



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO. 310 OF 2013

THOMAS ODHIAMBO OKUMU.....PLAINTIFF

VERSUS

HESBON OGADA WAMAMBA.....DEFENDANT

RULING

1. The defendant, **HESBORN OGANDA WAMAMBA**, is the registered owner of Land parcel **No.KISUMU/CHIGA/3302**(Suit land thereafter). He intended to sell the land to the plaintiff, **THOMAS ODHIAMBO OKUMU**, and an agreement to that effect was entered into, with the plaintiff even making some payment.
2. But things did not go as planned and the ensuing disagreements gave rise to this suit. The defendant alleges that the plaintiff breached the agreement by not paying the remaining balance within the stipulated time. The plaintiff alleges the defendant breached the agreement by not adhering to the terms of a verbal agreement that extended the date of payment.
3. It appears clear that the defendant repudiated the agreement, made some refund, and went a head to make separate arrangements to sell the suit land to another person. The plaintiff felt aggrieved and filed this suit. The suit was filed on 11/11/2013 and with it was also filed an application for temporary restraining orders. The application was argued before me exparte on 25/11/2013 and I granted a temporary restraining order.

The defendant felt that the order should not have been given and was infact givenbecause the court had been misled.

4. The defendant filed an application on 31/1/2014 seeking, interalia, the discharge of the orders given and also removal of caution registered against the suit land by the defendant. That application is the subject of the ruling.
5. According to the defendant, the move to issue restraining orders and the placement of caution by the plaintiff were ill -advised and improper. This is so because the sale agreement had been repudiated and the plaintiff had even received a refund of the money paid. The orders were therefore procured through a deliberate scheme to mislead both the court and the Land Registrar and by withholding facts material to the application.

6. According to the defendant, the sale price was 3,075,000/=. He received Kshs.1,550,000/= as part payment leaving a balance of Kshs1,575,000 to be paid on or before 20/10/2013.
7. The plaintiff however did not pay the balance as agreed. The penalty clause in the agreement provided for 7.5% of purchase price as damages to be paid by the defaulting party. The defendant therefore repudiated the agreement and deducted the penalty of 230,000. He therefore refunded the plaintiff Kshs1,319,375/=. The plaintiff accepted the refund.
8. But the plaintiff later wrote a demand letter asking for payment of Kshs455,000 which apparently included the Kshs.230,00/= deducted by the defendant during refund. The other money was penalty as stipulated in the sale agreement because the plaintiff felt that it is the defendant who had breached the agreement.
9. The plaintiff made a response vide a replying affidavit, filed on 19/2/2014. He talked, inter alia, of a verbal variation of the date of payment as that date fell on a public holiday. The date of payment was pushed to 25/10/2013 and the plaintiff was set to pay the balance but the defendant had changed his mind.
10. According to the plaintiff, the defendant breached the agreement. He refused to accept payment of the balance and went a head to make secret arrangements to sell the suit land to Synergy Gases Kenya Limited. This aggrieved the plaintiff, who went a head to place caution on the land.
11. The application was argued before me inter partes on various dates, starting on 20/2/2014. Broadly speaking, the defendant arguments were in conformity with what the application contained. In addition however the following decided cases were availed :

(a) OWNERS of the motor vessel "Lilian" Vs CALTEX OIL (Kenya) LTD (1989) KLR 1

(b) RE RAINBOW, Manufactures LTD (2003 IEA 253.

(c) EAST AFRICAN FOUNDRY WORKS (K) LTD VS. KENYA COMMERCIAL BANK LTD (2002) 2 E.A. 371.

12. The defendant on his part denied misleading the court. According to the defendant, failure to disclose refund does not amount to concealment as party only discloses that which will assist his case. In any case, the plaintiff was forced to accept a refund. According to the plaintiff, this issue is better left to be handled during trial.

13. On the issue of caution, the court was urged not to remove it as the registrar was not enjoined as party to the suit. The plaintiff argued that it is the defendant who breached the sale agreement by entering into a secret sale agreement with a third party.

14. The plaintiff also availed some decided authorities to drive various points home. The authorities are:

(a). MOBIL KITALE PETROLSTATION VS MOBIL OIL KENYA LIMITED & Another: (2004) 1KLR 1

(b). SOLOMON MWITI MUGWIKI VS M. MUGWIKI M. ANNAI HCC NO.135.011(1980)

(c). JULIANA ACHIENG OWINO VS ROSE OBAMA & GORDON OBAMA HCC NO.208/2013, KISUMU

15. I have read and considered the material laid before me by both sides, including the decided authorities. Some of the materials, if conclusively handled at this stage, would pre-maturely determine the main suit. For instance, it was argued that the sale agreement is null and void. If a finding is made now that this is the position, that should lead to the dismissal of the suit because

the entire suit is based on the sale agreement.

I have therefore decided to leave out material which I feel should be considered after trial.

16. Two considerations are in my view enough to make us move forward regarding the application they are:

(I) Why was a restraining order given *ex parte* in the first place?

(ii) Would the court have changed its mind if the materials subsequently made available were known to it at the time?

17. The court gave the temporary restraining orders on 25/11/2012. It was represented to it that the plaintiff had entered into a sale agreement with the defendant to buy the suit land at about 3 million shillings. The plaintiff had paid 1.5 million shillings but the defendant later changed his mind and wanted to sell the suit land to a 3rd party. The court was told that the plaintiff stood to lose both the land and the money.

18. The court looked at the suit as filed, the documents accompanying it, the application and what the plaintiff counsel had said. It granted the orders. Particularly weighing in the court's mind at the time was the presumed fact that the plaintiff stood to lose both the land and the money paid. That's all about the first consideration.

19. We now go to the next consideration. The consideration is this: At the time

the plaintiff filed the suit, he had already been paid some refund and had accepted it. The plaintiff did not disclose this to the court. He withheld the information.

20. It is noteworthy too that in the list of documents availed by the plaintiff together with the suit, a demand letter was not one of them. Under order 3 rule 2 (d) of the Civil Procedure rules 2010, the plaintiff is mandatorily enjoined to avail the demand letter sent before action. The demand letter in this case was instead availed by the defendant to show that had the court seen it, it would probably not have issued the order. It is crucial to note that the demand letter is purely a demand for payment of money. It has nothing to do with specific performance or recovery of the suit land.

21. The position then is that crucial information about refunded money was withheld from court. It is not the law, as plaintiff's counsel would have the court believe, that the plaintiff was bound to disclose information that would only assist his case. Rather the law is that where the plaintiff is seeking an equitable remedy, he is bound to make full disclosure to enable the court to arrive at the truth. The restraining order being sought was an equitable remedy.

22. And the plaintiff's omissions do not end there; the demand letter was also conveniently left out of the list of documents. If the court had seen the demand letter, it would have established that the suit as formulated and filed is at variance with the demand letter before action. It would have become clear that a substantial part of the suit was actually an after-thought.

23. The position then emerges that the withholding of that information had a misleading effect. The availability of the information now impacts negatively on the plaintiff's case. If the court had been seized of the information, it would not have issued the restraining orders.

24. It was wrong for the defendant to approach the issue as he did. He was less than honest yet the orders he was seeking required absolute honesty. It really does not matter that so many other arguments were made by the plaintiff's counsel. The crucial issue is whether some disclosures were withheld. And they were. And this works against the plaintiff. It really does not help to argue, as plaintiff's counsel did, that the defendant is also guilty of non-disclosure. The defendant is not seeking equitable orders. It is the plaintiff who is seeking them.

25. I therefore agree with the defendant and hereby discharge the restraining orders granted here on 25/11/2013.
26. The next issue is that of caution. It appears clear that the plaintiff placed a caution against the title to the suit land. The decision to place the caution was made by the land Registrar. Records show the plaintiff placed the caution claiming purchaser's interest. Records also show that the defendant wrote to the Registrar demanding removal of the caution. The registrar apparently refused to comply, hence the prayer in the application.
27. The court can order removal of caution in an appropriate case. But is this one such case? In the court's view, the position of the Registrar needs to be known. And the only way of knowing is by enjoining him here so that his side of the story can emerge. It should not be the habit of the court to overturn decisions of government officials without giving them a hearing. The issue of caution also is not one of an equitable remedy. A caution is a statutory remedy and different considerations would apply for its removal.
28. The defendant should have approached the registrar's office for removal of the caution and upon refusal, he should have asked for a written reason to explain refusal. Such reasons could have helped even where the registrar is not enjoined as a party.
29. For these reasons, the court does not think it is appropriate to order for the removal of the caution. It will decline to issue that order at this stage. But that does not close the door to the plaintiff. If the appropriate application is made after the concerns raised here are addressed, the court will entertain the application.
30. The application therefore succeeds only to the extent of discharging restraining orders but is unsuccessful as regards the removal of caution. Costs in the cause.

HON A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

7/5/2015

A.K. Kaniaru J.

John Ogendo court clerk

Interpretation Kiswahili

M/S Alinaitwe for Otieno for defendant

Omondi for plaintiff

Court: Ruling on application filed on 11/11/2013 read and delivered in open court.

Right of appeal 30 days.

HON A.K. KANIARU

ENVIRONMENT & LAND – JUDGE

7/5/2015

