



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CIVIL SUIT NO. 114 OF 2012

**JOHN WAWERU MWANGI (Suing as administrator of the estate of
MARK MWAURA MWANGI).....PLAINTIFF**

-VERSUS-

LINUS MOSES KOSAMBO.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

=AND=

STEPHEN NDEDA

T/A NDEDA & ASSOCIATES ADVOCATES.....3rd PARTY

RULING

1. The 1st defendant was sued by Mark Mwaura Mwangi – deceased vide his plaint dated 7th June 2012. He passed on during the subsistence of this suit and was replaced by his legal representative John Waweru Mwangi on 12th March 2015.

2. The 1st defendant applied to join a 3rd party to these proceedings and the said application was allowed where the 3rd Party was joined on 11th February 2013. The current motion dated 18th November 2015 is also filed by the 1st defendant against the 3rd party. It is premised under the provisions of Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The 1st defendant (hereinafter referred to as the applicant) seeks the following ORDERS:

1. Spent

2. That this Honourable Court be pleased to order the Third Party to deposit the sum of Kenya Shillings Eleven Million One Hundred and Nineteen Thousand Five Hundred (Kshs. 11,119,500/=) and such sum to be held as deposit by the Court until the suit is disposed of or until further orders of the Court as the Court may deem fit to grant.

3. That this Honourable Court be pleased to order that costs of this application be provided for.

3. The application is supported by the grounds listed on the face of the application *inter alia* that the sum of Kenya Shillings Eleven Million One Hundred and Nineteen Thousand Five Hundred (Kshs 11,119,500/=) was paid to the 3rd party for the purchase of plot No Kwale/Galu Kinondo/526 and he acknowledged receipt of the monies. Secondly that the 3rd Party was acting as the vendor's (plaintiff) advocate.

4. The motion is further supported by an affidavit sworn by the 1st defendant/Applicant. The applicant deposed that he purchased the suit property and paid the full purchase price of Kshs 11,119,500/=. That the 3rd Party has acknowledged receipt of this money on behalf of the plaintiff but the plaintiff now alleges he never sold his land. The applicant deposes that there is a possibility the 3rd Party is still holding the purchase price which the applicant is apprehensive he may spend in a bid to frustrate the 1st defendant's claim for indemnity. He urged the Court to grant the orders.

5. The application is supported by the plaintiff. Mr John Mwangi deposed that his deceased brother is the owner of the suit property and they are still holding the original title deed. He deposed that the 1st defendant purchased the property from someone else and not his brother which sale was conducted in the offices of the 3rd Party. He is supporting the application because the plaintiff was not a party to the sale transaction and that the 3rd Party had no instructions to sell and receive the money. It is thus incumbent upon the 3rd Party to give security by depositing the entire decretal sum in Court pending determination of this suit.

6. The 3rd party opposed the application vide his replying affidavit dated 13th January 2016. He deposed that he was instructed by the plaintiff to act for him in the sale transaction. That the applicant conducted a search from the Lands office before buying the land. The 3rd Party acknowledged receiving bankers cheque for the sum of Kshs 1,111,950 from the applicant's advocates on record and reciprocated by supplying the said advocate with all the transfer documents.

7. The 3rd Party confirmed that after the title was registered in the name of the applicant, he received the balance of the purchase price as provided for under clause 2 (c) of the sale agreement. It is his case that after the 1st defendant got title, he took possession of the suit premises by fencing it. The 3rd Party deposed that he advanced all the sale proceeds to his client and his client acknowledged receipt as per acknowledgement notice annexed as "SN – 8".

8. He continued that he is distancing himself with the allegations put forth by the applicant as his mandate and professional duty as an advocate was discharged therefore has no capacity to hold any proceeds from the sale of the suit property. He urged the Court to dismiss this application with costs to him.

9. The 3rd Party was also placed on the dock for cross-examination on his affidavit. During the cross-examination, he stated that a Mr Francis Mwangi who deals in property called him and informed him about a client who wanted to sell his property. The documents were forwarded to his office. He said the plaintiff went to his office to sign the sale agreement and he identified him using his national ID No 8779679. The 3rd Party admitted receiving the deposit and also forwarding several documents to the applicant.

10. After transfer, he was sent the balance of the purchase price. He maintained acting for Mark Mwaura Mwangi the plaintiff. While being cross-examined by Mr Nyachiro advocate for the plaintiff, he stated that he received instructions from Mr Francis Mwangi whom he knew. He said the consent to transfer was obtained on 17th August 2011 while the agreement was drawn on 29.8.2011. The 3rd Party stated that he does not have the details of the bank transfers but he can avail them. That the postal address of Sirya is the same one given as belonging to the plaintiff but he did not know their relationship.

11. The parties also filed written submissions which I have considered. The 3rd Party admits preparing the sale agreement and forwarding to the applicant's advocates together with the transfer documents. The

3rd Party also admits receiving the entire purchase rice which was paid by a bank transfer from the applicant's advocates. His contention is that he paid the monies once he received them to the vendor and therefore he was discharged from his duties of advocate client relationship. He also stated that since the applicant has failed to show he is holding the monies, the orders sought should not be granted.

12. This Court has reminded itself that the application before it is interlocutory. The suit is yet to be heard on merits. For that reason I will not question the documents raised in the questions during cross-examination such as the variance of dates on the consent letter and sale agreement or similarity of postal address. I will also not make a finding unto whether the 3rd Party was instructed by the plaintiff or otherwise. My part for now is to determine whether the order seeking the 3rd Party to deposit the money in Court while this suit is still pending has any merit.

13. In his submissions, the 3rd Party referred to the case of **Samuel Njenga & 2 Others (Members of Juja Self Help Group) vs JKUAT, NBI ELC No 266 of 2013 (2013) eKLR** which quoted **Locabail International vs Agro Export (1968) I ALLER 901** as regards the circumstances when a mandatory injunction can be granted. According to him, the applicant has failed to prove that the 3rd Party is still in possession of the monies. He also submitted that the applicant lacks locks to sue him as the monies were transferred after the applicant had ascertained that due diligence had been done by him.

14. The 3rd Party in contesting the orders granted is because he released the funds to the vendor and he is no longer having any monies in his possession. As I said earlier, I will not determine whether any monies were released to the vendor or not. But it is instructive to note that the 3rd Party himself admitted payments were made to his accounts by the applicant's advocate through RTGS and he annexed several correspondences exchanged in the process of this transaction.

15. The applicant having paid money through him to the vendor is seeking indemnity from the 3rd Party in the event the plaintiff's ("**Vendor**") suit succeed. The 3rd Party has placed reliance on the acknowledgement note annexed to his affidavit as '**SN-8**' as evidence that money indeed left his hands/office. He has not annexed any evidence of any document of how this money left his hands/office to the plaintiff. Such evidence would rebut the presumption being put forth by the 1st defendant that the 3rd party is still in possession of the money.

16. Further the plaintiff filed suit against the 1st defendant that he sold his land. The replying affidavit put forth by the plaintiff is that he never instructed the 3rd Party nor did he receive the money allegedly paid by the 1st defendant. The 1st defendant is therefore the one under threat of losing out on his money. The 3rd Party has not indicated any signs of giving undertaking neither has he filed any claim as against the plaintiff.

17. In my view by deposing that he released funds to the plaintiff, the burden of proof shifted now on him to show evidence of such payment and not to submit that the burden is on the applicant to prove he is in possession of the funds. I say so because the 1st defendant has laid a basis on how they sent funds to the 3rd Party. The 3rd Party has acknowledged receipt. He is under an obligation once he was called to answer how the funds left his possession to the plaintiff or whoever. None has been shown. Is this therefore not a clear case where an order equivalent to a mandatory injunction is deserved. If not so then I would fail to understand what a clear case means.

18. In any event, the money is not sought to be paid to any of the parties but to be put in Court to guarantee the rights of all the parties. The 3rd Party has also not alluded to any prejudice he will suffer in the event the orders are granted. For the reasons contained in the body of this ruling, I make a finding that this application has merit. The same is allowed. The 3rd Party to deposit the sum of Kshs 11,119,500/= to Court within 45 days of this date.

Ruling signed and delivered at Mombasa this 13th day of October 2016.

A. OMOLLO

JUDGE