



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 359 OF 2017

PETER MWAURA KINYORO.....PLAINTIFF/APPLICANT

VS

NDUNGU MWANGI.....1ST DEFENDANT/RESPONDENT

PUNDAMILIA FARMERS SOCIETY LIMITED...2ND DEFENDANT/RESPONDENT

RULING

1. What is before me is an application filed on the 21/5/19 by the Applicant seeking orders that judgement be entered for the Plaintiff against the 1st Defendant as prayed for in the plaint upon the 1st Defendant's own admission.
2. The grounds of the application are; the 1st Defendant has by his own statement dated the 15/5/17 and filed in Court on the 16/5/17 admitted the Plaintiffs claim save for costs; the 1st Defendant has also surrendered the original title deed of the suit property to the Plaintiff together with a copy of his identity card; the 2nd Defendant shall not be affected by the said admission and that the defence as filed is a sham frivolous vexatious and malafides.
3. The application is supported by the affidavit sworn by the Applicant where he reiterates the grounds stated in para 2 above. He added that soon after filing the said admission the 1st Defendant handed over the original title of the suit property to his custody and that the defense filed is a sham and intended to delay the matter further.
4. In his further affidavit the Applicant and another deponent Peter Njogu Mwangi deponed that the 1st Defendant handed over the title of the suit land and the admission to the Plaintiff Applicant upon being served with the summons in this suit.
5. The application is opposed by the 1st Defendant through his Replying Affidavit sworn on the 26/7/19 where he deposed that immediately after service of summons to enter appearance the Plaintiff approached him and took him to his advocates offices in Muranga where they deceptively persuaded him to sign the documents without any clear understanding and knowledge and the said documents were filed on the 16/5/17 without his involvement and that he later learnt that the said documents were an admission to the claim in regard of the Plaintiffs claim. He stated that to the contrary he did not admit the claim and contends that the suit land belongs to him.
6. That further he has been advised by his Advocate that the said admission was struck off the record on the 16/5/17 by the honourable Court and therefore in his estimation there is no admission on record for the Court to grant a final judgment.
7. Further that the application is an afterthought and urged the Court to dismiss it.
8. The Plaintiff filed written submissions which I have read and considered.
9. The application was canvassed through written submissions by consent. However only the Applicant appears to have filed written submissions.
10. The Plaintiff Applicant submits that the Replying Affidavit as filed on behalf of the 1st Defendant was not sworn by the 1st Defendant and seeks for it to be expunged from the record. That the memorandum of appearance filed by the 1st Defendants' Advocates on 26/5/2017 after the 1st Defendant had already entered appearance on 16/5/2017 was an irregularity, the said advocates thus being irregularly on record all documents filed by them should be expunged from the record. That since the Defendant has admitted the Plaintiff's claim and surrendered the original title to the Plaintiff there is then no questions to be litigated upon hence the prayer for summary judgment. The Applicant relied

on the case of *Vehicle and Equipment leasing limited and Coca Cola Juices Ltd* where the Court quoted from the case of *Ideal Ceramics Ltd vs. Suraya Property Group Ltd* and observed

“The law on summary procedure vide a judgment on the admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently sure and admitted does not wait for determination by the Court of a non-existent question. It is undesirable to litigate when there is no question or issue of fact or law.....”

11. The Applicant submits that he is cognizant that the grant of summary judgment is discretionary by the Court and avers that he has given sufficient reasons to warrant the exercise of that discretion in his favour.

12. The issue for determination is whether the Applicant is entitled to the orders sought.

13. Order 13 Rule 1 and 2 states as follows;

“1) Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

2) Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just”.

14. In *Gilbert v Smith* [1876] 2 CD 686 at pp 688 – 689, Melisih LJ, referring to an equivalent English rule said:-

“I think that rule was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the Plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the Plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the Plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action.”

15. I concur with the position taken on page p 856 in **Mulla on the Code of Civil Procedure** which states that;

“An admission is clear if the answer by a bystander to the question whether there was admission of facts would be “of course there was.”

16. Admissions of facts as contemplated by Order 13 Rule 2 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rule uses the words “or otherwise” which are words of general application and are wide enough to include admissions made through letter, affidavits and other admitted documents and proved oral admissions.

17. In order to successfully invoke the provisions of Order 13 Rule 2 the test is therefore; whether the admission of the fact arises in the suit; whether such admissions are plain, unambiguous and unequivocal; whether the defence set up is such that it requires evidence for the determination of the issues and whether objections raised against rendering the judgement are such which go to the root of the matter or whether these are inconsequential making it impossible for the party to succeed even if entertained.

18. It is trite that a judgment on admission is not a matter of right. It is a matter of discretion of the Court.

19. In this case the suit was filed on the on the 5/5/17. On the 15/5/17 the 1st Defendant filed both memorandum of appearance and together with a written admission worded as follows;

“The 1st Defendant herein NDUNGU MWANGI holder of ID. No. 16021117 and of P.O. Box 45, Saba Saba do hereby admit having been served with the Plaint dated 5/5/2017, the same day at my place of residence within Iganjo Sub-Location within Saba Saba Location of Murang’a South District within Murang’a County.

I do agree with the prayers prayed for by the Plaintiff in this case in regard to the suit property No. MAKUYU/MAKUYU/BLOCK 1/5301 which was transferred to me by aid of the 2nd Defendant herein Pundamilia Farmers Co-operative Society Ltd through their Chairman.

I now admit liability and urge this Honourable Court that I am willing to return the title deed for title No. MAKUYU/MAKUYU/BLOCK 1/5301 under my names for cancellation by the District Land Registrar Murang’a so that a new title deed do issue under the names of the Plaintiff herein PETER MWAURA KANYORO as prayed in the Plaint dated 5/5/2017.

I finally urge the Court to deny the Plaintiff Prayer No. (d) in regard to costs of the suit as I have complied to return the title without wasting the precious time of the Court.

That is all to state for now in regard to this suit.”

20. I have seen the joint statement of defence filed by the Defendants on the 9/6/17 on the 21/6/17 the 2nd Defendant filed its own defence through the firm of Morigori & co advocates.

21. It is on record that that the admission on record has not been withdrawn by the 1st Defendant. He incorrectly alluded to the same having been struck out by the Court on the 16/5/17. According to the record the issue was raised by Mr L Kinuthia Advocate but since the Plaintiff's counsel had no instructions on the same, the matter was not pursued. In any event I am at a loss as to how a party can seek to have his own pleading struck out by the Court. He had the option of withdrawing it but he did not.

22. The 1st Defendant has admitted that he signed the admission in the Plaintiff's Advocates office. The admission is dated the 15/5/17. He says he did it through deceitful persuasion and without his consent and knowledge. The 1st Defendant does not explain who deceived him to sign the admission. And if indeed he realized he had been deceived why did he not withdraw the same? The burden of proof shifted to him to prove deceit which he has failed to discharge. He has not showed any evidence of a police abstract indicating that he raised a complaint either.

23. The 1st Defendant has not refuted the claim that he handed over the original title to the Plaintiff. What was the reason of handing over the title to the Plaintiff if he had a defense to the Plaintiff's claim. It can only be concluded that it was handed over to the Plaintiff in pursuance of the said admission. It would appear to the Court that the 1st Defendant's defence on record is an afterthought. I say this following the sequence of the activities and conduct of the parties.

24. The 1st Defendant is estopped by the doctrine of estoppel from claiming that he did not execute and file the admission. By filing the admission and handing over the title to the Plaintiff he represented to the Plaintiff that he had agreed to transfer the suit land to him. The Plaintiff relied on the said admission and hence the motion to this Court seeking for judgement on admission. He cannot therefore turn around and claim that he was deceived. By whom? He has not tendered any proof of deception if any.

25. Parties are bound by their pleadings. The 1st Defendant filed an admission and the Court is not persuaded that it was procured by deceit.

26. Based on the plain unequivocal admission on record, the Court grants the application and enters judgement for the Plaintiff against the 1st Defendant as prayed.

27. The 1st Defendant is ordered to execute all the documents in favour of the Plaintiff and in default the Deputy Registrar of this Court is ordered to so execute them.

28. The cost of the application shall be in favour of the Applicant.

29. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19TH DAY OF DECEMBER 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Bwonwonga for the Plaintiff/Applicant

Ms Rungare HB for Kinuthia for the 1st Defendant/Respondent

2nd Defendant/Respondent – Absent

Irene and Njeri, Court Assistants