

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 448 OF 2013

JAMES KIPKOECH KOSGEI.....PLAINTIFF

VS

HILLARY KIPKOSGEI KIBOINET T/A SWEETLAND LTD.....DEFENDANT

(Application for summary judgment; principles to be applied; Order 36 Rule 1; Summary judgment only applicable where no defence has been filed; applicant seeking summary judgment where a defence has already been filed; application not tenable; application dismissed)

RULING

The application before me is the Motion dated 1 November 2013. It is an application filed by the plaintiff brought vide the provisions of Order 36 Rule 1 (a) of the Civil Procedure Rules, 2010. It seeks the following orders :-

- (1) That the defendant's defence be struck out and summary judgment be entered in favour of the plaintiff as prayed in the plaint.*
- (2) That the defendant respondent be condemned to pay the costs of this application.*

The application is founded on the following grounds

- (1) That the defence filed herein is a mere sham and does not raise any triable issues.*
- (2) That the defence contains mere denials.*
- (3) That the defendant does not have any defence that will warrant a full trial.*
- (4) That the defendant is unnecessarily employing delaying tactics and in the process denying the plaintiff what is truly due to him.*
- (5) That the plaintiff justly and truly entered into a written sale agreement with the defendant for the purchase of a portion of land known as Pioneer Ngeria Block 1 (U.G) 8768 Plot No. 6A measuring 0.09 Ha and paid for the total consideration thereto.*

The application is supported by the affidavit of the plaintiff. Before I go to the gist of the affidavit, I think it is prudent that I set down a little background to this suit.

This suit was commenced by way of plaint filed on 20 September 2013. In the plaint, the plaintiff pleaded that in January 2012, he entered into a sale agreement with the defendant by which the defendant sold to him a parcel of land measuring 0.09 Ha contained in a parcel known as Pioneer Ngeria Block 1 (UG) 8768. The consideration was Kshs. 1, 150,000/= . It is pleaded that the whole sum was paid and a further payment of Kshs. 20,000/= was made on 21 May 2012 for processing of the title. It is the plaintiff's case that despite paying this money, his efforts to enter into occupation and possession have been frustrated. It is pleaded that the defendant was out to defraud the plaintiff of his hard earned money. Two particulars of fraud are pleaded being :-

(a) Pretending that he was in a position to genuinely sell to the plaintiff the said parcel of land.

(b) Causing the plaintiff to part with his hard earned money for a plot that never was.

In his plaint, the plaintiff sought the following orders :-

(a) An order of specific performance on the part of the defendant to transfer the title of the parcel of land in favour of the plaintiff.

(b) That in the alternative to prayer (a) the plaintiff be refunded the principal sum of kshs. 1, 150,000/= plus Kshs. 20,000/= plus interest accruing from 4th January 2012 when the agreement was entered into.

(c) General Damages for breach of contract.

(d) Costs of the suit.

(e) Any other relief that the court deems fit and just to grant.

The defendant filed Defence on 25 October 2013. In the defence he has denied that he has not performed his part of the agreement and has pleaded that he is in the process of transferring the suit land to the plaintiff. He has stated that if there was any delay in transferring the land to the plaintiff, the same was occasioned by unforeseen circumstances resulting from the process of sub-dividing the suit land, obtaining consent to transfer, consent to sub-divide, and all other processes of sub-division.

In the supporting affidavit to this application, the plaintiff has more or less repeated the averments in the plaint. In addition, the plaintiff has added that the defendant failed to give him possession and occupation of the said land. He has stated that the defendant defrauded him by false representations. He has further said that the defendant is employing delaying tactics. He has annexed copies of the agreement of 4 January 2012 between himself and the defendant.

I have seen that in the agreement; the defendant is said to be the owner of land described as Pioneer Ngeria Block 1 (UG) 8768 and that what is being sold is a Plot No. 6A measuring 0.09 ha. The consideration is Kshs. 1, 150,000/= of which Kshs. 650,000/= was said to have been paid on the signing of the agreement. As to the balance, Kshs. 100,000/= was to be paid on or before 4th February 2012 and Kshs. 400,000/= was to be paid on 4th March 2012. It is also put down that the purchaser "agrees that he has seen the said parcel of land and shall take possession of the same after full payment is made." The vendor was to pay land rates and rents and the purchaser was to be responsible for payment of stamp duty and registration fees. The agreement is drawn by Kiboss-Kibet & Company Advocates. The plaintiff has also annexed a bank deposit slip for Kshs. 296,000/= of 20 January 2012 and another bank deposit slip of 30 April 2012 for Kshs. 204,000/=. These amounts have been receipted by the defendant. It is apparent that the monies were paid a little beyond the stipulated time in the agreement, but that is not an issue at the moment. He has also annexed a receipt dated 21 May 2012 for Kshs. 20,000/= said to be payment of "processing title deed".

The applicant did not file any response to the application and neither did he attend court on the date that the application was heard. That does not however mean that I must automatically allow the application. I need to be convinced that the application has merit. Mr. P.K. Kibii for the applicant, while urging the application, stated from the bar that the plaintiff has dropped the claim for specific performance and only wants a refund.

This application is brought under Order 36 Rule 1. That provision states as follows :-

Summary judgment [Order 36, rule 1.]

(1 In all suits where a plaintiff seeks judgment for—

(^a) a liquidated demand with or without interest; or

) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant
(b whose term has expired or been determined by notice to quit or been forfeited for non-payment of
) rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2 The application shall be supported by an affidavit either of the plaintiff or of some other person who
) can swear positively to the facts verifying the cause of action and any amount claimed.

(3 Sufficient notice of the application shall be given to the defendant which notice shall in no case be less
) than seven days.

If the plaintiff wishes to drop his prayer for specific performance, then his claim is only one for a liquidated demand for which summary judgment may be entered. However, it will be seen from the above, that one can only apply for summary judgment, *where the defendant has appeared but not filed a defence*. It follows that one cannot apply for summary judgment where there is a defence on record. But this provision, to me, does not appear to affect any application brought pursuant to Order 2 Rule 15, where the court has discretion to strike out pleadings and enter judgment accordingly, if the pleadings disclose no reasonable cause of action or defence, are scandalous, frivolous or vexatious, or may prejudice embarrass, or delay the fair trial of the action, or the pleadings are an abuse of the process of court.

It therefore behoves a party to make an election, on whether to proceed under Order 2 Rule 15 or to proceed under Order 36 Rule 1. One cannot combine the two, since under Order 36, there is no defence to strike out. Order 2 Rule 15 presupposes that there is a defence filed, for one cannot strike out a pleading that does not exist. In my view, this application must fail for it is brought under Order 36 Rule 1, yet there is already a defence on record.

Even assuming that the application was properly brought before the filing of defence, or that the intention was to come under Order 2 Rule 15, I would have hesitated not to allow the defendant leave to defend. The agreement of the parties did not provide for a performance period on the part of the defendant. It is therefore difficult to state with conviction, that the defendant has failed to perform his part of the bargain. Although the plaintiff claims that he has not been given possession, the agreement states that he has seen the plot and he is happy with it. There is absolutely no deposition that the plaintiff went into the suit land and was denied entry, or that he was repulsed, and refused the opportunity to take possession. The defendant in his defence has stated that he is willing to complete the transaction but that there have been delays in sub-dividing the parent title. As I have said before, in absence of a performance and completion period in the agreement of the parties, I have no material before me that would suggest that the defendant has failed and will not perform his part of the bargain. The defence of the defendant cannot therefore be said to be a sham.

My sentiments hereinabove are purely obiter, for the application must fail, for the sole reason that it was filed after a defence was already placed on record contrary to the provisions of Order 36 Rule 1.

I have no option but to dismiss the application. Since the defendant did not deem fit to respond to it, I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. P.K. Kibii present for the plaintiff/applicant.

Defendant acting in person- Absent.