



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND AT NAKURU**

**ELC NO 4 Of 2013**

**NJOROGE IRANYA .....PLAINTIFF**

**VERSUS**

**PETER MUCHIRI MWANGI .....DEFENDANT**

**RULING**

1.The plaintiff in this case filed pleadings instituting this suit on 10<sup>th</sup> January, 2013. They included a plaint and verifying affidavit drawn and filed by the firm of M.G Ntabo and Company Advocates. The plaintiff's list of witnesses and Documents were drawn and filed by Rubua Ngure, Wangari & Company Advocates on even date against the same receipt.

2. This matter came up for hearing on 2<sup>nd</sup> April, 2014. On that date the plaintiff Njoroge Iranya, testified that he had purchased Njoro/Township Block 1/1088 (hereafter referred to as the suit land) from the defendant for Kshs. 400,000. The first sale agreement they entered into was drawn by Njau Kayai & Company Advocates on 6<sup>th</sup> June, 2002.

3. After some time they found it necessary to enter into a 2<sup>nd</sup> sale agreement which was drawn by the firm of Ngure and Company Advocates on 20<sup>th</sup> February, 2004. This second agreement clearly spelt out how much of the purchase price the plaintiff had paid for the suit land, what the balance was and how this balance was to be paid. The said agreement was executed by both parties on the same date.

4. According to the plaintiff, despite having received a total of Kshs. 350,000/= from him, the defendant failed to process the title deed in the plaintiff's name as agreed thus necessitating the filing of this suit.

5. Mr Ngure had been called as a witness by the plaintiff. When he took the stand, Mr Murimi Counsel for the defendant objected to him testifying on 2 grounds:

- i. That the plaintiff in his testimony had admitted having signed all the documents instituting the suit in Mr Ngure's office.
- ii. That the plaintiff's witnesses statements and list of documents were drawn and filed by the firm of Rubua Ngure, Wangari & Company Advocates. There would be a conflict of interest if Mr Ngure was allowed to testify as a witness for the plaintiff having drawn the aforementioned documents for the plaintiff and also the sale agreement for both parties.

6. Mr Murimi urged the court to expunge the documents filed by Mr Ngure from the court record or in the alternative reject Mr Ngure as a witness.

7. under Order 9 Rule 5 of the Civil Procedure Rules 2010, a party is at liberty to change his

advocate and when he so decides, an appropriate notice of change of Advocates must be filed. An advocate who is not duly appointed to act for a party cannot be allowed to purport to file documents on behalf of a party. **Documents filed by an Advocate who is not duly appointed is an affront to the court process and is a nullity.** The court can strike it out *ex debito justitiae*.

8. When an advocate who is on record on a matter realizes that there are strange documents in the file, filed by an Advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out of the record. In this case M.G Ntabo & Company Advocates are properly on record having filed the plaint. The firm of Rubua Ngure, Wangari & Co Advocates are not and the documents they filed are a nullity. Ms. Wanjiku ought to have applied to be allowed to withdraw the list of witnesses, their witness statements and the list of documents filed by the firm of Rubua Ngure, Wangari & Co Advocates and sought leave to file other documents.

9. Such documents can be withdrawn even when a matter has been set down for hearing with leave of the court even if the other party refuses to consent to the withdrawal. That may be discerned from the provisions of **Order 25 Rule (2) (2) of the Civil Procedure Rules 2010** which applies to discontinuation of a suit or withdrawal of any part of a claim even after it has been set down for hearing upon such terms as to costs. The court may also on its own motion under Section 3A of the Civil Procedure Act make such orders that will ensure that the ends of justice have been met.

10. It is clear that the documents filed by the firm of Rubua Ngure, Wangari & Co Advocates are improperly before court as they were filed by a stranger and I proceed to strike them out.

11. However in the interest of justice, I invoke Article 159 (d) of the Constitution of Kenya and sections **1A, 1B and 3A of the Civil Procedure Act** and direct that the plaintiff files a fresh list of witness statements and a list of Documents within 14 days. Corresponding leave is granted to the Defendant to file a supplementary list of Documents and further witness statements if they so wish.

12. There being no list of witness statements on record filed by the plaintiff I do not wish to speculate on who will be in the fresh list of witnesses. I will hold in abeyance the matter of Mr. Ngure being a witness until the plaintiff complies with the order of the court.

13. Due to the inconvenience caused to the defendant I will award him costs of 10,000/= to be paid before the mention date.

14. Mention on 7<sup>th</sup> May 2014.

**Dated, Signed and delivered in open court this 8<sup>th</sup> day of April 2014.**

**L N WAITHAKA**

**JUDGE**