



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.28 OF 2015

ACTIONRICH INVESTMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH OTIENO ONYANGO.....1ST DEFENDANT/RESPONDENT

EVANS ODERO NYAKIGO.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR KISUMU LAND REGISTRY.....3RD DEFENDANT/RESPONDENT

AND

KENPIPE CO-OPERATIVE SACCO SOCIETY LIMITED.....GARNISHEE

RULING

The 2nd defendant/respondent's application dated 20.4.2016 and supported by his sworn affidavit dated the same day prays for the following orders:

(a) That the court be pleased to stay the execution of the ruling and orders issued by Honourable H. K. Chemitei on the 1st day of December 2015 pending the hearing and determination of this application;

(b) This court be pleased to set aside all proceedings emanating from the filing of the plaintiff's application dated 7th July, 2015 and the ruling and order issued by Honourable H. K. Chemitei on 1st December 2015 *ex debito Justea*.

(c) The Honourable court be pleased to grant leave to the 2nd defendant to file his response to the plaintiff's application dated 7th July, 2015 and to file a separate independent defence from the one filed by M/s Onsongo & Company Advocates

This court shall equally consider later the plaintiff's/garnishee proceedings dated 31.3.2016 and make a decision within this ruling.

In the 2nd defendant's application earlier quoted, he argues basically that he ought to be heard for the reasons that he was never served with the pleadings by the plaintiffs which culminated into the ruling of 1.12.2015 and that the firm of Onsongo & Company Advocates acted on his behalf without his instructions. He said that the purported statement of defence by the said law firm was without his advice and or consent and that the amount in contention of Kshs.18 million was received by the 1st defendant who did not disclose to the 2nd defendant. He deponed that there was a collusion between the plaintiff and the 1st defendant in this matter.

On its part the plaintiff has opposed the 2nd defendant's application vide the replying affidavit of **TIMOTHY MULATYA** sworn on 23.4.2016 arguing inter-alia that the firm of Onsongo & Company Advocates rightly represented the 2nd defendant as well as the 1st defendant jointly and that in all occasions Mr. Oguso Advocate appeared for the 2nd defendant. That there was sufficient evidence to show that the said defendant was fully conversant of the matter and he narrated how he personally met the applicant who promised to sell land parcel No. **KISUMU/DAGO/449** to repay the plaintiff

The plaintiff further attached several annexures to suggest that the 1st defendant all along acted on his on behalf and on behalf of the 2nd defendant.

Both the 2nd defendant and the plaintiff have gone ahead to file written submissions together with the supporting authorities which I have had time to peruse

ANALYSIS AND DETERMINATION

There is no dispute that the parties did enter into a sale agreement on 22.9.2014 where both defendants were indicated as vendors and the plaintiff the purchaser. There is no dispute also that the plaintiff paid a total sum, of Kshs.18 million or thereabouts for the purchase of the said property namely KISUMU/DAGO/3527 and the amount deposited in an account provided in the sale agreement.

The 2nd defendant's argument however is that he was never served with the pleadings and that all along he was not made aware of the suit. That the orders made on 1.12.2015 adversely mentioned him and he believes that there is a collusion between the plaintiff and the 1st defendant.

The salient issues to be determined can be summarised as follows:

- (a) Whether or not the 2nd defendant was served with the pleadings.**
- (b) Whether or not the firm of Onsongo & company rightly acted for the 2nd defendant.**
- (c) What prejudice does the applicant stand to suffer if any.**

On the 1st issue of service it appears from the affidavit of service of one Thomas **OMOLO OYUGI** sworn on 22.4.2016 and from the annexures to the replying affidavit by the plaintiff that he clearly served the 1st defendant who apparently seemed to have received on behalf of the 2nd defendant. The said deponent goes further to quote the mobile telephone number of the 2nd defendant. Apparently there seemed not to have been any rebuttal of the said annexures

Equally, there is no evidence to suggest that the firm of Onsongo & Company did not have express instructions to act for the applicant. Mr. Oguso in particular appeared before this court on 13/7/2015, 29/7/2015 Mr. Onsongo on 24/9/2015 and again Mr. Oguso on 22.10.2015 as well as taking the ruling on 1.12.2015. Further on 20.12.2015 MR. OGUSO did appear before Justice MWITA in Kakamega arguing an application on behalf of both defendants. Again on 15.12.2015 MR. OGUSO did appear before this court on behalf of both defendants. On 10.3.2016 MR. OGUSO again representing the defendants jointly did appear on their behalf.

The appearance of MR. OGUSO and Mr. Onsongo on behalf of the defendants, I suppose was buttressed by the joint defence filed by the said firm on 10.11.2015.

Can it be said that any reasonable person or tribunal for that matter taking all the prevailing circumstances including the filing of pleadings and the arguing of the same fail to appreciate that the 2nd defendant was not aware of the suit? I respectfully do not think so. In fact the court takes judicial notice of the fact that the two advocates who appeared on behalf of the applicant, Mr. Onsongo and Mr. Oguso are sufficiently experienced to know whether they had instructions or not.

Significantly also the 1st defendant apparently in all the affidavits on record shows that he has

sworn them on his own behalf and that of the 2nd defendant. There was no reply from the 1st defendant or for that matter from the firm of Onsongo & Company Advocates. This court is unable to clearly see how the 2nd defendant was duped into entering into the agreement by both the plaintiff and the 1st defendant.

Even on the issue of the money being deposited in Account No.0290192394351 in the name of the 1st defendant, there is nothing to suggest from the sale agreement or otherwise that the applicant did not consent or for that matter did not profit from the sale proceeds.

I therefore do find that the applicant was well served. He was privy to the matter and that the firm of Onsongo & Company were properly representing both his interest and the co-defendant.

Is there any prejudice suffered or likely to be suffered by the applicant? I do not think so. There is nothing on record to indicate that he did not benefit from the proceeds or the purchase consideration. The mute silence by the 1st defendant speaks volumes. Both were registered proprietors of the suit property. They entered into the sale agreement mutually without any evidence of duress, fraud, undue influence or misrepresentation. Infact if there is any dispute on how the money was shared then the same ought to be between the two defendants. The plaintiff should not be dragged into their differences if indeed one exist.

For the above reasons I do not find the application meritorious

There was no denial that the applicant received the purchase consideration. This court cannot allow the applicant to use legal procedural technicalities as advanced by the applicant to shield him from his obligations. The applicant can on a separate application apply to file an independent defence. The court cannot allow the prayer for now as there is no draft defence. The application is dismissed with costs to the plaintiff.

GARNISHEE APPLICATION

The garnishee application dated 31st March 2016 prays for the following orders:

- (a) That status quo be maintained in that the garnishee to continue holding the balance of the purchase price of Kshs.28,000,000/= due to the 2nd respondent/debtor;**
- (b) The court be pleased to order the attachment of the sum of Kshs.18,087,000/= being the amount due from the Garnishee to the 2nd Respondent arising from the sale of land parcel No. EAST KISUMU/DAGO/449 pursuant to the order issued herein on 2nd December, 2015.**
- (c) The court be pleased to order the attachment of the sum of Kshs.1 million being the costs due from the Garnishee to the 2nd Respondent arising from the sale of land parcel No. East Kisumu/Dago/449 pursuant to the order issued herein on 2nd December 2015.**
- (d) The court be pleased to issue prohibitory orders restraining the garnishee whether by themselves, their agents and or servants from releasing Kshs.28,000,000/= to the 2nd Respondent pending the hearing and determination of this application.**

The application is supported by the affidavit of **TIMOTHY MULATYA** the plaintiff/applicant's Director. He depones that the applicant did pay the defendants herein the sum of Kshs.21.870.000/= for the purchase of land parcel No. KISUMU/DAGO/3527 wherein they paid a total sum of Kshs.18,087,000/=. The said agreement was frustrated by the defendants who have failed to deliver the conveyancing instruments and thus the agreement was terminated.

He goes further to state that the said defendants have sold land parcel **No. EAST KISUMU/DAGO/449** the only known property to the garnishee herein for a sum of Kshs.28,000,000/= and that they have already received a sum of Kshs.3 million being the 10%. In the premises the plaintiff prays that the garnishee be compelled not to release the entire sum of Kshs.28 million to the defendants.

On its part one **RICHARD AKETCH** the garnishee chairman duly acknowledges the fact that it purchased the land namely **EAST KISUMU/DAGO/449** from the 2nd defendant. It has however emerged that the land in question has problems on its title hence the garnishee cannot be given the same.

From the above reply there is no documentary evidence to indicate whether or not the garnishee has made any payments to the 2nd defendant or for that matter they are experiencing any problems in the transfer of the land purchased. I also note that the said replying affidavit was filed late and there was no evidence of service upon the plaintiff.

On their part the defendants choose not to challenge the said garnishee proceedings or to support it either.

In the absence of any proof of the difficulty in having the land transferred to garnishee, its very difficult for this court to believe the content of **Mr. RICHARD AKETCH'S** affidavit. As earlier stated there is nothing to show that they have been unable to collect its title from the lands department. Neither has it exhibited a copy of the sale agreement for this court to interrogate.

In the premises I am inclined to allow the application. The sum of Kshs.18,087,000/= was duly received by the defendants as per the sale agreement. This has never been disputed. Further the defendants and for this matter the 2nd defendant has not denied entering into a sale agreement with the garnishee. Neither has he denied receiving any deposit of Kshs.3 million from the garnishee.

I do therefore find that for purpose of compensating the plaintiff a sum of Kshs.18,087,000/= already received by the defendants ought to be deducted from the sum of Kshs.28,000,000/= paid by the garnishee to the defendants. There is no loss suffered by the garnishee as it has already received its land.

CONCLUSION

The application be allowed as follows:

(a) The sum of Kshs.18,087,000/= be deducted from the purchase consideration of Kshs.28,000,000/= by the garnishee to the 2nd defendant.

(b) The garnishee be at liberty to pay to the defendants the balance of Kshs.10,000,000/= after complying with (a) above

c. Costs of this application to the plaintiff payable by the defendants.

Dated, signed and delivered this 18th day of May 2016.

H. K. CHEMITEI

J U D G E