



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 223 OF 2017**

**AUSTIN OMONYO BARASA.....PLAINTIFF**

**VERSUS**

**JAMES IRUNGU MWANGI.....DEFENDANT**

**RULING**

1. The Defendant has filed an Application dated 5<sup>th</sup> July, 2017 in which he is seeking for the following reliefs:

a. That the Plaintiff and Timothy Vitalis Makokha Okwaro Advocate either jointly or severally in their own capacity or by agent, servant, employee or persons acting in their behest be and are hereby restrained by way of an injunction from in any way selling or transferring, presenting or lodging the title documents in respect of all that property known as L.R. Number 12715/11601 situate in Mavoko Machakos County or in any way interfering with the ownership of the property pending the hearing and determination of the main suit.

b. That Timothy Vitalis Makokha Okwaro Advocate be compelled by this Honourable Court to cease acting for the Plaintiff in this matter for wrong doing on his part and generally due to conflict of interest.

c. That Timothy Vitalis Makokha Okwaro Advocate, by virtue of being the joint Advocate acting for both the Vendor and Purchaser as per the Sale Agreement of 18<sup>th</sup> December, 2014 be enjoined as a Plaintiff to this suit, since the Defendant intends to seek specific prayers against the said Advocate in his Counter-claim.

d. That the original title be brought to court at the next hearing date for inspection and thereafter be deposited in court for safe keeping pending the hearing and determination of the suit.

e. That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Defendant who has deponed that he entered into an agreement with the Plaintiff dated 18<sup>th</sup> December, 2014 in respect of land known as L.R. No.12715/11601 (*the suit property*).

3. The Defendant/Applicant has deponed that they agreed that the Plaintiff will pay him Kshs. 1,000,000 at the execution of the agreement and clear the balance of Kshs. 750,000 upon successfully lodging the transfer documents for registration.

4. According to the Defendant, upon signing of the agreement, he surrendered the original title document to their joint advocate, Timothy Vitalis Makokha Okwaro and that the Plaintiff has declined to pay the balance of the purchase price.
5. It is the Defendant's case that their joint advocate has now sided with the Plaintiff; that the said advocate is in breach of his fiduciary duty to act in the best interest of both parties and that the agreement was rescinded vide the letters dated 8<sup>th</sup> September, 2015 and 21<sup>st</sup> October, 2015.
6. According to the Defendant, the Plaintiff's advocate has declined to return to him the title document despite the agreement being terminated and that the Plaintiff and the said advocate may defraud him of the suit land.
7. In response, the Plaintiff/Respondent deponed that although it had been agreed that the law firm of Tim Okwaro Associates Advocates was to act for both parties, the Defendant appeared with his own advocate on the day of execution of the agreement; that the said advocate furnished his advocate with all the completion documents except the Transfer and that the Defendant's purported termination of the Agreement that they entered into is irregular, illegal, null and void.
8. It is the Plaintiff's case that he is ready and willing to pay the balance of Kshs. 750,000 and that he even forwarded to the Defendant's advocate a bankers cheque of Kshs. 500,000 which was returned unbanked and that the balance of convenience tilts in his favour because the Defendant has already received kshs.1,000,000.
9. In the Supplementary Affidavit, the Defendant/Applicant admitted that Martin Kefa Simiyu Advocate accompanied him to witness the execution of the Sale Agreement in his capacity as his friend and not as an advocate on record; that Martin Kefa Simiyu advocate was not under any obligation to furnish the Plaintiff with the Transfer document and that it was the firm of Tim Okwaro Associates, being their joint advocate, who was supposed to furnish him with the Transfer document for signing.
10. Both parties filed their respective authorities and submissions which I have considered.
11. This suit was commenced by the Plaintiff who has alleged in the Plaint that after paying to the Defendant the deposit of the purchase price of Kshs. 1,000,000 as agreed, the Defendant has refused to furnish him with the duly executed Transfer.
12. The Plaintiff has averred that instead, the Defendant, vide a letter dated 8<sup>th</sup> September, 2015, purported to rescind the Sale Agreement.
13. In the Plaint, the Plaintiff is seeking for an order of specific performance to issue and for damages for breach of contract.
14. After being served with the Summons to Enter Appearance, the Defendant entered appearance through his advocate on 6<sup>th</sup> July, 2017. On the same day, he filed the current Application.
15. The Defendant is seeking for injunctive orders, amongst other orders, even before filing a Defence to rebut the Plaintiff's allegations in the Plaint that he is the one who is in breach of the Agreement of 18<sup>th</sup> December, 2014.
16. It is trite that the order of injunction can be granted to a party only if the said party demonstrates that he has a prima facie case with chances of success and if he will suffer irreparable injury that cannot be compensated by way of damages. If the court is in doubt, then it will decide the Application on a balance of convenience (See the case of Giella vs. Cassman Brown Ltd (1973) E.A 358.
17. In the absence of a Defence, does it mean that the court ought to consider the Application filed by the Defendant/Applicant as his Defence and Counter-claim to the Plaint? I do not think so.

18. As long as the allegations raised in the Plaint have not been traversed by the Defendant by way of a Defence or a Defence and Counter-claim, it will be unjust, albeit unlawful, for this court to interrogate whether the Defendant has a prima facie case with chances of success or not. Indeed, the Defendant's Application dated 5<sup>th</sup> July, 2017 does not have "*legs to stand on*" and the same should collapse on that ground alone.

19. In the circumstances, I strike out the Application dated 5<sup>th</sup> July, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018.**

**O.A. ANGOTE**

**JUDGE**