



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 2 OF 2016**

**MOHAMED ABDULBASJET.....PLAINTIFF**

**VERSUS**

**COLLINS KIBET BORRUETT.....1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, UASIN GISHU COUNTY....2<sup>ND</sup> DEFENDANT**

**RULING**

The first defendant has come to court with the application dated 18.2.2016 praying for an order that this suit herein be struck out with costs for being vexatious and that the caution placed on the land be removed. The application is based on the grounds that the 1<sup>st</sup> defendant and the plaintiff entered into a land sale agreement on 13.7.2015. Pursuant to the sale agreement, the plaintiff was to receive from the 1<sup>st</sup> defendant a total consideration of Kshs.13,500,000/=. The plaintiff was entitled to the purchase money whilst the 1<sup>st</sup> defendant was entitled to the land reference Eldoret Municipality Block 14/2462. The 1<sup>st</sup> defendant has paid the plaintiff Kshs.13,890,000/=. The Plaintiff had received the purchase money prior to the filing of the suit. The suit is therefore vexatious as it is premised on the defendant's alleged failure to pay the balance of the purchase sum.

The application is supported by the affidavit of Collins Kibet Barnett who states that on 13.7.2015 he entered into an agreement for the purchase of land reference Eldoret Municipality Block 14/2462 at a total purchase price of Kshs.13,500,000/=. In the purchase agreement, he was the purchaser and the plaintiff was the seller. He paid the full purchase sum as follows:

- (a) On 14.7.2015 - Kshs. 4,000,000/=
- (b) On 17.7.2015 - Kshs .5,000,000/=
- (c) On 18.9.2015 - Kshs. 2,890,000/=
- (d) On 3.12.2015 - Kshs. 2,000,000/=

According to the defendant, he has paid a total of Kshs.13,890,000/= pursuant to the sale agreement Kshs.390,000/= which is more than the agreed sum. He is surprised that the plaintiff has filed a suit against him asserting that he owed him Kshs.5,500,000/= as at 6.1.2016. He was further dismayed to note that the plaintiff asserted that he had not performed his part of the contract by 6.1.2016 which is untrue. The suit is meant to vex him as he has fully performed his part of the bargain. By the time the letter dated 22.12.2015 was issued to him, he had fully performed his part of the contract. The suit ought to be struck out for being vexatious.

The 1<sup>st</sup> Defendant filed a replying affidavit stating that the application lacks merit and diversionary in nature. He reiterates that he has been paid so far, the only sum of Kenya Shillings Eight Million (Kshs.8,000,000/=) leaving a balance of Kenya Shillings Five Million Five hundred (Kshs.5,500,000/=) as agreed. The payment was agreed through the firm of M/s Ngigi Mbugua & Co. Advocates being the lawyer for the 1<sup>st</sup> Defendant and himself for a long period of time. He intends to amend his plaint to include the name of Mr. Allan Ngigi Mbugua proprietor of M/s Ngigi Mbugua & Co. Advocates either as a co-defendant or as an interested party in this case.

The plaintiff states that the 1<sup>st</sup> Defendant is in a position to tell this court as to what actually happened. Part of their agreement was that Mr. Ngigi Mbugua, Advocate upon receipt of the said monies from the Plaintiff he was to directly wire them into his account. The sum of Kenya Shillings Eight Million (8,000,000/=) was in fact wired into his account in his absence by the said law firm. The fact that the plaintiff may have paid entire sum into the account of M/s Ngigi Mbugua & Co. Advocates, he is still in breach of the said agreement since he has no knowledge of full payment the balance of Kshs.5,500,000/=.

The plaintiff believes that the law has not changed and that he remains unpaid seller and his contractual remedies are available in law, hence this application ought to be dismissed and most issues go for full trial of this case. He sees no hurry for the 1<sup>st</sup> defendant to scuttle the process mid-way and should be allowed to prepare himself for his defence. It's against the law and Law Society of Kenya (LSK) conditions of sale as stated on the said sale agreement to effect transfer before completion of sale by paying full consideration. In this case, the transfer was effected in to the names of the 1<sup>st</sup> Defendant before full payment of a balance of Kshs.5,500/= was made to date. Clause 5 of the said sale agreement is very clear. It only allowed the purchaser to take possession but not develop until the sum of Kshs.9,000,000/= is paid.

The defendant paid Kenya Shillings Eight Million (Kshs.8,000,000/=) only and therefore the issues of possession and transfer do not arise. According to the plaintiff, there are several triable issues in this case that will only come out during hearing of this case. In the meantime, he has instructed his lawyer, to effect any necessary amendments to the plaint to enable the court to determine all issues adequately.

The defendant submits that it is unconscionable and unjust for the plaintiff to sell his land receive full purchase price as agreed and thereafter seek counsel or rescind the agreement. The suit ought to be dismissed.

The Plaintiff submits that in *Trivedi and Trivedi -vs- Njeri Ngiru Civil Appeal No. 139 of 1984*, the court observed that a pleading should only be struck out in clear cases. In the instant case, the plaintiff has the Locus standi to institute the current suit since he has not received the total purchase price and the 1<sup>st</sup> defendant has already transferred the property to himself. It is the plaintiffs view that he has a legitimate claim and the same cannot be struck off as being vexatious.

It is clear that both the plaintiff and the 1<sup>st</sup> defendant agreed that the money be wired through the Advocates Account which monies were deposited in full, but Mr. Ngigi only transferred part of the money to the Plaintiff which is contrary to the agreement. The plaintiff submits that the Advocate was a commission agent and there was no reason for withholding the outstanding sum. An agent to a transaction ought to bring that fact to the knowledge of the two parties and tis is captured in the Estate Agent Act Cap 533. The knowledge that the outstanding sum has been paid was within the 1<sup>st</sup> defendant and Mr. Mbugua Ngigi and the same was brought to the plaintiff's attention by an annexure attached to the application. In as much as they believe that the outstanding money was deposited in the agent's account, the plaintiff remains unpaid seller who is entitled to seek his remedies. The outstanding sum should be wired to the plaintiff's account as commission is earned when a transaction is successful.

I have considered the pleadings, application and the replying affidavit and do find that there are several issues that have been raised in the pleadings for trial. The substantive law governing striking out of pleadings is founded in the provisions of **Order 2 Rule 15 of the Civil Procedure Rules**. Sub-rule 15 (1) of the aforementioned Order, enacts that:

**“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

- a) It discloses no reasonable cause of action or defence in law; or**
- b) It is scandalous, frivolous or vexatious; or**
- c) It may prejudice, embarrass or delay the fair trial of the action; or**
- 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.”**

The above provision gives the court power to strike out pleadings. In **Dev Surinder Kumar Bij v Agility Logistics Limited CIVIL SUIT NO. 311 OF 2013[2014] eKLR** it was held, inter alia, that:

**“For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant.”**

The first issue being raised by the plaintiff is whether ***the terms of agreement were complied with***. The second issue being ***whether the lawfully procedure of transfer was followed***. These are issues that cannot be determined by this application and therefore ought to go for full trial. I do find that the suit herein is not frivolous as it has substance. The application is therefore dismissed with costs.

**Dated and delivered at Eldoret this 24<sup>th</sup> day of November, 2017.**

**A. OMBWAYO**

**JUDGE**