



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. NO. 20 OF 2008

DEDAN KARUGA GICHINGA.....PLAINTIFF/RESPONDENT

VERSUS

TITUS NDEGWA.....1ST DEFENDANT/APPLICANT

AJAA OLUBAYI T/A AJAA

OLUBAYI & CO. ADVOCATES.....2ND DEFENDANT

RULING:

The Plaintiff herein **Dedan Karuga Gichinga** filed this suit on 30/1/2008, against the Defendants and sought for various Orders. Among the orders sought for are cancellation of the Transfer in respect of property **LR No.195/195/Karen** dated 30/5/2006 and registered in favour of 1st Defendant herein on **19th July, 2006** and further a declaration that the sale agreement for sale between the Plaintiff and 1st Defendant supervised by the 2nd Defendant, in respect of LR No. 195/195 Karen Nairobi was illegal fraudulent and void.

The two Defendants herein filed their separate defence and the matter proceeded with the process of preparation for trial.

However, on 4/4/2012 the 1st Defendant herein filed the instant Notice of Motion brought under **Section 1A, 1B, and 3A of the Civil Procedure Act, Order 27 rule (1) and Order 51 Rule 1 of the Civil Procedure Rules** for Orders that;

- i. The 1st Defendant be permitted to deposit in Court the sum of **Kshs13,500,000/=** being the balance of the purchase price in respect of **LR No. 195/195 Keren Nairobi**;
- ii. That upon payment of the said sum of **Kshs. 13,500,000** in Court, the 2nd Defendant be ordered to release all the original Title documents pertaining to **LR No. 195/195 Nairobi** to the custody of the 1st Defendant within (7) days of such payment into Court, and the Plaintiff be ordered to grant full access and vacant possession of **LR No. 195/195 Nairobi** to the 1st Defendant within Seven (7) days of such payments into the Court and costs be awarded to the applicant.

The application is based on grounds of the face of the application and on the annexed affidavit of **Titus Gethi Ndegwa**. The applicant alleged that he is the registered owner of **LR No 195/195 Nairobi** but averred that the Plaintiff has withdrawn his possession thereof on the grounds that full payment of the purchase price has not been made. He also averred that the Plaintiff has become elusive and cannot be reached so that 1st Defendant can effect payment of the balance of the purchase price. That the

applicant's property is withering and wasting away, occasioning tremendous loss to him and he is willing to pay the sum outstanding into court in order to access the property and to receive his title documents. He further alleged that such payments shall fully satisfy the Plaintiffs claim against the 1st defendant.

The Plaintiff Respondent opposed the application by filing his Replying Affidavit dated 23rd April, 2013. The Respondent averred that the application is vexatious, frivolous and an abuse of the court process and is also a delaying tactic. That the 1st Defendant breached the sale agreement which now stands cancelled. The 2nd Defendant herein did not oppose the application nor file his reply.

The parties canvassed the matter through written submissions which I have considered. The application is brought under order 27 Rule (1) which reads as follows:-

“ In any suit for a debt or damages any defendant may at any time after appearance upon notice to the plaintiff pay into account sum of money in satisfaction of the claim or (where several causes of action are joined in one suit) in satisfaction of one or more of the causes of action.

Reading of the above provisions shows that Order 27 is therefore reverted to in any suit for **debt** or **damages**. In the instant suit, the Plaintiff herein has sought for revocation or cancellation of sale agreement and cancellation of registration of title but not for payment of debt. The applicant therefore cannot resort to the provision of **Order 27 Rule 1 (1)**.

Though applicant alleged that the plaintiff became elusive and it was therefore impossible for the 1st Defendant to pay the balance of the purchase price, the 1st Defendant did not state so in his Defence. The court finds that this is a new allegation and may be a delay tactic as alleged by the Plaintiff herein.

I have considered the annexures attached to the Plaintiff. Replying Affidavit and it is evident that the 1st Defendant did delay in payment of the balance of the purchase price. The Plaintiff thereafter filed the instant suit allowing the application as brought by the 1st Defendant would be tantamount to forcing the Plaintiff to bring his suit or claim to an end, without hearing the evidence of the parties herein.

The court finds that the Plaintiff should be allowed to have his day in court and the court to decide the matter on merit.

Having now considered the Notice of Motion dated 4/4/2012 and the replying thereafter and the rival arguments in the written submissions, the court finds that the said Notice of Motion is not merited, it is vexatious and only meant to delay the hearing of the main suit.

For the above reasons, the court dismisses the said Notice of Motion dated 4/4/2012 with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered this 4th day of October, 2013

L.N. GACHERU

In the Presence of:-

.....For the Plaintiff

.....For the 1st Defendant

.....For the 2nd Defendant

Simiyu: Court Clerk

L.N. GACHERU

JUDGE