



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 707 OF 2014

TRACEY INVESTMENT LTD1ST PLAINTIFF

HANSLEY INVESTMENTS LIMITED.....2ND PLAINTIFF

VERSUS

SAMURU GITUTO FARMERS CO-OP. SOCIETY1ST DEFENDANT

GITONGA KITHINJI MURIUKI t/a

GITONGA MURIUKI & COMPANY.....2ND DEFENDANT

RULING

The Application

The application before the court is a Notice of Motion dated 12th January 2015 filed by the Plaintiffs, seeking orders that the 2nd Defendant's advocate do release the pleaded balance of the deposit(s) towards the purchase price the said advocate is allegedly holding in his client account to the Plaintiffs on a without prejudice basis, or that in the alternative, the said sum be deposited in an interest-earning account in the joint names of the said Advocate and the Plaintiffs' advocates.

The grounds for the application is that 2nd Defendant has now admitted in paragraph 12 of his defence that he is holding in his client account at least some balance of the subject deposits herein totaling Kshs.1,364,000.00/=. Further, that the 2nd Defendant has failed to specifically plead the amount of the said balance thereby confirming as pleaded by the Plaintiffs, that the said advocate has never been ready and willing to professionally account for the subject deposits.

The Plaintiffs reiterated these grounds in their supporting affidavit sworn on 12th January 2015 by Mercy Ringa, one of their Directors, and also in submissions dated 16th February 2015 wherein reliance was placed on correspondence between the parties in a complaint lodged by the Plaintiffs with the Law Society of Kenya. The Plaintiffs submitted that the 2nd Defendant has been sued in his professional capacity and that the essence of the application is to secure the purchase price paid to him to hold as stakeholder.

The Response

The 2nd Defendant opposed the Plaintiff's application in Grounds of Opposition and a replying affidavit both dated 9th February 2015, wherein he stated that Plaintiff's suit is against two parties, and involved a sale of a piece of land in which there were two modes of payments by way of cheques payables to the vendor's advocate in their names, and by way of cheques issued in the name of the vendor. Therefore, that it would not be feasible to deal with the application without involving the other Defendant who received the money.

The 2nd Defendant in submissions dated 23rd February 2015 argued that the Plaintiffs are not sure and certain of the amount that is the subject of the application, and that it is not clear where they got the figure of Kshs 1,364,000/= from. Further, that the issues raised by the Plaintiffs should be raised at the hearing of the main suit. The 2nd Defendant submitted that there was no fraud or dishonesty on his part as an advocate, and that the Plaintiffs should proceed against the 1st Defendant in this matter.

The Issues and Determination

I have read and carefully considered the pleadings filed and submissions made by the parties herein. I note that the Plaintiffs' application is brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act. These provisions do not provide for any specific remedies but provide general principles to guide the Court in determining disputes before it. The provisions in particular do not provide for the remedy that is sought by the Plaintiffs in their application. Be that as it may, and arising from the nature of the orders sought by the Plaintiffs, this Court will treat the application as one for a mandatory injunction, and the question therefore to be determined is whether the Plaintiffs have met the threshold for the grant of a mandatory injunction.

The principles for the grant of mandatory injunction were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The Court notes that that the Plaintiffs in their Plaint dated 22nd May 2014 are seeking orders of specific performance of a sale agreement entered into with the 1st Defendant for purchase of the properties that are the subject of this suit, or in the alternative refund of the monies paid under the sale agreement. In the instant application the Plaintiffs are demanding a refund or deposit of money they claim the 2nd Defendant has admitted to be holding as stakeholder. I have perused paragraph 12 of the 2nd Defendant's defence dated 5th August 2014 and filed in court on 6th August 2014, and note that he does not admit to holding Kshs 1,364,000/= as alleged by the Plaintiffs. What he instead states therein is that he is ready and willing to release to the Plaintiffs the balance of the money held in his accounts.

The balance of any such moneys held by the 2nd Defendant must however first be determined by a process involving the tendering of evidence of payments made in this regard, and the settling of accounts involving the said payments. The prayers in the Plaintiffs' application cannot therefore be granted at this stage and are premature, and this is also not a clear case for the orders sought to issue. The Plaintiffs' Notice of Motion dated 12th January 2015 accordingly fails, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____March____, 2015.

P. NYAMWEYA

JUDGE