



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 30 of 2012

MUSA LOCHO PLAINTIFF/APPLICANT

VERSUS

1. DAVID TURERE SANKELEL

2. FELISTA GATHERU DEFENDANTS/RESPONDENT

R U L I N G

The application by way of **Notice of Motion** dated 8/2/2012 is premised on **Order 1, 2 and 4** of the **Civil Procedure Rules** and **Section 3A and 63 (e)** of the **Civil Procedure Act**.

The main prayer sought is that a temporary injunction do issue against the defendants, their agents, servants and/or employees from evicting the plaintiffs, selling, dealing with, trespassing, alienating, damaging and/or constructing or destroying the developments upon **Title Kajiado/Kipeto/2009** pending the determination of this suit.

On 29/8/2012, the plaintiff filed a Notice of withdrawal of the claim against the 2nd Defendant, **Felista Gatheru**. The court was informed that the 2nd defendant had since passed away. On 29/8/2012, one **Anne Nyanganyi Nyangai** filed a suit against **Musa Locho (plaintiff herein)** in **HCCC 323/12** (seeking orders of permanent injunction restraining him from trespassing, constructing, remaining and/or digging holes on **LR No. Kajiado/Kipeto/2009** (hereinafter suit land).

The plaintiff's case according to his affidavit sworn on 5/2/2012 is that by a sale agreement dated 25/3/2008, he entered into a sale agreement with the 1st defendant, **David Turere Sankelel** wherein the plaintiff was to purchase land parcel **No. Kajiado/Kipeto/2009** (suitland) which was owned by the 1st defendant. At the time of executing the sale agreement, the title deed to the land was held by **AFC Ngong Branch**. Out of the purchase price of Kshs. 1,610,000/=, Kshs.200,000/= was to be paid upon execution of the agreement. A sum of Kshs. 120,000/= was to be used by the 1st Defendant to facilitate the release of the title deed.

The balance of Kshs.1,410,000/= was to be paid within 90 days of the date of the agreement. The Law Society of Kenya (LSK) conditions of sale were incorporated into the sale agreement.

The plaintiff on 1/4/2008 paid further Kshs.200,000/= and Kshs.500,000 on 24/9/2010 to the 2nd defendant who represented herself as an advocate and was also the one who had prepared the agreement.

The plaintiff further averred that the defendants failed to respond to letters calling for the

completion documents. Eventually the plaintiff was informed by the 2nd defendant that the 2nd defendant had purchased the land and had refunded the plaintiff's money by depositing the same to the plaintiff's account.

The plaintiff further averred that the defendants have been harassing him with the intention of evicting him from the land and have partly demolished the plaintiff's developments that stand on the suit land and have the intent of selling the land to third parties.

In opposition to the application, the 1st defendant swore a replying affidavit on 7/3/2012. According to the said affidavit, the 1st defendant's case is that he entered into the sale agreement with the plaintiff on 25/3/2008 for the plaintiff to purchase the defendant's parcel of land Title No. **Kajiado/Kipeto/2009** measuring 5.69 Ha. That the purchase price was Kshs.1,610,000/= and a sum of Kshs.140,000/= was paid upon the execution of the agreement and by 24/9/2008 the plaintiff had paid the defendant a total of Kshs.1,040,000/=, leaving a balance of Kshs.570,000/=. According to the defendant, the plaintiff failed to complete the payment of the purchase price despite many reminders through the defendant's advocates, **Rumba Kinuthia & Co. Advocates**. After two years without payment of the purchase price, the defendant issued a notice of cancellation of the sale agreement. The money paid by the plaintiff was then refunded to him through the defendant's advocate by depositing the same in the plaintiff's bank account. The defendant further averred that one **Anne Nyanganyi Nyangai** has since bought the property in question and a Title Deed issued to her. The said **Anne Nyanganyi Nyangai** filed **HCCC Mks No. 323/12** against the plaintiff herein (**Musa Locho**) seeking a permanent injunction against him.

On 29/10/12, **Hon. Justice G. Dulu** consolidated the two suits. The case thereafter proceeded to the hearing of the application at hand.

I have considered the application, the reply to the same and the submissions by the counsel for the plaintiff and for the defendant and the authorities cited.

There is no dispute that the plaintiff and the 1st defendant entered into the sale agreement on 25/3/2008 for the purchase of the suit land by the plaintiff from the 1st defendant. There is also no dispute that the purchase price was Kshs.1,610,000/=. There is also no dispute that the plaintiff paid the deposit and the remaining balance was to be paid on or before the expiry of 90 days from the date of signing the agreement. It is also clear that the full purchase price was not paid.

The bone of contention concerns who is to blame between the plaintiff and the defendant on the issue of the failure to have the sale transaction completed.

According to the plaintiff, he wrote to the 2nd defendant on 24/9/2010, 9/10/09 and 20/1/2011 calling for the completion documents but the same were not availed. The said letters were exhibited herein (**annextures "MS/7, 8 & 9"**). It is important to bear in mind that the case against the 2nd defendant was withdrawn and that the aforesaid letters are addressed to **Rumba Kinuthia & Co. Advocates** and not the 2nd defendant. The plaintiff has also deponed that a search of the LSK Website showed that the 2nd defendant was not an advocate.

On the other hand, the 1st defendant's contention is that he issued a notice of cancellation of the sale agreement to the plaintiff on 15/9/2010 through the plaintiff's postal address as given in the sale agreement. However, the said letter (**annexture "DTS2"**) is written by the 1st defendant personally while his stand was that the firm of Rumba Kinuthia & Co. Advocates acted for him in the transaction. According to the 1st defendant, after it became apparent that the plaintiff was unable to complete the sale transaction, an agreement was reached for the 1st defendant to refund the plaintiff's money after selling the land (ostensibly to somebody else) and refund the plaintiff's money. The 1st defendant's position is that the plaintiff's money was refunded through the plaintiff's account whose details the plaintiff had given the Advocates for the 1st defendant.

Although there is no dispute that Kshs.1,040,000/= was deposited in the plaintiff's account on the 19/11/2010 and on 20/9/2010, the plaintiff disputes having been aware of the said deposit. Be as it may, the plaintiff's complaints in that regard are basically against the 2nd defendant against whom the case was withdrawn. It is also noted that the plaintiff has averred that the 2nd Respondent had been masquerading as an advocate.

However it is clear that both the plaintiff and the defendant and the documents that are before the court that the plaintiff did not complete paying the full purchase price within 90 days. The plaintiff's documents calling for the completion documents were addressed to **Rumba, Kinuthia & Co. Advocates** yet he claims to have dealt with the 2nd defendant who was not an advocate and who is no longer a party to this case.

In any event, letters said to have called for the completion documents (**annexture – "M/S 7, 8 & 9"**) are dated 24/9/2010, 9/10/2009 and 20/1/2012. None of the letters was written within the 90 days completion period. Although the plaintiff's counsel pointed out the date of completion of payment of the purchase price was extended on 24/9/2009 by the acceptance of a further instalment of Kshs. 500,000/= (**annexture "MS/6"**), it is clear that the 2nd defendant was not a person qualified to act as an advocate and cannot be described as the 1st defendant's agent.

There is no dispute that the property in question is currently registered in the name of **Anne Nyanganyi Nyangai** as per the Title Deed (**annexture "DTS 4"**). The plaintiff's application has been to a large extent overtaken by events.

All in all, the plaintiff has failed to prove a *prima facie* case against the 1st defendant for the orders sought to be granted.

Consequently, I dismiss the application with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 2nd day of May 2013.

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JUDGE