



Mwangangi Nzisa & Associates Advocates v Sachania & 2 others (Environment & Land Case E054 of 2021) [2023] KEELC 18506 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 18506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E054 OF 2021
LC KOMINGOI, J
MARCH 16, 2023**

BETWEEN

MWANGANGI NZISA & ASSOCIATES ADVOCATES APPLICANT

AND

KAMAL DINESH SACHANIA 1ST RESPONDENT

JYOTI KAMAL SACHANIA 2ND RESPONDENT

SHILPA CHANDRAKANT 3RD RESPONDENT

JUDGMENT

1. By the Originating Summons dated 8th December 2021, the Applicant seeks orders;
 - a. Spent.
 - b. This Honourable court be pleased to declare the rightful claimants to who the title and completion documents, to Flat No.B.8,in Nirav Apartments and erected on Land Reference No.209/1219/3 should be surrendered to by the Applicant.
 - c. The above named Respondents do appear and state the nature and particulars of their respective claims to the title and completion documents to Flat No.B.8.in Nirav Apartments and erected on Land Reference No.209/1219/3 currently in custody of the Applicant and maintain or relinquish the same and abide by such order as maybe made hereon.
 - d. That in the alternative, and incase the Respondents ignore orders issued pursuant to prayer c above, the Honourable court be pleased to order the Applicant to surrender and deposit the title and completion documents,



to Flat No. B.8, in Nirav Apartments and erected on land Reference No.209/1219/3 with the Deputy Registrar of this Court.

- e. That the surrender of title and completion documents to Flat No.B.8, in Nirav Apartments and erected on Land Reference No.209/1219/3 by the Applicant to the Respondent declared the right custodian of the documents by this Honourable court be subject to payment of the Applicant's fees for services rendered in the conveyance.
 - f. That the costs of this cause be awarded and the same be borne by the Respondents jointly and severally.
2. The application was supported by the supporting affidavit of Mwangangi Nzisa Kitheka, an Advocate practicing in the Applicant's firm, sworn on 9th December 2021.
 3. She deponed that in August 2017, the Respondents jointly approached her to act for them in the transaction involving the sale and purchase of flat No.B.8, in Nirav Apartments and erected on Land Reference No.209/1219/3. She further deponed that acting on the joint instructions from the Respondents, she drafted, witnessed and executed the agreement of sale dated 4th August, 2017 between the 1st and 2nd Respondents as vendors and the 3rd Respondent as purchaser.
 4. She deponed that one of the key terms of the agreement was that the purchaser, would pay a deposit of kshs.8,200,000/= on execution of the agreement and the balance was to be settled in two instalments, by paying kshs.6.8 million on or before 31st August 2017 and Kshs. 6 million on or before 30th November, 2017. She further deponed that pending completion, the vendors were to deliver completion documents to the Applicant which were; the original lease I.R 114846, transfer form, rent and rates clearance certificates, consent from the lessor, copies of vendors identification documents and valuation report which they delivered to in late 2017.
 5. Miss Mwangangi also deponed that a transfer was to be effected upon full payment of the consideration and that at the time of filling the originating summons herein, the purchaser had an outstanding balance of ksh.2.5 million. She further deponed that on 17th June 2021, the vendors, through the firm of Mohamood M.Sevany, wrote to her demanding the release of the title and completion documents on the premise that the purchaser had substantially defaulted on the sale agreement. She added that she declined since in her opinion, she had a professional duty to protect both the vendors' and purchaser's interests. She added that the Applicant has no interest over the completion documents save for costs and charges and that there is no collusion between the firm and any of the Respondents.
 6. The originating summons is opposed by the 1st and 2nd Respondents through the 1st Respondent's replying affidavit sworn on 17th January 2022. He admitted that they were the vendors of the suit property and that they were represented by the Applicant for purposes of the transaction.
 7. He deponed that one of the pertinent terms of the subject sale agreement dated 4th August 2017 was that upon receipt of the full balance of the purchase price by the vendors, the Applicant was to deliver the completion documents to the 3rd Respondents' Advocates. He added that the 1st and 2nd Respondents did not deliver the completion documents to the Applicant to hold them in trust.
 8. He also deponed that the 3rd Respondent defaulted on the terms of the sale agreement by failing to pay the balance of the purchase price by 30th November 2017 despite the vendors granting her vacant possession and that the amount due still stands at ksh.2.5 million thus the completion documents should be released to them.



9. On the issue of legal fees, Mr. Kamal deponed that they had agreed at kshs.100,000/= with the Applicant and have paid ksh.50,000/= and offered to pay the balance upon release of the completion documents.
10. The originating summons is supported by the 3rd Respondent vide her replying affidavit sworn on 14th March 2022. She admitted that the Applicant was the duly appointed Advocates for all the three Respondents in respect of the subject sale agreement and that she was the purchaser. She further deponed that during the transaction, a dispute arose in respect of their agreement and she has so far paid a total of kshs.19.5 million shillings from the initially agreed purchase price of kshs.21 million which is approximately 95% of the purchase price. She added that she has an equitable interest by virtue of having paid a substantial amount of the purchase price.
11. She deponed that handing over the title documents to the vendors would leave her interest exposed and would jeopardize her interest in the suit property as there exists a real risk of failure to reimburse the Ksh. 19.5 million that she has already paid.
12. On the 8th December 2022, the court with the consent of the parties directed that the originating summons be canvassed by way of written submissions.

The Applicant's submissions

13. They are dated 25th March 2022. They raised the following issue:-
 - a. That the court do declare the rightful claimants to whom the title and completion documents to flat No B.8 in Nirav Apartments and erected on Land Reference No.209/1219/3 should be surrendered to by the Applicant.
14. The Applicant cited Order 34 Rule 2 of the Civil Procedure Rules and Section 58 of the *Civil Procedure Act* to submit that it is just an interpleader suit. In which she claims no interest in the subject matter save to ensure that the law is followed. It relied on the case of Safina Properties Limited & Another v Barclays Bank of Kenya Limited & Another [2015] e KLR.
15. It was also the Applicant' submission that time was of the essence in the conveyancing agreement. The Applicant further submitted that it is not controverted that the 3rd Respondent defaulted in completing the purchase price within the time frame stipulated .It submitted that it was a material term of the sale agreement than in case of breach by the purchaser, the vendor was to issue a twenty one (21) day notice and thereafter be at liberty to extend the completion date or rescind the agreement whereupon the purchaser would forfeit 10% of the purchase price in favour of the vendors as agreed liquidated damages and the vendors would resell or otherwise deal with the property.
16. The Applicant also submitted that the vendors were equally in breach of the contract for failing to issue completion notice. He relied on the case of Rts Flexible Systems Limited v Molkerei Alois Muller GmbH & Co KG (UK Production)[2010] UKSC14 as well as the case of National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another [2001]e KLR.

The 1st and 2nd Respondents' Submissions

17. They are dated 27th April 2022.Counsel for the 1st and 2nd Respondent submitted that it is not for the Court to rewrite contracts between parties but rather to give effect to the terms and conditions of the contract. He added that the Respondents are bound by the terms of the subject agreement.



18. It was counsel's submission that it is not disputed that the full purchase price has not been paid thus the 3rd Respondent is not entitled to the completion documents currently in possession of the Applicant. He further submitted that the agreement does not state that substantial payment for the purchase price was a condition to withholding of the documents by the Applicant as claimed by the 3rd Respondent.
19. Counsel also submitted that this being an interpleader application, the Applicant has no basis to allege that the 1st and 2nd Respondents breached the terms of the sale agreement. He further submitted that the 1st and 2nd Respondents issued a 21 days' notice upon the 3rd Respondent on 10th March 2021 and they also withdrew instructions from the Applicant.

The 3rd Respondent's Submissions

20. They are dated 3rd June 2022. It was Counsel for the 3rd Respondent's submission that the title and completion documents in respect to the suit property be held by a neutral 3rd party pending the determination of the dispute between the vendor and purchasers on grounds that the 3rd Respondent has an equitable interest as she has paid ksh.19.5 million while the vendors have not been willing to reimburse any amount and have in the past attempted to evict the 3rd Respondent.
21. Counsel further submitted that the 3rd Respondent assumed possession of the suit land with the concurrence of the 1st and 2nd Respondents. He relied on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014]e KLR to submit that rights of a person in possession and or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. He added that the Applicant owes a fiduciary duty to the 3rd Respondent and that there would be no prejudice suffered by the 1st and 2nd Respondents if the completion documents herein are held by the Applicant or a neutral party. He relied on the case of *Serve in Love Africa (Sila Trust) v David Kipsang Kipyego & others* [2017]e KLR.
22. I have considered the originating summons and the affidavit in support. I have also considered the responses thereto, the written submissions and the authorities cited. The issues for determination are:-
 - i. Whether this is an interplead of suit.
 - ii. What orders should the court grant?
 - iii. Who should bear costs of this suit?
23. The Applicant contends that she acted for the 1st and 2nd Respondents as the vendors and the for the 3rd Respondent as the Purchaser in the transaction over the sale of Flat Number B.8 Nirav Apartments on LR No.209/1219/3. The parties to the sale agreement do not dispute that the Applicant acted for them and drew the sale agreement dated 4th August 2017.
24. However, the 1st and 2nd Respondents contend that they withdrew their instructions from the Applicant. The 3rd Respondent has still retained the Applicant as her Advocate in the transaction.
25. The Applicant contends that it is an interpleader suit seeking this court to declare to whom amongst the Respondents it should surrender the title and completion documents, to Flat No.B.8, in Nirav Apartments and erected on Land Reference No.209/1219/3 considering that it acted for both parties in the said sale agreement.



26. Section 58 of the *Civil Procedure Act* defines an interpleader as follows:-

“Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants, or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit, for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself”.

27. Further, Order 34 Rule 2(a-c) of the Civil Procedure Rules provides;

- “a) That the applicant claims no interest in the subject matter in dispute other than for charges or costs;
- b. That there is no collusion between the applicant and any of the claimants;
- c. That the applicant is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct.”

28. Is the Applicant herein an interpleader as the law contemplates? In their sale agreement dated 4th August 2017, the Respondents covenanted under clause 4.2 that the vendor would pay the final balance of the purchase price being ksh.6 million on or before 30th November 2017. Clause 5.3 provides; “Subject to clause 4.1 and 4.2, the vendor’s Advocates will deliver the documents specified in the schedule hereto to the purchaser’s Advocates.”

29. It is not contended that the 3rd Respondent has not paid the full purchase price. This means that the purchaser is already in breach of Clause 5.3 of the sale agreement. Further, the vendors withdrew their instructions from the Applicant; it no longer acts for them in the transaction.

30. Clause 5.3 of the sale agreement provides, that the vendor’s Advocates will deliver completion documents to the purchaser’s Advocates upon the purchaser paying the full purchase price. The purchaser admitted that she has paid about 95% of the purchase price. The completion documents should be with the vendor’s advocates as stipulated in the sale agreement. A court cannot rewrite a contract between the parties. The Applicant is not an interpleader, she is wrongfully in possession of completion documents contrary to the subject sale agreement.

31. In the case of *South Nyanza Sugar Co. Ltd vs Leonard O. Arera* [2020] e KLR Mrima J observed thus:-

“It is a long standing principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the court to rewrite contracts. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* [2002] EA 503, [2011] e KLR the Court of Appeal at page 507 stated as follows:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.



In Paul Kimaiyo Langat vs Cooperative Bank of Kenya Ltd [2007] eKLR the Court of Appeal further stated that:-

“We are a live to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts; unless coercion, fraud or undue influence are pleaded and proved”.

32. It is not in dispute that the Applicant acted for both the vendors and the purchaser in the transaction. This is how she came to be in possession of the completion documents. It is the 1st and 2nd Respondents' case that they have since withdrew instructions from the Applicant.
33. I agree with the 1st and 2nd Respondents' submissions that no term of the sale agreement provided that the Applicant would hold the title documents in trust of either party. It is upon the 3rd Respondent to pursue the remedies available to her.
34. In conclusion, I find the originating summons not to be merited. I decline to grant the orders sought. The same is dismissed. Each party do bear own costs.
- 35 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUARLLY AT KAJIADO THIS 16TH DAY OF MARCH 2023.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mwangangi for the Applicant

Mr. Manda for Mr. Muriithi for 1st and 2nd Respondents

Mr. Juma for the 3rd Respondent present

Mutisya- Court Assistant

