



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 308 OF 2010

**TITUS GETHI NDEGWA.....PLAINTIFFS/
RESPONDENT**

VERSUS

**GICHUHI NDIRANGU MACHARIA.....DEFENDANT/
APPLICANT**

RULING

1. The Plaintiff/applicant hereinafter referred as the applicant has filed a Notice of Motion dated 15/2/2012 under section 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 10, Order 51 Rule 1, and all other enabling provision of the law and is seeking the following orders.

- i. That the chamber summons application dated 30th July 2010 be dismissed for want of prosecution.
- ii. That this Honourable Court be pleased to enter judgment in favour of the plaintiff in terms of the prayers sought in the plaint and more particularly as follows:
 - a. An order of specific performance compelling the defendant to:
 - b) Execute transfer of the plots known as L. R. No. 195/143 to L.R. No. 195/152 in favour of the plaintiff within (30) days of the order hereto;
 - c) Release the said executed transfers, the original titles and all requisite clearing certificates and consents in respect of L.R. No. 195/143 to L.R. No. 195/152 to the plaintiff within ten (10) days of receipt of a professional undertaking from the plaintiff's lawyers to release to the defendant the balance of the purchase price of Kenya Shillings KES.11.650,000/-
 - b. in default of the defendant failing to execute the said transfer of the plots known as L. R. No. 196/143 to LR. No. 195/152 in favour of the plaintiff within thirty (30)days of the order herein, the respective transfer instruments to be executed on behalf of the defendant by the Deputy Registrar of the High Court of Kenya for purposes of registration and vesting of ownership of the said properties in the name of the plaintiff.
 - c. Costs of this suit.

d. Any other order that this Honourable Court may deem fit to grant.

iii. That in the alternative, this honourable Court be pleased to enter interlocutory judgment in favour of the plaintiff and grant an early hearing dated for formal proof.

iv. That costs of this application be awarded to the plaintiff.

2. The application is based on the following grounds.

i. The plaintiff has on 28th June 2010 filed this suit by way of a plaint dated 25th June 2010.

ii. The firm of Samuel W. Waigonja & Co. Advocates filed a Notice of Appointment on 13 July 2010, and a Memorandum of Appearance on 19th July 2010.

iii. The defendant has failed to file a defence to date.

iv. The defendant then filed a Chamber summons application dated 30th July 2010 seeking to stay all proceedings in this matter and to refer the matter to arbitration.

v. The defendant has failed to prosecute its application

vi. The plaintiff assumes, and rightly so, that the purpose of the said pending Chamber Summons application was simply to delay any further progression of his matter.

vii. The plaintiff has an extremely strong case in light of the evidence placed before this Court.

viii. The plaintiff has been in possession of the suit properties for a number of years, and now wishes to be registered as the owner thereof on payment of the balance of the purchase price.

3. The application is supported by the affidavit of the applicant dated the 15/2/12. The application was opposed. The defendant filed grounds of opposition dated the 8/3/2012 and on replying affidavit dated 8/3/2012.

The background of this matter is that the plaintiff and defendant entered into a sale agreements dated the 20/1/06 and 20/2/06. The plaintiff was to purchase from the defendant the parcels of land stated in the sale agreements. The plaintiff paid a sum of 6,850,000/-. The parties through the further agreement dated 20/2/06 agreed on the documents to be exchanged, the balance was to be paid the time to fulfill the conditions of the sale. According to the plaintiff the defendant failed to fulfill term of the agreement and they moved to Court and filed this suit. The defendant upon being served filed the application dated 30/7/10. The plaintiff now seeks to have the said application dismissed for want of prosecution. The defendant in his replying affidavit has explained that reasons he did not prosecute the application. He states he could not get a date. His explanation is acceptable and I find no reason to dismiss the said application. Further if I find that the application dated 3/7/2010 raises a vital issue in this matter. I therefore decline to strike out the defendants application dated 30/7/2010.

4. Before I deal with prayers 2 and the alternative prayer to no. 2, I note the following on the 28/7/10 the plaintiff's counsel requested for judgment under order 1XA Rule 3 of the Civil Procedure Rule to be entered against the defendant who had failed to enter appearance and failed to file a defence upon being served with the summons to enter appearance and copy of the plaint. His request was acted upon and on the 30/7/10 and interlocutory judgment was entered against the defendant as prayed. A further order was made that the matter be set down for formal proof. This judgment has not been set aside. It is apparent that the plaintiff is not aware of this, as the plaintiff is seeking have interlocutory judgment in his alternative prayer. This prayer is spent. Having noted that there is interlocutory judgment against the defendant I will therefore not deal with Prayer No. 2 of the application. I therefore dismiss the plaintiff application dated 15/2/12. Each party shall bear its own costs.

Orders accordingly.

Dated, signed and delivered this 4th Day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk