REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 795 OF 2005

OTIENO OKEYO

T/A OKEYO & COMPANY ADVOCATES..... APPELLANT

VERSUS

PETER MAINA MUGAMBI. .....RESPONDENT

(From the Ruling and Orders of Miss Wamae, S.P Magistrate in Milimani CMCC No. 4793 of 2004)

J U D G M E N T

The Respondent herein, by a plaint dated the 25th April, 2004, and filed against the Appellant herein, claimed against the Appellant a refund of Ksh.500,000/-, General Damages and Costs and interest.

The Respondent had pleaded that there was a sale of land agreement between the Respondent (Plaintiff) and the Defendant/Appellant, Leschester Square Investment Limited, concerning a property known as L.R. No. 209/13959 in Nairobi City. The sale agreement was apparently drawn by the Defendant through his firm Otieno Okeyo & Company Advocates. The Seller was Leschester Square Investment Limited and Purchaser was Peter Maina Mugambi the Respondent herein. The seller Lawyer, who are the Appellants herein, received the 10% Deposit amounting to Ksh.500,000/- in his capacity as a stake-holder, pending completion of the sale.

It is further pleaded that when the Purchaser failed to forward the relevant Transfer of the property within the 90 days prescribed period and could not comply with the purchaser's completion Notice of 21 days, the purchaser rescinded the contract and demanded back the said deposit of the Ksh.500,000/-. Upon the Seller's failure to refund the money, the Purchaser proceed to file this suit against the Advocate of the Seller.

The Appellant had filed a defence. He pleaded that his full name was Fredrick Otieno Okeyo and he traded as Otieno Okeyo & Company Advocates. He stated that his firm indeed received the Ksh.500,000/- for and on behalf of the Seller, Leschester Square Investment Limited and not for his own benefit. He further pleaded that the Plaintiff had no cause of action against him in relation to the sum claimed since he was not a party in the sale contract. The Defendant finally pleaded that the claim against him as a person, or in his and his legal firm's capacity as an advocate, was extremely bad in law and an abuse of court process which only deserved dismissal.

By an application by the Plaintiff/Respondent dated 21st February, 2004, the Respondent herein sought a summary judgment for the Ksh.500,000/- aforestated on the ground that his defence showed no reasonable defence and should be struck out. The Respondent had also argued that since the Appellant

had received the money as a stakeholder and the transaction for which he had done so had failed, he was under legal obligation to the Plaintiff to return the money to him.

The Appellant had on the other hand argued that his firm had received the money on behalf of the Seller, to hold it until the transaction would be completed and had issued a receipt to that end. That the sale agreement was drawn by his firm between the Seller and Purchaser who were the parties in the said contract, while the Defendant/Appellant who acted for the Seller, was the stake-holder of the 10% deposit of Ksh.500,000/-. The Appellant/Defendant accordingly, also stated that neither him nor his legal firm were parties in the contract and could not be sued directly.

The Appellant also had sworn that he held the money on behalf of and to the orders of the Seller. The Appellant annexed the Sale Agreement. He accordingly argued that all the above facts can only come out during the hearing of the suit. That they show that there exist reasonable issues which can only be resolved in a trial of the suit and which cannot properly be shut out by a court in a summary proceedings.

In a brief Ruling dated 13th September, 2005 the lower court struck out the Appellants defence and entered summary judgment, provoking this appeal.

The main issue before this court is whether there were issues before the trial court which should have made the court to act differently to allow the suit to go to a trial instead of striking the defence out.

I have carefully perused the lower court record, the Agreement of Sale between the Seller and the Purchaser of the Property L.R. No. 209/13959. I have also examined the plaint and the defence in this case.

It is not denied that the Appellant's firm who drew the sale agreement between the plaintiff who was the purchaser and the Seller who is not a party in this suit, received the disputed sum of Ksh.500,000/- as the Sellers Advocate and as a stake-holder in the transaction. The purchaser was being represented by the firm of Njoroge Nyagah & Company who also were the persons who paid the funds to Otieno Okeyo & Company Advocates and received a receipt to that end. It can, therefore, be said that the Plaintiff did not directly pay the money to the Defendant and there may be no privity between the two, an issue which should only be resolved during the trial. The same point raises another issue; whether the plaintiff could in law directly sue the Defendant for refund of money not directly paid to the Defendant by the Plaintiff. Again, that would be an issue for the trial.

The court notices also that in the Defence finally struck out, the Defendant raised the issue as to whether the terms and conditions of the Agreement of Sale in relation to the Law Society Conditions of Sale, were considered by the trial court. I have examined the same. The Act and Regulations provide on what should be done and by which party, if a sale of property failed after a 10% deposit has been received. That again would only be guided and be resolved during a trial. The Law Society conditions are imposed to protect both the Advocates representing the parties contracting a well as the Advocates themselves.

Also, there was no tested evidence upon which the trial court could be convinced, as the Ruling puts it, that the Defendant had received the Ksh.500,000/- as a stakeholder in a Sale Agreement that did not materialize, unless these documents were placed before him and properly tested in cross-examination.

Furthermore, that the trial court had to look at the affidavit sworn in the application to appreciate what the state of facts was between the parties, indicates the necessity that existed requiring the parties to adduce evidence before the court could properly make reasonable conclusions.

The Supreme Court Practice Rules give guidance to situations where summary procedure, as the one adopted by the trial court in this case, is applicable.

"The Summary Procedure under this Rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable'****. It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff***

really has a cause of action. If there is a point of law which requires serious discussion, an objection should be taken on pleadings and the point set down for argument..."

It is clear, therefore, that a court should only apply the summary procedure to deny a party the right to be heard only in plain and obvious cases. The trial court should therefore have exercised this power with extreme care and caution. It is said that the power is a very strong power and if not carefully and properly exercised, it might conceivably make a court take away a cause of action or defence that may actually exist and in that way drive a party from the judgment seat.

In my view, the court in this case, although very briefly, embarked upon a trial of the suit in the process of exercising its summary jurisdiction powers. It ended up dealing with the merits of the case which is a function only applicable and available at the trial. The court thus denied the parties the rights of discovery and cross-examination of oral evidence, and thereby denied itself as a court of justice, the right to sustain a suit. It instead proceeded to terminate it by summary application of striking out the defence. The defence itself was not hopeless or so seriously weak as to be worthless.

The result is that this appeal has merit. The trial magistrate erred in striking out the Appellant defence. He should have allowed the suit to go to a trial. I allow the appeal. I set aside the orders of the trial court of striking out the defence, which defence is accordingly reinstated.

The suit shall be fixed for full trial before a different magistrate with jurisdiction subject to the right of amendment, if any. Costs shall be in the cause. Orders accordingly.

Dated and delivered at Nairobi this 4th day of April, 2014.

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D A ONYANCHA

JUDGE