



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUITNO 184 OF 2014

MARTIN GATHECA GIATI.....PLAINITFF

VERSUS

DANIEL KIRERA BOSIRE T/A ONGENGU & ASSOIATES ADVOCATES.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 2nd July 2014 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21, Order 36 Rule 1 and 5, Order 13 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. It sought the following orders:-
 - a. **THAT judgment be entered against the defendant for the sum of Kshs 27,030,000.00 together with interest thereon at the prevailing commercial rate from 6th May 2014 until payment in full.**
 - b. **THAT costs of this application and generally for the suit be awarded to the Plaintiff against the Defendant, together with interest therein.**

THE PLAINTIFF'S CASE

3. The Plaintiffs' application was supported by the Affidavit of Martin Gatheca Gaiti. It was sworn on 2nd July 2014. His written submissions were dated and filed on 13th November 2014.
4. He stated that he was the intended purchaser of a parcel of land known as L.R. No 14970/89 (hereinafter referred to as "the subject property") that was purportedly owned by one Ephraim Mwangi Maina who was being represented by the Defendant. The Plaintiff and the said Ephraim Mwangi Maina duly executed the Agreement for Sale on 4th September 2013.
5. He was claiming a sum of Kshs 27,030,000/= that was computed as follows:-

| | |
|---|-------------------|
| a. Payment on 2 nd September 2013 | Kshs 10,000,000/= |
| b. Payment on 30 th September 2013 | Kshs 15,000,000/= |
| c. Stamp Duty | Kshs 980,000/= |
| d. Legal Fees | Kshs 350,000/= |

e. **Architectural Designs**

Kshs 700,000/=

Kshs 27,030,000/=

6. Unfortunately, the said sale transaction did not go on due to certain allegations of fraud and parties recorded statements with the Criminal Investigation Department (CID). He said that the Defendant thereafter agreed to refund him the full purchase price as could be seen in Paragraphs 5-7 of his Statement of Defence. He therefore sought entry of judgment as prayed.

THE DEFENDANT'S CASE

7. In opposition to the Plaintiff's claim, on 16th October 2014, the Defendant swore a Replying Affidavit. The same was filed on the same date. His written submissions were dated 28th November 2014 and filed on 1st December 2014.
8. The Defendant stated that he assumed the Plaintiff had conducted due diligence of the subject property as his advocate communicated intention to proceed with the sale transaction. He said that he released the Completion Documents after the Plaintiff paid a deposit in the sum of Kshs 10,000,000/= whereafter the Plaintiff indicated that he was unable to proceed with the said transaction. He confirmed having gone to CID to record a statement and had since been charged with the offence of obtaining money by false pretences.
9. He denied having admitted in writing that he owed the Plaintiff the said monies and termed the Plaintiff's civil action against him, when there were criminal proceedings against him, an abuse of the court process. He was emphatic that the Plaintiff ought to have brought proceedings against him under Order 52 of the Civil Procedure Rules, 2010.
10. He contended the court needed to evaluate the pleadings and the evidence and therefore urged the court to dismiss the Plaintiff's present application

LEGAL ANALYSIS

11. In the Plaintiff's Complaint dated 6th May 2014 and filed on 7th May 2014, the Plaintiff stated as follows:-

7. Upon discovery, the defendant met the Plaintiff and his Advocate and the defendant agreed to refund all the money deposited in his account (now totalling Kshs.25,000,000.00), but has not done so to date despite having agreed to do so and also pursuant to clause 7 (e) of the sale agreement.

8. The Plaintiff has issued demand to the defendant to refund the said monies through my advocates but the defendant has failed, refused and/or otherwise neglected to deliver the said amount of Kshs. 25,000,000.00.

12. In the Defendant's Defence dated 24th June 2014 and filed on 26th June 2014, it was stated as follows:-

5. The Defendant admits the contents of Paragraph 7 and party (sic) admits the contents of Paragraph 8 of the Plaintiff's Complaint in so far as the demand is concerned but states that he has not refused to deliver the said amount of Kshs 25,000,000.00.

6. The Defendant denies the contents of Paragraphs 9, 10, 11 & 12 of the Plaintiff's Complaint and further avers that the only sum he is aware of due to the Plaintiff is Kshs.25,000,000.00 and put the Plaintiff to strict proof on the other contents as regards interest and other charges.

7. That in response to Paragraph 13 of the Plaintiff's Complaint the Defendant avers that he has not refused to acknowledge the amount of the Purchase price that is Kshs 25,000,000.00 as alleged.

13. The Plaintiff submitted that the Defendant's defence was a sham and was merely intended to

- delay the fair trial of the matter herein. He contended that the Defendant had unequivocally admitted that he was entitled to a refund in the sum of Kshs 25,000,000/=in Paragraphs 5-7 of his Defence.
14. After a careful evaluation of the facts and submissions by the parties, it was evident that the matter herein was clearly a dispute between an Intended Purchaser and the Intended Vendor's Advocates which arose after the Plaintiff herein was unable to register the title of the subject property to his name, due to what the Plaintiff attributed as fraud.
 15. The contents of the Plaint and the Defence showed that there was no commercial element in the matter herein that would warrant the same being heard in the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division.
 16. In the **Practise Directions Relating To The Filing Of Suits, Applications and Reference in Proper Court, 2009 Gazette Notice No 1756** it is clearly stipulated as follows:-
 1. ...
 2. **Where suits have already been filed in the wrong court, the Court should exercise its authority ...to return the plaint to be presented to the court in which suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the court process.**
 17. It is critical that parties file matters in the assigned Divisions of the High Court to avoid any delays in the determination of the said matters. Indeed, the court in which a suit is filed is to be determined in accordance with the guidelines already set down and not according to the preference or convenience of the plaintiff.
 18. For the foregoing reasons, the court was thus hesitant to make a determination of the present application for fear of arriving at a decision that would be different from what a judge who would ordinarily deal with the same in the Civil Division would arrive at.

DISPOSITION

19. Accordingly, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated and filed 2nd July 2014 is hereby transferred to the High Court of Kenya Milimani Law Courts Civil Division for determination. It is hereby directed that the file be placed before the Presiding Judge of the said Civil Division for a mention on 25th February 2015 for his further orders and/or directions.
20. The court did not make any orders as to costs as it did not deal with the substantive issues that had been raised herein.
21. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of February 2015

J. KAMAU

JUDGE