REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.281 OF 2014

MOSES KURIA NGUMO.......................................PLAINITFF

VERSUS

NANCY WANJIKU MUIKIA............................DEFENDANT

RULING

(Application seeking to strike out the plaint and have the plaintiff ordered to give vacant possession; plaintiff and defendant having entered into a sale agreement; plaintiff defaulting in payments; defendant issuing a notice to rescind; plaintiff contesting the notice as illegal; parties agreeing to maintaining status quo; order 2 Rule 15 not to be invoked lightly; plaintiff's case not frivolous; order 2 Rule 15 not to be used to conduct a mini-trial; application dismissed).

1. The application before me is that dated 20 May 2016 filed by the defendant. The application seeks the following substantive orders :-

(i) That the plaint be struck out and this suit be dismissed in its entirety with costs to the defendant.

(ii) That pending the hearing and determination of the suit, the Honourable Court be pleased to order the plaintiff to give vacant possession of the suit property namely Naivasha/Mwichiringiri Block 4/9470, 9478 and 9479, to the defendant.

2. The application is founded upon the following grounds :-

(a) The plaintiff's cause of action against the defendant is null and void ab initio by dint of Section 6 of the Land Control Act, 302.

(b) The defendant has provided evidence that she is the registered owner of all the parcels of land which are the subject matter of this suit.

(c) The plaintiff is in blatant breach of the sale agreement dated 1st June 2014 and he has not bought and/or paid for any parcels of land which are the subject matter of this suit and the erections thereon.

(d)The plaintiff has not filed a defencce to the applicant's counterclaim and in any event cannot have a reasonable defence to the counterclaim.

(e) The plaintiff is willingly destroying/demolishing the suit property and reconstructing it without the consent and authority of the applicant.

(f) Unless the orders sought are granted the applicant stands to suffer irreparable damage which the defendant cannot obviously compensate.

(g) The plaintiff's suit against the defendant is null and void ab initio. It is an unprecedented abuse of the court process whereby the plaintiff is seeking to use the defendant's title documents to secure a bank loan without the defendant's consent and/or without any basis in law.

(h) The interests of justice and fair play demand that the suit be dismissed with costs to the defendant.

3. The application is supported by the affidavit of Nancy Wanjiku Maina and is opposed by the plaintiff.

4. By way of background, this suit was commenced through a plaint which was filed on 1 October 2014. In the suit, the plaintiff/respondent pleaded that on 1 June 2012, he entered into an agreement with the defendant/applicant for the sale of the land parcels Naivasha/Mwichiringiri Block 4/9470,9478 and 9479 at a purchase price of Kshs. 15,000,000/=. It is averred that it was a term of the agreement that the plaintiff will tender monthly installments of Kshs. 140,000/= per month for a period of 18 months commencing 1 June 2012 and terminating on 30 November 2013, which installments were treated as deposit, purely based on rent to own arrangement until payment in full. It is averred that by November 2013, the plaintiff had not paid the purchase price but consequently entered into an oral agreement to extend time for payment by installment which amount continued to be paid and receipt acknowledged by the defendant. It is stated that the plaintiff has sought financial accommodation, but these efforts have been frustrated by the failure by the defendant to furnish the security documents. It is pleaded that the defendant in the months of May, June and July 2014 disconnnected power. It is averred that on 7 September 2014, the defendant issued a notice to rescind the agreement and it is the plaintiff's contention that this notice is null and void for the reasons that the defendant continued to receive rent after 30 November 2013. In the suit, the plaintiff sought the following orders :-

(a) A permanent injunction restraining the defendant from selling, entering or dealing with the suit properties.

(b) A declaration that the notice to rescind issued on 7 September 2014 is illegal.

(c) A mandatory injunction compelling the defendant to reconnect power to the suit properties.

5. Together with the plaint, the plaintiff filed an application for injunction which application was compromised on 9 February 2015 by an agreement between the parties that status quo be maintained. The status quo was agreed to be that it is the plaintiff in the suit properties and is operating some businesses.

6. On 7 October 2015, the defendant filed a defence and counterclaim. She admitted entering into the sale agreement mentioned by the plaintiff, but denied that there was any further oral agreement as claimed by the plaintiff. She pleaded being a stranger to the plaintiff's claim that she has frustrated the plaintiff from acquiring a bank loan and pleaded that under the sale agreement the plaintiff had no such right. She pleaded that according to the sale agreement she had every right to rescind the agreement owing to default. She further pleaded that by dint of Section 7 of the Land Control Act, the sale agreement is void. In the counterclaim, she pleaded that in their sale agreement, it was a term that completion would be 18 months from the date of agreement, but by this time, the plaintiff had paid less than 1/3rd of the agreed purchase price. She pleaded that she then issued a completion notice pursuant to the agreement, but the plaintiff did not make good his default, after which she issued the notice to rescind the agreement as provided for in the sale agreement. She complained that the plaintiff in total breach of law lodged a caution over the suit properties. She has mentioned that she is willing to refund the plaintiff within 90 days of removal of the caution and further pleaded that she has suffered loss of use owing to the plaintiff's default. In the counterclaim, she sought the following orders (paraphrased) :-

(a) A declaration that the defendant is in breach of the sale agreement and that she is entitled to rescind the sale agreement and refund the plaintiff what was paid less 10% of the purchase price within 90 days of removal of the caution.

(b) An order of mandatory injunction compelling the plaintiff to remove the caution and in default the Land Registrar to remove it.

(c) General damages for breach of contract.

(d) General damages for misrepresentations by the plaintiff.

(e) An award of loss of user at the sum of Kshs. 100,000/= per month with effect from 30 November 2013 until the defendant obtains vacant possession of the suit properties.

(f) Costs and interest.

7. On 26 January 2017, the plaintiff filed a reply to defence and defence to counterclaim wherein it is inter alia denied that a notice of completion was ever issued and the notice to rescind is contested. It is averred that there was nothing irregular in placing the caution.

8. In the supporting affidavit to the motion, the defendant/ applicant has inter alia deposed that the suit properties are agricultural land and therefore fall within the province of the Land Control Act, Cap 302, Laws of Kenya, and subject to consent of the Land Control Board. She has repeated the averments in the plaint that the completion date of the agreement with plaintiff/respondent was to be 18 months i.e by 30 November 2013; that the respondent had not fully paid the purchase price by this date; that the respondent has irregularly placed a caution; that in view of the rescission notice, the respondent should be compelled to give vacant possession and the respondent's suit be dismissed with costs; that the respondent is destroying/demolishing the suit premises and rebuilding to suit his taste; that the respondent cannot sustain a suit in view of the rescission notice; that there is no legal or equitable justification for the respondent to remain in possession; that the respondent will not suffer any prejudice; that the respondent will not be in a position to compensate her for any loss.

9. The respondent filed a replying affidavit to contest the motion. He inter alia deposed that the suit properties have a hotel and catering establishment and doubts if they are agricultural properties; that the applicant could not purport to rescind the agreement having not issued a notice to complete; that the applicant severely frustrated and breached the agreement; that the applicant is estopped by her conduct of accepting payments even after the lapse of the completion date from rescinding the agreement; that it was imperative for him to undertake refurbishment of the premises due to its poor ratings and performance owing to dilapidation.

10. I invited both counsel for the applicant and respondent to file written submissions which they duly did. I also gave them an opportunity to highlight the same at the inter partes hearing of the application. I have taken note of all of these in arriving at my decision.

11. At the beginning of this ruling. I did set out what I believed to be the substantive prayers sought by the applicant. In his submissions, Mr. Kibe Mungai, learned counsel for the applicant, made fairly elaborate submissions on the issue of whether or not his client deserves an injunction. I deliberately did not set this out as a substantive prayer sought because what was sought in the application and listed as prayer 2 in the application is the following prayer :-

> That pending the hearing and determination of this application (emphasis added) the Honourable Court be pleased to issue an order of injunction to restrain the plaintiff from demolishing and reconstructing the premises on the suit properties or to interference with them in any manner whatsoever.

12. The way the above prayer was framed, was for purposes of an injunction pending the hearing of the application and did not seek an injunction pending the hearing and determination of the suit. Be that as it may, assuming that indeed it was an application for injunction pending the hearing and determination of this suit, interlocutory orders giving the manner in which the suit properties are to be preserved were made by consent of the parties on 20 November 2014, when the parties agreed that status quo be maintained. It would be improper for this court to now delve into whether or not to issue an injunction against the respondent, when the parties themselves agreed by consent, to have status quo maintained. If I proceed to entertain any prayer for injunction, then I will be going against the vey consent of the parties. In the event that the applicant feels that there is a violation of the order of status quo, by say, the respondent making alterations or inappropriate renovations to the suit properties, the appropriate course to take is to file an application for contempt which can be considered on its merits. I will not therefore delve into any issue touching on an injunction against the respondent.

13. On what I considered to be the two principal prayers, the first, which is prayer 3 of the application, is seeking orders for the striking out of the plaint and dismissal of the respondent's suit with costs to the applicant, and the second, which is prayer 4 of the application, seeks orders for the respondent to give vacant possession of the suit properties pending hearing and determination of this suit. I opt to start with the latter prayer which I can easily dispose off. As I have mentioned, the parties have already agreed on how to maintain the subject matter pending hearing and determination of the case, i.e that status quo be maintained, the status being that it is the respondent in possession and operating some business/es. If I entertain the prayer to give vacant possession to the applicant, then I will be disturbing the status quo as agreed by the parties. It would be improper for me to now go into whether or not the applicant deserves to be the one in possession, pending the hearing and determination of the suit, as that is a matter that has already been agreed by consent.

14. The only prayer left in the application is therefore that seeking to have the plaint struck out and for the suit to be dismissed in its entirety. The applicant in the body of the application has mentioned that she has presented the application based inter alia on the provisions of Order 2 Rule 15 of the Civil Procedure Rules. This provision of the law is drawn as follows :-

> **15. Striking out pleadings [Order 2, rule 15.]**
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> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> (a) it discloses no reasonable cause of action or defence in law; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
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> (3) So far as applicable this r. shall apply to an originating summons and a petition. (i)

15. The above provision of the law permits the court to dismiss a suit summarily when it is apparent that it discloses no reasonable cause of action; is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of court.

16. The issue in contention in this suit is a sale agreement that the parties entered into on 1 June 2012. There is no dispute over this agreement, but from what I can see, there is a dispute on whether or not the applicant was entitled to rescind the agreement for want of due performance on the part of the respondent. There is also a dispute as to whether the agreement is void for want of consent of the Land Control Board. It is the position of the respondent, and it is indeed one of the prayers in his plaint, that the rescission notice issued by the applicant on 7 September 2014, is illegal. On her part, the applicant asserts that she was perfectly entitled to issue a rescission notice. In his submissions, Mr. Kibe invited me to look at the sale agreement and argued that this court cannot rewrite the contract of the parties, and pointed out to several clauses within the agreement. That is well and good, but it must be appreciated that the respondent has contested the issuance of the rescission notice, and has argued that because the applicant continued receiving money after the completion date, she is estopped by her own conduct from rescinding the agreement.

17. Now, I do not think that the pleadings of the respondent do not reveal a cause of action, or are frivolous, or are an abuse of the process of court. There is indeed a question to be tried as to whether or not the applicant was entitled to rescind the agreement. I am afraid that this is not the forum for determining that question. That must be determined at the hearing of the suit and I will not go to the depths of interpreting the sale agreement, or determining whether there was breach, whether there was waiver, or whether the applicant is estopped by her conduct from rescinding the agreement, at this stage of the proceedings. Those issues lay at the heart of this matter and are best determined after the parties have presented their evidence. Suffice it to state that I am not persuaded that the respondent has presented a frivolous or vexatious

claim to this court, and I am not persuaded that the cause of action is "fanciful" as claimed by Mr. Kibe in his submissions. There was argument that there is no defence to the counterclaim, but I have already pointed out that there is on record a defence to counterclaim, so nothing arises out of this. I however note that the same was filed way out of time after this application was filed. I will allow it to remain on record but there could be some repercussions on costs.

18. Back to the issue at hand, the provisions of Order 2 Rule 15 should not be lightly invoked. Just because one party does not think much of the other person's case, is no reason enough to invoke Order 2 Rule 15. It must be patently clear from the pleadings that there is absolutely no cause of action being presented by the respondent. This is not the proper avenue to take where the court is invited to make a determination on documents which are contested or conduct a mini-trial. Where such is involved, it is best that the issues be deferred to a full trial.

19. For the purposes of this case, the best avenue for the applicant is to prepare her case for trial and have the court determine all issues after all parties have been given their day in court.

20. For the above reasons, I see no merit in this application and the same is dismissed. I make no orders as to costs as part of the application was premised on the reasoning that there was no defence to counterclaim which was filed later after this application. For that reason the respondent does not deserve to have the costs of this application.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

Mr. Magata holding brief for Mr. Kibe Mungai for the defendant/applicant.

No appearance on the part of M/s Munene Chege & Compnay Advocates for the plaintiff/respondent

Court Assistant :Nelima Janepher.