



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 227 OF 2012**

**JOYCE CHEPKEMOI NGE'NO..... PLAINTIFF**

**VERSUS**

**ERICK D K NGETICH ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPHINE SIGEI.....2<sup>ND</sup> DEFENDANT**

**PETER RONO.....3<sup>RD</sup> DEFENDANT**

**COUNTERCLAIM**

**ERICK D K NGETICH ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPHINE SIGEI.....2<sup>ND</sup> PLAINTIFF**

**PETER RONO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JOYCE CHEPKEMOI NGE'NO.....1<sup>ST</sup> DEFENDANT**

**SAMUEL KIPKORIR A. NGE'NO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is a **Chamber Summons** application filed under **Order 2 Rule 15 (1) a, b, c and d** of the **Civil Procedure Rules** by the 2<sup>nd</sup> defendant in the counter claim for determination dated **24th May, 2013**. The application is opposed.

2. In a nutshell, the application seeks that this suit be struck out with costs, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants plaintiffs in the counterclaim, (hereafter referred to as plaintiffs/respondents) do pursue the 2<sup>nd</sup> applicant for a refund of monies paid to him and the plaintiffs/ respondents do vacate **Nakuru/Olenguruone/Amaro/503** and **Nakuru/ Olenguruone/Amalo/512** ("suit parcels")

3. The Application is premised on the grounds on the face of the application and the affidavit of **Samuel Kipkorir A. Ngeno**, the 2<sup>nd</sup> defendant in the counterclaim (hereafter referred to as the 2<sup>nd</sup> defendant/

applicant) sworn on **24<sup>th</sup> May, 2013** as follows;

- i) *The sale herein is void and cannot be enforced in view of the express provisions of the Land Control Act*
- ii) *Consent from the area Land Control Board having not been obtained, the only available remedy is a refund of purchase price as a civil debt*
- iii) *The continued occupation of the land is now criminal in view of the said Act*

4. The application is opposed through the following grounds of opposition filed by the plaintiffs/respondents as follows;

1. *That the application is misconceived, highly precipitate and the same ought to be dismissed with costs.*

2. *That striking out is a drastic remedy which must be exercised with caution and only in the clearest or circumstances of which this is not one of them for the following reasons:-*

i) *That the defendants claim in the counter claim that they duly purchased the various suit properties from the applicants and that the contracts were partly performed is a valid cause of action against the applicants.*

ii) *That the prayers as sought ought to be ventilated in court because even the applicants in this application have admitted to transactions of sale of land between the 2<sup>nd</sup> applicant and the respondents.*

3. *That in any case the applicants are not certain*

*on the provisions of the law they have brought the application and they are on a fishing expedition since one cannot bring an application under **Order 2 Rule 15 (i) (a)** and at the same time purport to adduce evidence or even rely on the other paragraphs of sub rule 1.*

4. *That the application is brought Mala fide as the applicants' are blatantly asking the court to assist them in not performing the obligations they committed themselves to. The applicants should therefore appreciate the fact that courts don't aid in the perpetuation of illegality but are there to promote good public policies as was held in the case of **N.B.K Vs Wilson Ndolo Ayah.***

5. *That it is the applicants fault that the consent from the Land Control Board was not obtained and thus the 2<sup>nd</sup> applicant should not rely on the lack of consent and purport to claim that the contract should be voided. In any case the period to obtain a consent can be extended and a sale agreement cannot be voided on the lack of consent from the L.C.B*

6. *That the applicant's application is frivolous, vexatious and nothing but an abuse of the court process and the same ought to be dismissed with costs.*

5. On **2<sup>nd</sup> December, 2013** parties agreed that the application be disposed of by way of written submissions. The plaintiff filed their submissions on **22<sup>nd</sup> January, 2014** while the respondents filed theirs on **23<sup>rd</sup> January, 2014** in support of their respective contentions.

6. The applicant in his submissions reiterated what was contained in his grounds and affidavit. He

submitted that consent from the Land Control board had not been sought which was mandatory **under section 6 of the Land Control Act Cap 302** for all Agricultural land. That the suit was a nullity and the continued occupation of the suit land by the respondents was criminal. He relied on two cases namely;

1. **Richard Kamiri Gachwe Kahia –vs- Edward Kamau Ng’ang’a, Court of Appeal at Nairobi No.16/ 2001**
2. **Grace Wambui Wamanda – vs- Charles Edward Njoroge, Court of Appeal at Nakuru No.126 of 1999.**

7. The respondents equally reiterated what was contained in the grounds of opposition. In addition they submitted that striking out a suit was a drastic remedy which must be exercised with caution and only in the clearest of circumstances and that the plaintiffs/Respondent purchase of the suit land had not been denied by the 1<sup>st</sup> Defendant and her husband. These are issues that needed to be canvassed during trial which position was reiterated in the case of **D.T. Dobie & Company (Kenya) Ltd vs. Joseph Mbaria Muchina and Another (1980)** eKLR

8. He stated that this application had been brought under the wrong provision of the Law because **Order 2 Rule 15** was clear that in an application under the said rule no evidence shall be admissible but the application shall state concisely the grounds on which it is made. The applicant had gone on to adduce evidence by filing a supporting affidavit which stated issues of fact therein.

9. He also submitted that the court should not aid the applicant in perpetuating an illegality. He relied on the case of **N.B.K vs Wilson Ndolo Ayah 2009** eKLR. It was his contention that the 2<sup>nd</sup> defendant had not only failed to fulfill his part of the sale agreement but was also feigning ignorance by alluding to lack of consent from the Land Control Board which is part of his obligation under the said agreement and is at the same time threatening the defendants with eviction and even criminal sanctions.

10. Finally he submitted that the applicant had not fulfilled the conditions for grant of an injunction and wondered at the 2<sup>nd</sup> defendant's proposal how it would be possible that the plaintiffs/ respondents pursue the 2<sup>nd</sup> defendant for a refund if their suit was struck out. He relied on the case of **John Ayawo Oneko & 5 others v Titus Matya Kiondo & 2 others [2013]**eKLR

11. Briefly and as I understand from the pleadings and submissions, the 2<sup>nd</sup> defendant with his wife's (1<sup>st</sup> defendant) knowledge, being the owner of the suit parcel, entered into an enforceable sale agreement with the plaintiffs/ respondents to sell to them the suit parcels. The respondents paid the purchase price in full, took possession and have remained in possession. The 1<sup>st</sup> defendant has brought this suit against the plaintiffs/Respondents praying for judgment against them for a permanent injunction restraining them either by themselves, their agents, servants, and/or employees from alienating, selling, disposing off, fencing off and/or in any manner dealing with the suit parcels and a mandatory injunction compelling them to remove the structures and fences they have put up.

12. Before this application, the plaintiff in the main suit had contemporaneously with the plaint, filed an application seeking an order of injunction against the defendants which was dismissed by **Emukule J.** In his usual humorous manner, he delivered a ruling on **6<sup>th</sup> December, 2012** and expressed himself thus; "**what the Applicant is trying to do, possibly with the egging of her husband is to have their cake and eat it at the same time. what they cannot be allowed legally to do, is to use the provisions of the Constitution of Kenya and the Land Control Act (Cap.302, Laws of Kenya) as a shield and defender for reneging on enforceable contracts. The court will not grant an injunction to a party who sells a property, receives the full purchase price and having fed fully on the purchase price belch it out, and purport to hide behind the Constitution and the Land Control Act (Cap.302, Laws of Kenya) and pretend that one was unaware of the husband's transactions. If indeed the Applicant was unaware, there would have been a reposte and a further affidavit in response to the Defendant's detailed Replying Affidavit. Neither the Constitution of Kenya nor the Land Control Act are or were intended to be instruments of**

**deception or fraud."**

13. I wholly agree with the ruling by **Emukule J.** What the 2<sup>nd</sup> applicant is trying to do is to wriggle out of an enforceable sale agreement by urging the court to remove his name from these proceedings using statute as a shield. He was the main player in the transaction and cannot get off the hook as easily as he thinks. The court should be very slow in striking out a suit as observed by the court of appeal in one of the authorities relied on by the respondents, **DT Dobie & Company (Kenya) Ltd V. Muchina** (Supra):-

**"1. The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.**

**2. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."**

16. The overriding objective of this court being administration of justice, I find that striking out the suit against the 2<sup>nd</sup> Defendant will be highly prejudicial to the plaintiffs. For that reason, I dismiss the Chamber Summons dated **24<sup>th</sup> May, 2013** with costs to the plaintiffs/Respondents.

17. Before I leave this matter, I have noted that summons have not been issued for the 2<sup>nd</sup> defendant herein. Using the inherent powers of the court under **order 3A of the Civil Procedure Act**, I grant the plaintiffs in the counter claim 30 days to apply for summons for the 2<sup>nd</sup> defendant in the counterclaim.

**Dated, signed and delivered on this 11<sup>th</sup> day of July 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

Mr Odundo holding brief for MS said for the respondent/plaintiffs in C.C

Mr Koima holding brief for Mr Simiyu for the 1<sup>st</sup> defendant/Applicant

Mr Mwangi holding brief for Mr Ikua for the 2<sup>nd</sup> Defendant/applicant in the C.C

Emmanuel Maelo : Court Clerk

**L N WAITHAKA**

**JUDGE**