



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E438 OF 2020

CAREN BOCHERE ANGIMA & ANOTHER.....1ST PLAINTIFF/APPLICANT

JACOB MASESE ANGIMA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

BOSIRE DANIEL KIRERA T/A

ONGEGU & ASSOCIATES ADVOCATES.....1ST DEFENDANT/RESPONDENT

FREDRICK KIMANI KIMEMIA.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of two separate applications filed by the defendants. The first one is a Notice of Motion dated 27th November, 2020 by the 2nd defendant. It is supported by his affidavit sworn on the same date and a further affidavit sworn on 9th June 2021. The application seeks the following orders:-

- 1. THAT there be a stay of any further proceedings in this suit as against the 2nd Defendant pending the hearing and determination of this application.**
- 2. THAT the suit against the 2nd Defendant be struck out.**
- 3. THAT the costs of this application and of the entire suit be awarded to the 2nd Defendant.**

The second application is a Notice of Motion by the 1st defendant dated 3rd February, 2021. It is supported by the affidavit of **NEWTON M. MWANGI** advocate sworn on 3rd February, 2021. The plaintiff filed a replying affidavit sworn by **CAREN BOCHERE ANGIMA** on 24th May, 2021. The application dated 3rd February, 2021 seeks the following orders:-

- 1. THAT this application be certified as urgent and the same be heard *ex-parte* in the first instance.**
- 2. THAT pending the hearing and determination of this application or until such time as this court may order this court be pleased to stay the orders issued on the 2 March 2021 and any subsequent proceedings arising therefrom.**
- 3. THAT this court be pleased to set aside the orders of the 2nd March 2021.**
- 4. THAT this court be pleased to consider and allow an application by the 1st Defendant to settle such sums as may be found to be outstanding to the Plaintiff in installments of Kshs.500,000 per month until payment in full.**
- 5. THAT for as long as the 1st Defendant abides by the above stated proposed payment plan, the order for warrants of attachment to issue against him be vacated and or lifted.**
- 6. THAT the costs of this case be provided for.**

Counsel for the 2nd defendant submit that the matter involves a dispute between an advocate and his client. Money was paid into the advocate's account and the 2nd defendant is not a partner in the 1st defendant's law firm. A sale agreement dated 5th October 2015 was executed by the parties and there is no evidence that the 2nd defendant benefited from the money paid as purchase price. There is an alleged Memorandum of Understanding (MOU) that was done by total strangers. The advocate undertook to settle the debt and that commitment has nothing to do with the 2nd defendant. According to counsel, at worst the 2nd defendant could be a witness as he is not a necessary party in the dispute. A demand letter by the plaintiffs' advocates expressed surprise as to how the 2nd defendant could be involved in the MOU.

Counsel for the 1st defendant entirely relied on his application and had nothing to say in reply to the application by the 2nd defendant. The 1st defendant's application mainly seeks to settle the debt by monthly instalments of Kshs.500,000 as well as stay of execution against him. It is stated that as commitment to this proposal, the 1st defendant has already paid Kshs.350,000 to the plaintiff.

Counsel for the plaintiffs opposed both applications. It is submitted that the 2nd defendant came into the dispute and urged the plaintiffs to withdraw the proceedings as he would jointly settle the claim. The 2nd defendant and the advocate jointly undertook to settle the debt by an agreement signed on 9th March 2016. Counsel contend that the MOU is not a forgery and the 2nd respondent is a necessary party in the proceedings. With regard to the application by the 1st defendant, it is submitted that the 1st defendant has not complied with earlier court orders by failing to provide security.

The source of the dispute is a sale agreement made on the 5th of October, 2015 whereby the plaintiffs sold their property namely Title No. **RUIRU/KIU BLOCK 31/785** measuring 0.09hectares to one Peter Gathigi Njau. The purchase price of Kshs.8 million was paid to the 1st defendant who was the plaintiffs' advocate but the same was not subsequently passed over to them.

Paragraphs 10 and 11 of the plaintiffs' replying affidavit states as follows:-

“THAT on 9/3/2016 vide a Memorandum of understanding and undertaking to pay dated the same day, the 1st Defendant together with the 2nd Defendant (who was neither the purchaser nor an individual known to the Plaintiffs) undertook to pay the 2nd Plaintiff a sum of Kshs. 8,000,000/= within 14 days from 9/3/2016 but failed and/or neglected to honour their agreement. (Attached herein, marked and produced as Exhibit- CAB- 2 is a copy of the Memorandum of Understanding executed on 9/3/2016).

THAT on 8/1/2019 vide a Tripartite agreement (after institution criminal proceedings), the 1st Defendant together with 2nd Defendant undertook to pay Kshs. 10 Million to the 2nd Plaintiff before 19/2/2019 but further neglected to Honour to date forcing the Plaintiff to institute these proceedings. (Attached herein, marked and produce as Exhibit CAB-3 is a copy of the agreement).”

There is a Memorandum of Understanding dated 9th March 2016 and it reads as follows:-

“MEMORUNDUM OF UNDERSTANDING \$ UNDERTAKING TO PAY;

I BOSIRE DANIEL KIRERA AN ADVOCATE OF THE HIGH COURT OF KENYA

PRACTISING IN THE NAME AND STYLE OF ONGEGU & ASSOCIATES DO

HEREBY STATE AS FOLLOWS:-

1.THAT I ACTED AS AN ADVOCATE FOR THE SELLER MR. JACOB

MASESE ANGIMA OF ID No. 32107614 IN THE SALE PROPERTY IN

KAHAWA SUKARI AND RECEIVED ENTIRE PURCHASE PRICE OF

KSHS 8,000,000. (EIGHT MILLION) INTO MY CLIENT'S ACCOUNT.

2. THAT HAVING CONVERTED THE SAID PROCEEDS INTO BUSINESS

INTO SOME BUSINESS VENTURE WITH MR FREDRICK KIMANI KIMEMIA

OF ID NO. 12527598 NOW JOINTLY UNDERTAKE TO ENSURE REFUND

OF THE SAID AMOUNT WITHIN 14 DAYS FROM THE DATE HEREOF,

FAILURE TO WHICH THE SELLER HEREIN CAN SEEK ENFORCEMENT

OF THIS AGREEMENT.

SIGNED

BOSIRE DANIEL KIRERA 09/3/2016

ID No 32107614

SIGNED

FREDRICK K. KEMEMIA 09/3/2016

I.D No. 12527598

SIGNED

JACOB M. ANGIMA March 9, 2016

ID # 32107614

Josephine Angima

Apart from the MOU, there is a tripartite agreement dated 8th January 2019 which also includes the 2nd defendant. It states as follows:-

“TRIPARTITE AGREEMENT

THIS AGREEMENT MADE THIS 8TH DAY OF JANUARY BY BOSIRE DANIEL KIRERA OF ID No. 12513460 AND FREDRICK KIMANI OF ID NO. 32107614 IS IN RELATION TO THE SALE OF PROPERTY IN KAHAWA SUKARI (Ruiru/3/1785) WHOSE PROCEEDS WERE NOT REMITTED TO MR. JACOB MASESE ANGIMA.

IT IS AGREED THAT:

- a) MR BOSIRE DANIEL KIRERA AND FREDRICK KEMEMIA SHALL PAY A TOTAL OF KSHS. 10 MILLION TO MR JACOB MASESE ANGIMA ON OR BEFORE THE 30TH OF APRIL 2019.**
- b) THAT THE CRIMINAL CASE AGAINST BOSIRE DANIEL KIRERA COMING UP ON FEBRUARY 19, 20 AND 21ST IS DEPENDENT ON FULFILLING THIS UNDERTAKING.**
- c) THE OUTSTANDING BALANCE SO FAR IS K.SHS. 9,200,000 (NINE MILLION TWO HUNDRED THOUSAND) WHEREIN A SUBSTANTIAL AMOUNT SHALL BE PAID BEFORE THE NEXT HEARING DATE BEING 19th of FEBRUARY, 2018, BEING KSHS. 4.5MILLION (FOUR MILLION FIVE HUNDRED THOUSAND)**

SIGNED: BOSIRE DANIEL KIRERA

FREDRICK KIMANI

JACOS MASESE ANGIMA 8/1/19

WITNESS: CAREN BOCHERE ANGIMA I/D NO. 1643110

Order 1 Rules (1) and (3) of the Civil Procedure Code states as follows:-

“(1) All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

(3) All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

The 2nd defendant contends that he is not partner in the 1st defendant’s firm of advocates and that there is no evidence that he benefited from

the purchase price. It is further contended that the MOU and tripartite agreement were signed by strangers and are forgeries. The 1st defendant has not denounced the two documents. Equally, the 2nd defendant has not denied that his identity card number is indicated in both documents. The 2nd defendant's denial can only be established through other evidence disproving the documents.

In the absence of such evidence, I am satisfied that indeed the 2nd defendant agreed to pay the money and is a necessary party to the proceedings. The 1st defendant categorically states in the MOU that he received the sale proceeds and entered into some business venture with the 2nd defendant. Indeed the 2nd defendant's identity card number is indicated twice in the MOU. The MOU was entered into on 9th March 2016. Almost three years later on 8th January 2019 the 2nd defendant resurfaced and once again signed the tripartite agreement. The two defendants undertook to pay Kshs.10 million on or before 30th April, 2019.

The 2nd defendant's contention that the two documents were signed by strangers is doubtful. The 1st plaintiff, CAREN BOCHERE ANGIMA witnessed the tripartite agreement and must have seen the 2nd defendant signing the agreement. The 2nd plaintiff, JACOB MASESE ANGIMA witnesses the MOU and must have also seen the 2nd defendant when the MOU was signed. The contents of the two documents does establish on a balance of probabilities that the 2nd defendant benefited from the purchase price. The 2nd defendant is not alleging that the 1st defendant's statement in the MOU that he entered into a business venture with him is also a forgery. I am satisfied that the 2nd defendant has been properly joined in the proceedings.

The second application by the 1st defendant seeks to allow the defendant settle the debt by instalments. I delivered a ruling in this matter on 17th December, 2020 whereby I ordered that the 1st defendant provide security for the sum of Kshs.8 million or deposit the said amount in court within thirty (30) days. That order has not been complied with. It is now over eight (8) months and the 1st defendant has only paid Kshs.350,000. On 8th February 2021 counsel for the 1st defendant informed the court that his client was in the process of complying with the court orders and required twenty-one (21) days. The court issued warrants of execution on 2nd March 2021. Since then, nothing has happened.

The 1st defendant's application was filed in March, 2021. It is now over five (5) months and the applicant has not shown any commitment of making a single payment of the proposed Kshs.500,000 monthly instalments. The 1st defendant should understand that he was paid the money in 2015 and has not made any substantive payment to the plaintiffs. He is the one who benefited from the sale proceeds and his action cannot be rewarded by an order of payment by instalments from the court. I am satisfied that he has had all the time to settle the debt but has failed to do so. In 2019 he promised to pay Kshs.10 million by 30th April, 2019. It's now over two (2) years and he has not paid that amount. I am satisfied that the current application is an abuse of the court process and is only meant to seek more time for the applicant.

The upshot is that the two applications by the two defendants/applicants lack merit and are hereby dismissed with costs.

Dated and delivered at Nairobi this 30th day of **September**, 2021

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S. J. CHITEMBWE

JUDGE