



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 1132 OF 2016**

**BENARD OMONDI WASONGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PATRICK MBIU THAIRU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DAVID MWAURA THAIRU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**STEPHEN MACHARIA THAIRU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**PETER NJENGA THAIRU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff seeks judgment on admission against the Defendant through his application dated 9<sup>th</sup> November, 2016 brought under Order 13 Rule 2 of the Civil Procedure Rules. The application is premised on the ground that the defence raises no triable issues and that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants admit owing the Plaintiff the sum of Kshs. 620,000/= at paragraph 3 of their defence. Since the debt is admitted in the defence, the Plaintiff urges the court to grant the orders sought to avoid a delay in the expeditious disposal of this suit. The Plaintiff swore the affidavit in support of the application in which he set out the facts of this case.

On 14<sup>th</sup> February, 2014 the Plaintiff entered into a sale agreement with the Defendants for the sale of two portions of land (“the Suit Property”) that were to be created out of land reference number Dagoretti/Rituta/ 1186 once it was surveyed and subdivided to create eight portions. The Defendants sold the two portions to the Plaintiff at a cost of Kshs. 6.2 Million. Pursuant to this agreement, the Plaintiff paid a deposit of Kshs. 620,000/= to the Defendants being 10% of the purchase price. The Plaintiff was to pay the balance of the purchase price on completion of the transaction. On the day the land was to be subdivided, the Plaintiff was shocked when a third party came up claiming to have bought the same parcel of land from the Defendants. This third party had a sale agreement confirming that he had purchased the Suit Property from the Defendants and went ahead to commence development on the Suit Property.

In their defence and counterclaim, the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants admit entering into an agreement with the Plaintiff and also admit being paid the sum of Kshs. 620,000 by the Plaintiff. However, the Defendants argue that their defence raises triable issues since the sum of Kshs. 620,000/= that they owe the Plaintiff ought to be offset against the damages they expect to be awarded against the Plaintiff.

The 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants claim damages against the Plaintiff for complaining to the police when he

learnt that the Defendants had sold the Suit Property to a third party. The Defendants aver that as a result of the Plaintiff's complaint, the Defendants were arrested, held in custody and subsequently charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code in Kibera Law Courts Criminal Case No. 4058 of 2014. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants contend that following their arrest, they lost their employment, suffered psychologically and incurred loss and damage when they were held in custody. The Defendants argue that the Plaintiff ought not to have pursued criminal action against them by complaining to the police and getting them arrested and charged in court yet the Plaintiff knew all along that he could recover the sum of Kshs. 620,000 through a civil suit as he finally did through this case. They also seek the costs of the suit and the counterclaim.

The Defendants contend that allowing the present application will work to their disadvantage since execution will proceed before they have had an opportunity to prove their counterclaim and yet they have equally suffered loss and damage as a result of the Plaintiff's actions.

The Defendants were put on their defence in the criminal matter before the court in Kibera. At the time this application was argued it was not clear whether the criminal proceedings against the Defendants in the magistrate's court had been determined.

Paragraph 2 of the Defence reads as follows:

*The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant admit the contents of paragraph 9, 10, 11 and 12 of the plaint save that they shall seek to offset the Kshs. 620,000 that they were paid with their counterclaim.*

Since the Defendants admit owing the Plaintiff the sum of Kshs. 620,000/=, the question for determination is whether judgment on admission should be entered for the Plaintiff, or whether the Defendants are entitled to offset the sum they admit owing the Plaintiff against the damages they may ultimately be awarded if they prove their counterclaim.

A party may apply to the court for judgment where there is admission of facts either on the pleadings or otherwise without waiting for the determination of any other question between the parties under Order 13 Rule 2 of the Civil Procedure Rules.

In **Choitram v Nazari [1984] KLR 327**, it was held that an order for judgment on admission under Order XII Rule 6 of the Civil Procedure Rules should only be made if it is plain that there are either clear express or clear implied admissions. Madan J.A. had this to say:

“... Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.

The admission by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' in their defence is in the Court's view plain and obvious on the face of it.

Order 7 Rule 3 of the Civil Procedure Rules reads as follows:

*“A defendant in a suit may set-off by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the Plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit or ought not to be allowed, refuse permission to defendant to avail himself thereof.”*

The Plaintiff's claim in this court is for a refund of the deposit he paid to the Defendants pursuant to the agreement to sell him the Suit Property. The Defendants in their cross claim seek damages for loss of

employment and for suffering when they were arrested, detained and charged following the Plaintiff's complaint. The Court is of the view that it will not be practicable to pronounce a final judgment on both the original claim and cross- claim in this same suit.

The Defendants can file a suit claiming damages for loss of employment and psychological suffering once the criminal proceedings are determined in their favour. The claim for damages for loss of employment would have to be filed and proved before the Employment and Labour Relations Court and not the Environment and Land Court in accordance with Article 162 of the Constitution.

After considering the pleadings, application, Replying Affidavit and the Submissions of counsel, the court allows the application and enters judgment for the Plaintiff for Kshs. 620,000/= plus interest and costs.

Dated and delivered at Nairobi this 6<sup>th</sup> day of April 2017.

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff/Applicant

Mr. Kinyua for the Defendants/Respondent's

Mr. V. Owuor- Court Assistant