not suffer any prejudice if the application is granted.

The application is opposed by the 1st Respondent. The 2nd Respondent did not file any papers to oppose the application despite being served. In his grounds of opposition the 1st Respondent states as follows:-

1.
2. The application is anticipatory and there is no proof that the material so far purchased by the Applicant and the cost of the land is beyond the jurisdiction of the Subordinate Court.
3. That in any event the plot in question Langas Phase 4/506 is situated on Agricultural land and as the consent of the Eldoret Municipal Land Control Board has not been obtained and is likely not to be obtained in view of the prevailing competing interests of the parties in the suit in the lower Court, all the transaction pertaining to the said parcel of land are likely to be declared null and void and the only remedy available to the purchaser is the refund of the purchase price as per the provision of the Land Control Act.
4. That the current application is merely intended to frustrate the hearing of the main application in the Subordinate Court on 17.12.2008.
5. Hence the first Respondent prays the Applicant's application dated aforesaid be dismissed with costs.

The suit before the Chief Magistrate's Court was filed on 25th November, 2008 and sought the following orders against the two Defendants who are the Respondents herein.

- (a) A declaration that the agreement made between the Plaintiff and the First Defendant has been abrogated and the First Defendant should take back the deposit of his purchase price.
- (b) A permanent order of injunction should be issued against the First and Second Defendants, their agents or servants from continuing further in construction a building on the said parcel of land known as Langas/Phase 4/506.

From the record, it is clear that the Plaintiff in the said suit at the same time filed an application for an order of temporary injunction against the Defendants and obtained interim orders ex parte. The application was due to be heard inter partes on 17th December, 2008. However, the 1st Defendant in the suit filed the present application on 11.12.08.

This Court in its discretion after hearing the parties ordered that the proceedings in the said suit be stayed pending the delivery of this Ruling.

Section 18 of the Civil Procedure Rules under which the application is, inter alia, made provides as follows:-

“18 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –

- (a) transfer any suit, or other proceedings pending before the trial or disposal to any Court**

subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any Court subordinate to it, and thereafter

—

(i) try or dispose of the same, or

(ii) transfer the same for trial or disposal to any Court subordinate.

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

The aforesaid gives this Court the jurisdiction and discretion to grant the orders sought herein. I have considered the application, the affidavit in support thereof and submissions by Counsel. I have also considered the Plaintiff in the Chief Magistrate’s Court. The Defendant’s Counsel states that the Defendant only entered appearance and had not filed any defence by the time the present application was heard.

It is contended that the intended counterclaim by this Defendant may take the suit outside the jurisdiction of the lower Court. However, the Applicant did not attach the draft Defence and Counterclaim to show how much the claim will be or the value thereof. Nowhere in the Supporting Affidavit is the amount of counterclaim stated. In paragraph 14 thereof the Applicant claims that he spent over Shs. 2,500,000/= so far in the construction apart from the cost of the land and timber which he purchased. In paragraph 7 of the Affidavit he states that the price of the land was Shs. 850,000/=. In his submissions Counsel referred to the photographs of the construction site and invited the Court to appreciate the possible value of the structures and development on the land.

With respect, it may well be that the total cost or value of the land and materials for construction are well above the jurisdiction of the Chief Magistrate’s Court but the absence of a defence or draft defence and counterclaim does not assist this Court to know all the particulars of the intended claim by the 1st Defendant against the Plaintiff in the said case. The remedy or relief against the 1st Defendant is for a permanent injunction from continuing further construction of a building on the suit property. At this stage the Court does not know the cause of action against the Plaintiff in the said suit and the exact remedies that will be sought against him. This is why a draft pleading by 1st Defendant was essential. At this point in time, the intended cross-action is hypothetical and speculative.

In the absence of a draft cross-claim, a valuation report to indicate the possible value of the land and structures would have been useful and more reliable to enable this Court consider whether the Chief Magistrate’s Court’s jurisdiction is likely to be exceeded by the Counterclaim.

Our system of law is an adversarial one. The Plaintiff in the suit in the Chief Magistrate’s Court has instituted proceedings against the Defendants. The Plaintiff belongs to him and the Court has jurisdiction in respect of the reliefs he has sought. For the Defendants to have the said suit withdrawn and brought to the High Court, they must place before this Court tangible and concrete material for it to exercise its discretion in withdrawing the suit from the Court chosen or elected by the Plaintiff. This Court will not transfer or withdraw a suit based on mere intentions and possibilities. There must be more to justify the Plaintiff’s case to be moved to a Court where he is likely to meet higher costs in the event that he ultimately loses the suit. He has at the moment chosen the relief he has sought and limited his risks and parameters. If he is to be taken to another forum to face a cross-action, then the Applicant must establish a clear, sound and plausible cause of action and disclose the pecuniary value of the cross-claim to justify the grant of the orders sought herein.

It is also noted that there is a pending application for temporary injunction to be heard inter partes. The Plaintiff in the said suit obtained ex parte orders to preserve the subject-matter of the suit. The Chief

Magistrate exercised his judicial discretion in granting the said order. The said order however temporary in nature, vests some benefit to the Plaintiff. He therefore has a proprietary interest in the said order until the inter partes hearing. As a result, this Court is reluctant to take away the said right of the Plaintiff or in any way interfere with the exercise of the said Court's discretion in granting the said order until the inter partes hearing unless there are overriding legal reasons, facts and circumstances to justify the case to be withdrawn from the said Court to be heard and disposed of by the High Court.

In view of the foregoing, I do hereby dismiss the application herein with costs to the First Respondent. The Chief Magistrate's Court may proceed with the said suit as it deems fit and in accordance with the law.

DATED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF JANUARY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of: