



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 607 OF 2011

GEORGE STEPHEN MUHORO.....PLAINTIFF

VERSUS

CATHERINE WANJIKU.....1ST DEFENDANT

RICHARD MWANDORO SAFARI.....2ND DEFENDANT

SIENNA LIMITED.....3RD DEFENDANT

PATRICK OTSOMO KONDO.....4TH DEFENDANT

MAURICE OTIENO OYUGI.....5TH DEFENDANT

SARAH MWERU MUHU.....6TH DEFENDANT/APPLICANT

RULING

The 6th Defendant/Applicant filed an application dated 5/9/2012 seeking an order she be struck out of the suit and the costs of the application be met by the Plaintiff. The application is premised on grounds that, first, the Applicant is improperly joined to the suit and second, that the suit does not disclose any cause of action against her, neither can the reliefs sought be attained against her.

The application is supported by an affidavit sworn by the Applicant on 5/9/2012. In the affidavit, the Applicant deposes that she, the vendor, entered into a sale agreement for the sale of a parcel of land known as L.R. No. 194/16 with the Plaintiff, the 1st, 2nd, 4th, and 5th Defendants, the purchasers, who were all represented by the 1st Defendant through her firm **C.W. Njuguna & Company Advocates**. The Applicant deposed that she agreed to sell the property as a block to the purchasers and was not concerned with what the purchasers would do with the property thereafter. It was her disposition that the purchasers

jointly paid the 10% deposit of the purchase price and subsequently the balance of the purchase price after she issued a completion notice to them through their advocate. The deponent stated she was not privy to how each of the purchasers contributed towards payment of the purchase price but however, a letter from the 1st Defendant addressed to the Plaintiff asking the Plaintiff to reimburse the other purchasers his share of the purchase price and interest thereon, was copied to her.

The Applicant deposed that she executed the Instrument of Conveyance as drawn by the purchasers' advocate and contended that she was not privy to the instructions that the purchasers had given to their advocate in drawing the conveyance. The Applicant deposed that on completion of the purchase price, and execution of the Instrument of Conveyance, as drawn by the purchasers' advocate, she forwarded the same alongside the completion documents to the purchasers' advocate for their further action. The Applicant deposes that she did not deal directly with the purchasers and therefore cannot be capable of excluding the Plaintiff from the transaction. As such, the Plaintiff's grievances in the suit can be adequately remedied by his co-purchasers. The Applicant reiterated that none of the orders sought by the Plaintiff in the suit can be obtained against her and further that the Plaintiff will not suffer any loss, damage or prejudice if she is struck off from the suit.

The Applicant annexed documents in support of her application, including, copies of the sale agreement, completion notice addressed to the purchasers' advocate, letter addressed to the Plaintiff from the purchasers' advocate - 1st Defendant, and a letter forwarding completion documents.

This application was opposed by the Plaintiff who swore a Replying Affidavit on 24/10/2012 wherein he deposed that he alongside the 1st, 2nd, 4th and 5th Defendants entered into a sale agreement with the 6th Defendant and that he contributed toward payment of the deposit of the purchase price. It was his disposition that he did not fail to pay his share of the balance of the purchase price but that he was excluded by the Defendants from the transaction with the intention of depriving him of his share of the suit property which has since appreciated in value. The Plaintiff refuted claims that the suit did not raise any reasonable cause of action against the Applicant and deposed further that since the Applicant was part of the sale transaction, she cannot claim to have been improperly joined to the suit. The Plaintiff maintained that the Applicant is crucial to the fair and just determination of this matter and thus her application should be dismissed with costs.

Submissions

The application was canvassed by way of written submissions. Counsel for the Applicant filed submissions dated 12/7/2013 wherein he submitted that it is undisputed that the Applicant no longer holds interest in the suit property having released physical possession, executed and forwarded requisite instruments of transfer upon receipt of the purchase price. Hence, counsel submitted that the Applicant has discharged her obligation under the agreement. Counsel submitted further that no orders would be enforced against the Applicant as she had already transferred the land and interests therein to the purchasers and thus orders of injunction and specific performance against her would be futile. In respect to the alternative prayer of the refund of the contribution made towards the deposit of the purchase price, counsel submitted that the same could only be refunded by the co-purchasers in the event that the Plaintiff's suit succeeds.

Counsel for the Plaintiff filed submissions dated 23/7/2013 wherein he submitted that the Applicant admitted that she transferred the suit property to the purchasers excluding the Plaintiff and in the circumstances failed to discharge the duty to the Plaintiff. Counsel referred the Court to the provisions of Order 1 rule 10(2) which allows for a party to be added whose presence before the court may be necessary to enable the court effectually and completely adjudicate and settle all questions involved in the suit. Counsel submitted that the Plaintiff was such a party, being the vendor of the suit property.

Counsel further submitted that the Applicant's action gave him a reason to complain and that the suit against the Applicant has chances of success.

Counsel relied on the decision in the case of **Time Magazine International Limited & 2 Others v**

Rotich & Another (2000) KLR 544 where the Court held,

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the Plaint are considered”.

Counsel also submitted that it is not absolutely clear that the Plaintiff did not have a cause of action against the Applicant neither was the suit a clear case. Further that the suit is not hopeless and it discloses a reasonable cause of action against the Applicant. He referred to the case of **Kassam v Bank of Baroda (Kenya) Limited (2002) 1 KLR 294** where the court held,

“The power to strike out pleadings for disclosing no reasonable cause of action should be invoked only in absolute clear cases and exercised with extreme caution.....it is a jurisdiction which out to be very sparingly exercised and only in exceptional cases.”

Determination

The undisputed facts are that the Plaintiff alongside the 1st – 5th Defendants were co-purchasers whereas the Applicant was the vendor

in a sale transaction over property known as L.R. No. 194/16 situate in Karen, Nairobi. All the purchasers were represented in the sale transaction by the 1st Defendant. The purchasers paid the 10% deposit of the purchase price and subsequently the balance thereof. Upon completion of the purchase price, the Applicant conveyed the property to the purchasers, but to the exclusion of the Plaintiff. The Plaintiff avers that the Applicant has excluded him from the sale transaction by keeping the details of completion away from him and conveying the suit property to his co-purchasers without his consent. He has sought the following orders in the main suit:

- i. ***an order of injunction restraining the Defendants from transferring or in any way dealing with the suit property,***
- ii. ***a declaration that a portion measuring 0.2 HA of the suit property belongs to the Plaintiff,***
- iii. ***Specific performance of the sale agreement dated 18/11/2010 by transfer of the portion measuring 0.2HA to the Plaintiff, and***
- iv. ***In the alternative, a refund of the sum of Kshs. 1,189,000/-***

The Applicant, in rejoinder avers that the purchasers, including the Plaintiff, were represented by an advocate and thus she had no control over the instructions given to the said advocates by the purchasers. Further that the Instrument of Conveyance was prepared by the purchasers' advocate and thus it was not in her place to question the absence of the Plaintiff. The Applicant contends that the purchasers agreed to transact jointly to purchase the property as a unit.

The provisions for joinder and/or misjoinder of a party to a suit is found under **Order 1 of the Civil Procedure Rules Rule 10(2)** provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”. Emphasis added.

Is the Applicant a necessary party to enable the Court to effectually and completely adjudicate and settle all questions involved in the suit? The answer to this question lies in the facts outlined hereinabove.

The Applicant has since transferred the suit property to the Plaintiff's co-purchasers and no longer has any proprietary interest thereto. Consequently, orders of injunction cannot lie against the Applicant. *The purpose of injunctions is to maintain status quo. Thus injunctions are not to be granted if the event meant to be restrained has taken place,* See **Esso (K) Ltd v Mark Makwata Okiya Civil Appeal No. 69/1991**. Similarly, specific performance is an order of the court requiring a party to carry out his obligations under a contract according to its terms. The general rule is that specific performance will be granted where the common law remedy of damages is inadequate. However, *even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant,* See **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR**. As it is not in contention, the Applicant has already transferred the property ***L.R. No. 194/16 Karen*** to the Plaintiff's co-purchasers. She therefore has no proprietary interests thereto. An order of specific performance will cause severe hardship to the Applicant as she cannot observe the said order. At the same time, to issue such orders would amount to the court acting in vain.

In respect to the refund of the contribution towards the 10% deposit of the purchase price, it is my view that it is not for the Applicant to refund this money for reasons that it was a joint transaction and the purchase price was agreed. This claim can be adequately addressed by the 1st – 5th Defendants. Suffice to say, this Court can effectually adjudicate and settle all the questions involved in the suit without the participation of the Applicant.

In effect therefore, I find that the Applicant is not a necessary party to the suit herein. I exercise the discretion donated to me by **Order 1 Rule 10(2)** and allow this application with costs which shall be borne by the Plaintiff.

Dated, signed and delivered this 25th day of February 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....**For the Applicant**

.....**For the Plaintiff**

.....**For the 1st, 2nd, 3rd, 4th and 5th Defendants**

.....**Court Clerk**

L.N. GACHERU

JUDGE