



No.34/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO. 195 OF 2011

WILSON MOPIA LENGISITO (suing in his capacity As administrator of the
estate of the late **LENGISITO NAKASIANKA**.....**1ST PLAINTIFF**
OLE SANGITI NAKASIANKA.....**2ND PLAINTIFF**

VERSUS

FRANCESCA BOEN.....**1ST DEFENDANT**
DAVID NYONGIO (sued on their own behalf and on
Behalf of all members of **KITWEK SELF HELP GROUP**.....**2ND DEFENDANT**
THOMAS A. K. BUTTO T/A T.K. RUTO & CO.....**3RD DEFENDANT**

R U L I N G

1. The suit herein was initiated by way of a Plaint dated 2.8.2011 and filed on 2.11.2011 praying for:
 - a. A declaration that the agreement for sale of part of Title No.Kajiado/Kaputiei-North/594 dated 2nd March, 2008 herein lapsed and/or became void for failure to procure Land Control Board consent as by law required or at all.
 - b. A mandatory order to issue directed to the 3rd Defendant to forthwith surrender **Title No. Kajiado/Kaputiei-North/594** to the Plaintiffs.
 - c. The 1st and 2nd Defendants do accept a refund of KShs.2,200,000/- paid to the deceased as part payment of the purchase price though in default, failure to which Plaintiffs be at liberty to deposit the same in court within such reasonable period as the court may direct.
 - d. Further and in the alternative but without prejudice to prayer (b) hereof, the Honourable Court do direct that the Kajiado Land Registrar and/or Ngong to dispense with production of title deed for

Title No. Kajiado/Kaputiei-North/594 as a prerequisite for issuance of a new title deed on confirmation of the grant in the Succession Number 2121 of 2010 on registration of the transmission as for the said title thereof.

e. Costs of the suit.

2. The 1st and 2nd Defendants filed defence and counterclaim in which they seek the following reliefs:

a. The Plaintiffs suit against the Defendants be dismissed with costs.

b. An Order of Permanent injunction to be issued to restrain the Plaintiffs by themselves, their agents or servants from transferring or in any manner dealing or interfering with land known as **Title No. Kajiado/Kaputiei-North/28402**.

c. A declaration that the Defendants are lawful purchasers of the land known as **Title No. Kajiado/Kaputiei-North/28402**.

d. An Order directing the Plaintiffs to execute the Transfer, Land Control Board Application Forms and any documents and application as may be requested to facilitate the registration of **Title No. Kajiado/Kaputiei-North/28402** in the name of the Defendants and or their nominees

e. That in default of performance of prayers (d) above the alternative the court directs and or authorize the register of High Court to execute the Transfer and any other necessary documents as may be required to facilitate the registration of **Title No. Kajiado/Kaputiei-North/28402**.

f. Costs of the counterclaim and interest therein.

g. That further and in the alternative to the above prayers the Defendants claim damages pleaded as followings:-

(i) KShs.2,45,000 together with interest at the rate of 16% per annum from 2nd May, 2008 until full payment.

(ii) KShs.31,000,000/- as pleaded in paragraph 8 hereinabove.

3. The 3rd Defendant filed defence in which he pleaded that he has no interest in the suit property or title deed other than claim for legal fees and that he is ready, and willing to deliver the title to the rightful Claimant. He also pleads that he is not a proper party and is totally non-suited and ... that he would raise a P.O. to have his name struck out as a Defendant with costs.

4. It is in light of the foregoing that on 7.3.2012 he filed an application under Order 1 Rule 10(2) Civil Procedure Rules, 10(2) Civil Procedure Rules and Section 1A and 1B cap 21 seeking orders that he be struck out of pleadings as a 3rd Defendant.

5. The Applicant on his Notice of Motion dated 5.3.2012 relied on the following grounds:-

i. That the Plaintiff does not disclose any reasonable cause of action against the 3rd Defendant.

ii. That the Plaintiff does not raise any claim nor seek any relief against the 3rd Defendant.

iii. That the role of the 3rd Defendant is defined by the Advocates Act Cap 16 Laws of Kenya.

iv. That there was a valid contract between the deceased Plaintiff (Lengisito Ole Sangiti) and the 1st and 2nd Defendant which the Applicant duly attested for both and only holding the title as a lien

and to safeguard interests of the parties herein hence there is misjoinder as a co-defendant.

v. That the Plait is frivolous, vexatious, scandalous, bad in law, incurable defective and is otherwise an about of the court process as against the 3rd Defendant.

vi. That this application is brought in good faith and in the interests of justice.

vii. That it would be a waste of this honourable court's time to let the Plait proceed for full trial against the 3rd Defendant herein when no claim is as against him.

viii. That the striking out of the 3rd Defendant from the pleadings herein shall not jeopardize the interests of the Plaintiffs nor the interests of the 1st and the 2nd Defendants and shall accord the parties a quick trial.

6. The same is supported by the affidavit he swore on 2.3.2012 and a further affidavit he swore on 22.10.2012. The 1st and 2nd Plaintiffs oppose the same application and they authorized 1st Respondent Wilson Mopia Lengisito to swear an affidavit on 14/9/2012 in reply. The 1st and 2nd Defendants have not filed any rely to the same application and thus they are taken not to oppose it.

7. The Applicant's case is that he acted for the vendor of land subject of this suit and the 1st and 2nd Defendants for the sale of the Kajiado/Kaputiei-North/594. Prior to completion of the sale transaction, the vendor passed on and his administrators filed the suit herein seeking to avoid the agreement on account of lack of Land Control Board consent to sell the subject land. The Applicant an advocate of the High Court of Kenya was sued on allegation of refusal to release title deed to the Plaintiffs.

8. The Applicant avers that he acted for both parties and the title came to his possession as a stakeholder. He claims to have lien over it for his legal fees as against the Plaintiffs thus his continuous hold to the same. The Applicant submits that in words of Mwela J in authority of Nai.HCC.1403/1997 (unreported) only parties to the issues in controversy as the proper parties to be enjoined to a suit. The case above held that

“if the prayers sought are not against a party in the suit, the said party ought not to be enjoined into a suit”.

9. He also relies on authority of NAI.HCC 72/2010 where MUCHELULE JUDGE held that:

“The 3rd Defendant acted for both parties, no allegation exist that he received and unlawfully kept any money..... The Defendant advocate's duty was to draw documents for signature, if either party fails to execute the agreement it was not the advocate's responsibility to do so”.

The court went ahead to strike out the 3rd Defendant from the suit. The Applicant seeks the court to do the same herein. The Plaintiff's/Respondent's case is that, the 3rd Defendant/Applicant acted for seller and buyer of land subject herein. They state that the agreement subject of this suit was drawn by the Applicant for the benefit of himself and the other 2 defendants and that is why he is even withholding the title deed.

10. They state that the Applicant was negligent in the way he handled the sale transaction and thus they seek the mandatory order to force the Applicant to release the title deed. They claim that there is no legal fee which is unpaid to him.

11. After going through affidavits, pleadings and the 3rd Defendant's submissions, I find the following issues arising for determination.

a. Whether the 3rd Defendant is properly enjoined herein?

b. Whether there is any reasonable claim against 3rd Defendant arising from the sale transaction?

c. Whether 3rd Defendant should be struck out from the suit?

d. What is the order as to costs

12. Order 1 Rule 10 (2) Civil Procedure Rules is to the effect that

“the court may at any stage of any proceedings order any name of party improperly joined as Defendant be struck out.”

The Plaintiff claim is founded on the terms of sale agreement in which the 3rd Defendant handled in course of his professional duties whereas he is accused of professional negligence on how he handled the transaction, the only claim against him is to surrender the title deed vide paragraph (b) of the prayers in the plaint dated 2.8.2011.

13. The core of the plaintiffs claim is the alleged collapse of the agreement due to want of Land Control Board consent and thus they seek to refund the 1st and 2nd Defendants purchase price. The 3rd Defendant has averred that his interest is only the unpaid legal fees for transaction and thus holds title deed as a lien. He further avers that he is ready, able and willing to hand over the title to the victorious party in the dispute in the instant suit.

14. In the instant case and circumstances, is the 3rd Defendant therefore properly enjoined as party? In NAI HCC.1403/1997 George G. Mbutia Vs. Small Enterprises Finance Co. Ltd. & others. Mwera J held that ***“only parties to the issues in controversy are the proper parties to be enjoined to a suit”***.

15. The issues in controversy are principally that whether the sale agreement is null and void for want of consent of Land Control Board? Whether the 1st and 2nd Defendants should be refunded Deposit of purchase price? Whether specific performance can be ordered? Whether the 1st and 2nd Defendants can be paid any other amount or and above paid amount. In the event the specific performance order is not available?

16. It is clearly discernible therefore that the above issues have nothing to do with the 3rd Defendant who has no claim over the subject matter or proceeds thereof. The court thus finds that the issues of lien of title and the unpaid fees can be handled by way of Advocate client bill without being drugged in the suit herein. The claim for surrender of title against the 3rd Defendant is therefore unreasonable in the circumstances of the case.

17. The court therefore makes the following orders:

1. Application dated 5.3.2012 is allowed with costs.

2. The Applicant also to get costs in the suit.

Signed and Delivered this 28th day of **November**, 2014.

CHARLES KARIUKI

JUDGE