REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 261 OF 2016

OMAR MOHAMED BAWALY (Through his Son &

Manager, Mr. Mohamed Omar Mohamed)**.....PLAINTIFF**

VERSUS

JOSHUA GITAHI RODROT……..... DEFENDANT

R U L I N G

1. This is an application dated 8th November 2016. It is expressed to be brought under Order 2 Rule 3(2) (0) (i), of the Civil Procedure Rules and Order 36 Rule 1, Section 1A and 3A of the Civil Procedure Act. The applicant Omar Mohamed Bawaly prays for orders that

(i) ……

(ii) The Statement of defence filed herein is struck out and Judgement is entered for the Plaintiff on the grounds that: -

- **The defence is spurious and a sham;**
- **The statement of defence does not disclose any or any reasonable defence to the claim;**
- **The contract for sale of land known as Plot No. 139 Malindi, was between Ahmed, Omar, Swaleh and Dahman M. Bawaly (as Vendors) and Joshua Gitahi Rodrot (as purchaser) and the litigation alluded to in the Statement of Defence, reportedly filed against a company in which Mr. Joshua Gitari Rodrot is a director, are irrelevant for the purposes of performance of the contract sued on;**
- **Mr. Joshua Gitahi Rodrot, and not his company, is liable to pay the purchase price;**
- **Delay in payment of purchase price is attributable to the purchaser, and strict time-line to make such payments were agreed upon, before hand;**
- **Interest at court rate on the balance of purchase price is payable from the date the amount became due, or purchaser took possession;**
- **The purchaser fenced off the land before and after registration of Indenture on 18/11/2015;**
- **The purchaser is in awful default, and must pay interest on the purchase price, either at 19% or such rate as the court in its sole discretion may order.**

2. The Application is supported by an affidavit of Mohamed Omar Mohamed sworn on 9th November 2016. From the said Affidavit, it is clear that the deponent is a son of, and the manager and Guardian of one Omar Mohamed Bawaly, the Plaintiff herein, duly appointed under the Mental Health Act. It is also

clear from the Affidavit that Pursuant to a Sale Agreement, the Defendant has since 18th November 2015 been registered as the owner of and taken possession of all that parcel of land known as Plot No. 139, Malindi measuring approximately 28.76 acres. It is the Plaintiff's case that the land formerly belonged to him and his three brothers, and that the Sale Agreement had clearly stipulated that the Plaintiff's share of the purchase price being Kshs 2,221,482/ would be paid to the Plaintiff on or before 1st November 2015.

3. According to the Plaintiff, after taking possession of the land, the defendant has instead of honouring his part of the bargain instituted or caused to be instituted against his company, a frivolous suit so that he may get an excuse to delay payment of the purchase price. The defendant's Statement of Defence is therefore spurious and a sham and the same should be struck out and Judgement be entered in favour of the Plaintiff.

4. The Application is opposed by the Defendant. In his Replying Affidavit sworn on 11th February 2017, Joshua Gitahi Rodrot confirms that there is indeed a case filed and pending hearing before this court being Malindi ELC No. 219 of 2015 whose determination is relevant to the cause of action set out by the Plaintiff herein. The Defendant however denies that he is the one who filed the said suit and/or that it was filed with his connivance as suggested by the Plaintiff.

5. It is the Defendant's case that he is and has always been ready and willing to pay the balance of the purchase price for the said Plot No. 139 Malindi but since he is a director of one of the defendants in the said ELC No. 219/2015 in which a declaration has been sought which may affect the validity of the sale of the land, it is only lawful and prudent that he withholds any further action until the said suit is concluded.

6. The Defendant admits that the sum due and owing from him to the Plaintiff, subject to the determination of the said ELC No. 219/2015 is Kshs 2,221,482 as demanded by the Plaintiff. He however disputes the 19% interest rate demanded by the Plaintiff on a number of grounds including the fact that it is unlawful and that as a good Muslim the Plaintiff should not be heard to claim or receive interest on any sum due to him as doing so would be immoral to the Plaintiff's sworn beliefs.

7. Ultimately the defendant contends that the application as framed is defective in law, that it is an omnibus application that seeks to cure all, and that in the circumstances, it ought to be dismissed.

8. I have carefully gone through the application and the Replying Affidavit in opposition thereto. I have also studied the rival submissions and lists of authorities supplied to me by Mr. S.M. Kimani Advocate for the Plaintiff and Mr. Ole Kina, Counsel for the Defendant.

9. The defendant has raised a number of issues pertaining to the competency of the application before me and I think it is fair that I address them first. The application as I have said is expressed to be brought under Order 2 Rule 3(2) (0) (i); Order 36 Rule 1 (of the Civil Procedure Act) and Sections 1A and 3A of the Civil Procedure Rules. As correctly pointed out by the Defendant, Order 3(2) (0) (i) does not exist under the Civil Procedure Rules. Counsel for the Plaintiff/Applicant did not address the court on the defects cited by the Defendant/Respondent in regard to the application before me. I note however in light of the particular objection that Order 51 Rule 10 of the Civil Procedure Rules provides as follows: -

> 1. "Every Order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
>
> 2. No application shall be defeated on a technicality or for want of form that does not affect the substance of the application..

10. As Justice Hancox stated in ***Githere -vs- Kimungu (1976-1985) EA101***:

> "The relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and the court should not be too far bound and tied by the rules

which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.

11. In the more recent case of ***Telkom Kenya Ltd -vs- John Ochanda and 996 Others (2015) eKLR,*** the Supreme Court commenting on the Judicial discretion to waive certain required forms in the conduct of proceedings, rendered itself thus:

> **"The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this court. Parties should comply with procedure, rather than look to the court's discretion to cure the pleadings before it. This court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene in instances where full compliance with procedure has not taken place……**
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> **It is this court's position of Principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case, and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant, but are the handmaiden of justice that facilitates the right of access to justice in the terms of Article 48 of the Constitution.**

12. I think the overriding objectives under Section 1A of the Civil Procedure Act which is cited in the application have a similar objective. Consequently, while this court would not under -emphasize the importance of adherence to the Civil Procedure Rules, I am of the opinion that this is a clear case where the substantive justice of the case requires that I overlook the mistake of counsel in failing to bring the application under the relevant provisions of the Rules, which in this case I think ought to have been Order 2 rule 15.

13. The power to strike out pleadings, and in the process, deprive a party of the opportunity to present their case has been held over and over the years to be a draconian measure which ought to be employed only as a last resort and only in the clearest of cases. The defendant in his submissions has indeed cited numerous cases in support of this position as to why the defence herein should not be stuck out.

14. A perusal of the pleadings reveals a very narrow difference between the parties. The Plaintiff's case is that pursuant to a Sale Agreement of all that parcel of land known as Plot No. 139, Malindi the Defendant was required to pay to the Plaintiff a sum of Kshs 2,221,482/ on or before 1st November 2015. Pursuant to the said Sale Agreement, the Defendant took possession of the land and has since 18th November 2015 been the registered proprietor thereof.

15. The Defendant does not entirely disavow the averments contained in the plaint. At paragraph 7 of the Written Statement of Defence the Defendant refers to the contents of Paragraph 5, 6, and 7 of the Plaint and avers that the contents thereof are not entirely correct. In particular, the defendant states:-

> (a) That he has always been ready and willing to pay the balance of the purchase price but since he is a director of one of the defendant's sued in ELC No. 219 of 2015 where the Plaintiffs have sought a declaration that may affect the validity of the sale by the Plaintiff in this case to the defendant it is only lawful and prudent that "no further action as may render the outcome of the said suit nugatory are taken" before the conclusion of the said suit.
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> (b) That as a demonstration of good will he is ready and willing to deposit the balance of the purchase price in court or an interest bearing account in the names of both the Plaintiff and the Defendant; and
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> (c) That the sum due and owing to the Plaintiff subject to the determination of ELC 219 of 2015 is Kshs 2,221,482/ only.

16. The averments contained at paragraph 7 of the Written Statement of Defence are repeated word for

word in paragraph 8 of the Defendant's Replying Affidavit. In my view, save for the amount of the interest demanded by the Plaintiff, the defendant admits clearly that the sum of Kshs 2,221,482/ demanded by the Plaintiff is due and owing. It is however his position that he cannot lawfully complete the payment of the purchase price for the portion of land in dispute without offending the principle of *Lis Pendens*.

17. Black's Law Dictionary, 9th Edition defines Lis Pendens as the jurisdictional power or control acquired by a court over property while a legal action is pending. Lis Pendens is a common law principle that was enacted into statute by Section 52 of the Indian Transfer of Property Act (ITPA)- now repealed. While addressing the purpose of the principle of Lis Pendens, ***Turner L.J, in Bellamy -vs- Sabina (1857) 1 De J. 566*** held as follows:

> "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the defendants alienating before the Judgement or decree, and would be driven to commence his proceedings *de novo*, subject again to defeat by the same course of proceedings.

18. Cranworth L.J commenting upon the same doctrine in ***Bellany -vs- Sabine (Supra)*** observed as follows: -

> "Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end.

19. The mischief which the doctrine of Lis Pendens sought to address is clear from the dicta in the above decisions. That if alienation of a Suitland Pendente lite (pending Litigation) were permitted to prevail, the Plaintiff would be liable in every case to be defeated by the Defendant alienating before the Judgement or decree, and would be driven to commence his proceedings de Novo, subject again to be defeated by the same course of proceedings. In my considered view, this is not the situation facing the parties herein. The Plaintiff does not in any way seek to alienate the suit property. All he is seeking from the Defendant is that the Defendants makes good the terms of the agreement executed by the parties way back before the cited proceedings were commenced. I am unable to see how the said ELC No. 219/2015 would be rendered nugatory if the Defendant were to meets his obligations.

20. While both parties before me are not clear on the correct date of the Sale Agreement (the one on record is shown to have been executed on 31/12/2015); it is not contested that the balance of the purchase price, being Kshs 2,221,482 was to be paid to the Plaintiff on or before 1st November 2015. I have not seen anything either in the defence or in the affidavit in reply to the application before me indicating why the defendant did not remit the balance of the purchase price on the given date. It is however clear that on or about 18th November 2015, the property was duly registered in his name and he has now taken possession thereof. From the record, it is evident that ELC 219 of 2015 being cited as the reason to delay payment was not filed until 1st December 2015. The resort to the doctrine of Lis Pendens is therefore in my view an afterthought being raised long after the Defendant had defaulted in its obligations.

21. In any event, the defendant is not sensu strictu a party in the said suit. While the Defendant depones that he is a "director of one of the defendants in ELC 219 of 2015", it is not clear on what basis the defendant is sued given that the suitland is registered in the name of the Defendant in person. While it is true that as a member of the public, the doctrine of Lis pendens assumes that he has notice of the litigation, it is also clear as shown above that the payments of the purchase price was due from him long before the said ELC 219 of 2015 was filed. He cannot therefore be allowed to take advantage of the same and now waive it as a shield against meeting obligations which were long due from him.

22. In my view, the defendant has clearly admitted owing the Plaintiff the sum of Kshs 2,221,482/. The admission is contained both in the Defence and the Replying Affidavit sworn herein. The delay and/or refusal to pay was based on the defendant's fear that to do so would offend the doctrine of Lis pendens in regard to the matters currently pending in ELC No. 219 of 2015. The Defendant's reliance on the said doctrine is however without basis. What is at variance and what needs to be determined at the trial of the suit in due course is the rate of interest payable on the sum admitted as owing. As a result, I enter partial Judgement for the Plaintiff/Applicant in the amount of Kshs 2,221,482/ only. Costs of the application will be in the cause.

Dated, signed and delivered in Malindi this 21st day of April 2017.

J.O. OLOLA

JUDGE