



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO 59 OF 2015(O.S)

MILLY WAIRIMU GACHAU.....1ST PLAINTIFF/RESPONDENT

MARGARET WAMBUI.....2ND PLAINTIFF/RESPONDENT

FRANCIS GACHAO WAMBU.....3RD PLAINTIFF/RESPONDENT

-VERSUS-

GEORGE M. MAENGWE P/A

G.M.MAENGWE & CO. ADVOCATES.....DEFENDANT/APPLICANT

JUDGMENT

1. By an Originating summons dated 13th August 2015 and filed on the 18th August 2015, the three plaintiffs sued the defendant, who is an Advocate, under the provisions of **Order 37 rule 1 and Order 52 rule 4 of the Civil Procedure Rules (CPR)**. It states,

4(1) Where the relationship of Advocate and client exists or has existed the court may, on the application of the client or his legal personal representative make on order for

(a) Delivery by advocate of a cash account

(b) The payment or delivery up by the advocate of money or securities.

2. The plaintiffs/applicants seek that

(1) The court to direct the said George Morara Maengwe practicing as Maengwe & Co. Advocates to render a cash account of Kshs.1,100,000/= deposited in the defendant's account herein as consideration for the purchase of land parcel known as Njoro/Ngata Block 5/152 pending the completion of the conveyance of the title and the eventual registration in the names of the plaintiff. The account herein be rendered by the respondent in his capacity as an advocate.

(2) That the court directs the advocate to render an account of a sum of Kshs.1,100,000 deposited in the clients account to hold in trust pending the completion of the conveyance.

(3) That the court makes a finding that the defendant having received part payment of consideration in the sum of Kshs.1,100,000/= and having released the sum to a nondescript vendor before the conveyance was completed, and the title registered in the names of the plaintiff's herein, the defendant is liable as constructive trustee and/or for money held and received for a failed transaction.

(4) That the court finds that the defendant is liable to refund the sum of Kshs.1,100,000/= at a compound interest at court rates, as well as costs of this summons.

3. The first plaintiff swore the supporting affidavit on even date, and annexed the sale agreement Ext 1, cheque deposit slip for Kshs.1,100,000/= on the 5.03.2015 Ext 2, and another of Kshs.200,000/= on same date in the advocate's firm's names. A cash withdrawal receipt of Kshs.901,550/= duly acknowledged by the plaintiffs was also exhibited. Further, a demand letter by the plaintiff's advocates, then Githui & Co, dated 22nd and May 2015 was send out and received, and responded to by the defendant on the on the 7th July 2015.

4. Each of the other plaintiffs swore affidavits in support of their respective claims against the defendant.

The advocate, George Morara Maengwe swore and filed the Replying Affidavit to the Originating Summons on the 25th September 2015.

He explained the actions he did, being drawing the sale agreement on behalf of both parties who executed the same. He acknowledged receipt of the deposit amount, and averred that he transferred the said deposit to the vendor in good faith for purposes of facilitating the transfer, and that it was not an express or implied term of the agreement that the deposit would not be transferred to the vendor, unless the title documents in favour of the purchasers were surrendered to him.

5. It is the advocates averment that the only obligation on his part was to draft the agreement as agreed by the parties, which he did. He therefore denied the claim in its totality.

6. The sale agreement entered into between the parties and dated 25th February 2015 forms the basis of this dispute, by the Originating Summons.

It is trite that parties are bound by their pleadings, in this case the agreement, and that a court cannot rewrite an agreement for the parties, that the Court's duty is to enforce, unless it is demonstrated that it is tainted with illegality, fraud, or misrepresentation, or it is against public policy – **Court of Appeal, Civil Appeal No 298 of 2014, in Denis Noel Muhulo Ochwada & Another v-s- Elizabeth Murungari Njoroge & another 2018** – in which case, the court rendered that

“Allegations of fraud must be strictly proved--- on balance of probability.”

7. It is further trite that if the court is satisfied that the sale transaction is or was tainted with illegality, fraud or misrepresentation it cannot be enforceable – **Joseph Muriithi Njeri –vs- Mary Wanjiru Njuguna and Another(2018) e KLR.**

I shall refer to the terms of the agreement as and when necessary. The sale agreement states the parties names, and the description of the property subject of the sale agreement. It is dated the 25/2/2015.

On the **consideration, it is stated as Kshs.2,700,000/= out which the vendor has acknowledged the receipt of KShs.1,100,000/= on signing of the agreement**, and the balance payable in four equal instalments on stated dates (emphasis added).

Paragraph 5 thereof shows that payments would be made through the Advocates' firms bank account at K-rep, Kericho branch by EFT(electronic bank transfer).

Perusal of PExt 5 and 6 show that a sum of Khss.900,000/= and khs.200,000/= were wired to the advocate's bank account on the 6th February 2015, before the sale agreement was drawn and executed.

9. Plaintiff's submissions

It is submitted that the property **Njoro/Ngata Block 5/152** was at all material times owned by one MARITIM NGERECH - Title Deed PExt 1. No encumbrances are noted against the title deed. It is stated by the plaintiffs that despite the deposit of Kshs.1,100,000/= having been paid through the advocates bank account, the plaintiffs never got the land nor the deposit back when it became clear that the vendor was not ready to conclude the sale transaction.

10. The plaintiffs aver that the defendant failed to tender any documents that he transferred the deposit to the vendor, and therefore, having received the money in his capacity as the advocate for the vendor, he was obligated to render a cash account in terms of **Order 52 rule 4(1)**, stated above.

11. It is further submitted by the plaintiffs that the liability of the defendant is one of constructive trust where in the defendant represented to the plaintiffs that he had the vendor's authority to convey the interest in the land to the plaintiffs upon which promise they paid kshs.1,100,000/= as deposit to the advocate, on trust that the funds would be paid to the vendor once the transfer was concluded in the plaintiff's favour.

It is therefore the plaintiffs case that the advocate having received and retained the money in a fraudulent or failed transaction (land never existed), he is accountable as a constructive trustee to refund the said money to the plaintiffs.

12. Defendant's Submissions

In his replying affidavit, the defendant averred to having received the money, and transferred the same to the vendor in good faith. Further, the Advocate deposes and submits that the terms of the sale agreement were negotiated and agreed upon by the parties themselves without his involvement, and that the advocate's duty was limited to drafting the sale agreement on the parties terms, as agreed, and that due to fraud and forgery which were not within his knowledge prior to the execution of the agreement, the transaction was not concluded.

13. That at time of signing the agreement, the deposit had already been paid to the vendor, in terms of the agreement – **consideration clause**. The Advocate further submits that the agreement could only be signed, upon payment of the deposit as stated in the agreement.

14. ISSUES FOR DETERMINATION

(1) Whether the defendant advocate received the deposit as stakeholder, to hold in trust for the plaintiffs and if so, whether the advocate should render cash account, and refund deposit to the plaintiffs.

(2) Whether any liability attaches to the Advocate for the refund of the cash deposit for the failed sale transaction.

15. The terms of the sale agreement shall determine substantively the two issues above. At the signing of the agreement, the vendor had already received the deposit of kshs.1,100,000/=.

I agree that the said deposit had been paid through the Advocate's Bank Account for transmission to the vendor.

Looking at the deposits into the advocate's bank account, it is evident that the deposit aforesaid was paid on the 6/2/2015 before the sale agreement was executed 25/2/2015.

16. Thus it is to be construed, and reasonably so, as evidenced on the agreement that the vendor had already received the deposit before the agreement was prepared and executed. There is no other plausible explanation that may be attached to that fact. The vendor acknowledged receipt of the deposit in the sale agreement. If that be so, and I so hold, then, the advocate cannot be said to have held the deposit as stake holder, or on trust for the plaintiffs pending conclusion of the conveyance and transfer of the property in the plaintiffs favour.

17. By the above, my understanding is that the only money that would be paid through the Advocates (defendant's) bank account, as stated in the sale agreement, would be the balance of the purchase price, the deposit of Shs.1,100,000/= having been paid and acknowledged by the vendor, at the time of executing the sale agreement by both parties.

It would have been different if the deposit was expressly stated in the Sale Agreement to be held by the advocates as stakeholder, pending completion of the transaction, in which case, the vendor would not have acknowledged receipt at time of executing the agreement.

18. The Court of Appeal in **Juletabi African Adventure ltd & Another –vs- Christopher Michael Lockley (2017) e KLR** cited Black's Law Dictionary, 9th Edition, stated that, a trust therein is defined as

“1.The right enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.”

Thus the court employed the constructive trust doctrine as an equitable remedy to compel the trustee to convey title to the property to the buyer.

19. In the present matter, the plaintiffs have failed to prove that the advocate received and held the said deposit on their behalf pending completion of the transaction, and have failed to convey it back to them, not that he has taken advantage by holding the same to his benefit. No evidence was adduced to that effect.

It has been argued by the plaintiffs that the advocates have failed to prove when the said deposit was paid to the vendor. In my view it suffices that the vendor acknowledged receipt of the same during the signing of the agreement which agreement forms the basis of the dispute herein. Nowhere is it stated that the same was to be held by the Advocate's as stakeholder, to hold in trust pending completion.

20. I have earlier rendered that parties are bound by their agreement, and that the courts duty is only to enforce the terms of the agreement – **Dennis Noel Muhulo Ochwada Supra).**

By the agreement, the plaintiffs acknowledged that the deposit of Kshs.1,100,000/= was received by the vendor, not by the Advocates, to hold as stake holders pending completion. Indeed, the vendor acknowledged receipt, upon which he signed the Sale Agreement.

The advocate/defendant is therefore under no obligation to refund that which he did not receive, or held on trust for the plaintiffs under the sale agreement. The vendor having acknowledged receipt, the plaintiffs can only claim the refund from the vendor, not from the advocate.

21. In the circumstances, I find and hold that the defendant is under no obligation, nor can he be ordered to render a cash account under **Order 52 Civil Procedure Rules**, of the deposit paid before signing of the agreement that bound the parties, as no such condition to hold the deposit in trust for the plaintiffs pending completion existed in the sale agreement.

I further find and hold that the deposit was not paid to the Advocate's/defendant to hold in trust for the plaintiffs, and therefore the advocate/defendant cannot be held as a constructive trustee to refund the said deposit to the plaintiffs.

22. Consequently I find no merit in the originating summons dated 13/8/2015, the plaintiffs having failed to prove their claim upon a balance of probability. The orders and directions sought in the Originating Summons cannot be availed to the plaintiffs.

The originating summons is therefore dismissed with costs.

Orders accordingly.

Delivered, signed and dated at Nakuru this 30th Day of January 2020.

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J.N. MULWA

JUDGE