



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 11 OF 2013

PETER ZAKAYO KARIUKI PLAINTIFF

-VERSUS-

WILSON GITONGA MBAU DEFENDANTS

RULING

Introduction

[1] Peter Zakayo Kariuki the applicant herein filed an application in court asking the court to give an interpretation of the decree by consent dated 20th February, 2013 in relation to the contract dated 18th September, 2009 made between the parties in this suit and in relation to the court proceedings herein, among other prayers in his notice of motion dated 27th August, 2013. He supported his motion by an affidavit sworn on 27th August, 2013 supporting the application.

[2] The respondent in his replying affidavit sworn on 20th September, 2014 averred that the sharing of the suit property should be as per contribution. That this is what the consent signed by the parties on 20th February, 2013 was all about. That this is Kshs. 3.2 million for the applicant and Kshs. 5 million for the respondent. That the parties should not go back to the agreement of 11th September, 2009.

Background

[3] The applicant entered into an agreement with the respondent vide an agreement dated 12th June, 2009. In that agreement the respondent had been offered by Teleposta Pension Scheme Trustees registered all that piece of land situate at Kizingo Mombasa, known as Title No. Mombasa/1/Block XXVI/109 comprising of 0.04485 acres at a selling price of Kshs. 8.2. million shillings.

On 18th September 2009, the respondent who did not have the Kshs. 8.2. million entered into an agreement with the applicant to purchase the said property jointly whereby it was agreed that the applicant shall contribute Kshs. 3.2 million while the respondent shall contribute 5 million. It was a term of the said agreement that the LR No. Mombasa/1/Block XXVI/109 shall be registered in joint names of the said parties and that the applicant shall be at liberty to construct a residential house on the said land which shall occupy not more than half of the suit premises.

[4] The parties paid money in those proportions and the title documents were granted to the respondent for registration into their joint names. The mode of subdivision brought the dispute giving rise to this suit. After this application was filed the parties entered into a consent dated 20th February, 2013 in court.

The issue

The issue for determination is whether the parties should go back to the original agreement for purchase between themselves as agreed or whether they should now be bound by the consent between them of 20th February, 2013 aforesaid. Further that if they do so, what would be the meaning of sharing the property under their respective contribution of Kshs 3.2 million and Kshs 5 million.

Analysis

What is the effect of the consent of 20th February, 2013?

[5] The parties had earlier entered into an agreement dated 18th September, 2009. The original agreement stated as follows in paragraph 2 (e);

"Mbau has agreed to nominate "Kariuki" as a co-purchaser in accordance with the "Sale Agreement" clause 6:3:1.

- 1. That "Mbau shall contribute the sum of Kenya Shillings Five Million Only (Kshs. 5,000,000/-) and "Kariuki" the sum of Kenya Shillings Three million Two Hundred Thousand Only (Kshs. 3,200,000/-) towards the purchase price of the "subject land" hereof.*
- 2. That the said "property" shall be registered in the joint names of both "Mbau" and "Kariuki".*
- 3. That "Mbau" shall retain the "Building" standing thereon which shall belong absolutely to him.*
- 4. That "Kariuki" shall be at liberty to construct a residential House on the said land which shall occupy not more than half the acreage of the "subject land."*

The salient facts herein is that the contributions were to be Kshs 5 million and Kshs 3.2 million for the parties. The property shall be joint ownership. The building on the plot shall belong to the respondent absolutely. The applicant shall build his house at his expense on the undeveloped part of the plot and his house to cover not more than half the acreage of the land.

The agreement was clear that the applicant was to build on half of the land and not more than half of the same. However, on 20th February, 2013 the parties entered into another consent in Court. This consent stated

- 1. Suit land MSA/I/BLOCK XXVI/1109 be subdivided according to each parties share contribution contained in the agreement between the parties dated 18th September, 2009.*
- 2. That the Plot be registered within 120 days in the name of the Defendant and subsequently be sub-divided to create two titles in favour of the plaintiff and the other in favour of the defendant according to shares.*
- 3. The parties shall both share the costs of registration and stamp duty.*
- 4. Parties to agree on a joint surveyor to carry out the survey and share equally those costs within 25 days of this date if they do not agree the county surveyor be mandated to carry out the survey to create the sub-division at parties costs.*
- 5. The defendant to bear the cost of ground rent and rates.*

6. *Each party shall bear their own costs for this suit.*

7. *The injunction on record shall be lifted particularly for facilitating subdivision and registration as per term herein.*

[6] This agreement was signed by the parties through their respective lawyers. The court was told that both parties were in court and were aware of the consent. The consent effectively overtook the earlier agreement by the parties dated 18th September, 2009. A consent order by the parties cannot be set aside and/or changed by the court unless there is fraud, mistake or misrepresentation.¹ None of these requirements has been proved to me or alluded to in this case. The consent of 20th February, 2013 now binds the parties. It takes over from the earlier agreement.

The salient part as to subdivision is the clause that says the plot shall be subdivided according to each parties contribution. For the plot to be subdivided as per contribution one must bear in mind the entire cost of the plot. The same was 8.2 million shillings. This was the value of the plot and all developments therein. The value of the house in the premises was part of the 8.2 million shillings. This amount was shared by the applicant and respondent in 3.2 million and 5 million shillings respectively. This is indeed why the applicant and the respondent had agreed that the respondent retains the house and half of the plot, even when he had paid Kshs. 5 million because the houses' value was part of the 8.2 million shillings. The applicant was to have not more than $\frac{1}{2}$ of the acreage of the suit land and was to build his house therein at his own cost. Letting the respondent retain the house on the premises and then dividing the rest of the undeveloped land as per contribution would be inequitable to the applicant since the plot and the developments therein (namely the house) were all bought for Kshs. 8.2 million by the parties.

[7] The court therefore makes the following orders

The orders

1. That LR Mombasa/Block XXVI/1109 comprising of 0.0485 and the building standing thereon was purchased by the applicant and the respondent for Kshs 8.2 million the applicant paying Kshs 3.2 million and the respondent Kshs 5 million.
2. That the intention of the parties was that each party shall have a share of L.R. Mombasa/Block XXVI/1109 as per their respective contribution.
3. That it was intended by the parties from their various agreements that the respondent should keep the house standing on the premises being part of his contribution of Kshs 5 million.
4. That the parties intended that the applicant shall take $\frac{1}{2}$ of the acreage of the suit land and not more to build his house at his cost and this would represent his contribution of Kshs 3.2 million shillings.
5. The consent of 20th February, 2013 shall guide the parties on the way forward as to eventual subdivision and subsequent registration.
6. Each party shall bear their own costs.

Dated and delivered in open court at Mombasa this 27th day of

June, 2014.

S. MUKUNYA

JUDGE

27.6.2014

In the presence of:

Chebka Advocate for Defendant

Mogaka Advocate for the plaintiff.

1 See Frola Wasike vs Dstinio Wambko 1982-1988 IKelr 625.