



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 741 of 2011

KENNETH KIRIKA WATENE.....PLAINTIFF

VERSUS

PETER KIMANI KAIRU

t/a K. N. ASSOCIATES.....1ST DEFENDANT

THE REGISTERED TRUSTEES OF SOCIAL

MINISTRY RESEACH NETWORK CENTRE.....2ND DEFENDANT

MBAGE NJUGUNA NG'ANG'A t/a

WARUHIU K'OWADE & NG'ANG'A ADVOCATES.....3RD DEFENDANT

REGISTRAR OF TITLES.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

RULING

There are two applications before this court for determination. The first is a Notice of Motion dated 6th March 2012 brought by the 3rd Defendant under Order 2 Rule 15(1)(a) of the Civil Procedure Rules seeking substantive orders that the Amended Plaint and suit be struck out as against the 3rd Defendant, and that the costs of the application and suit be provided for.

The second application is a Notice of Motion dated 21st December 2011, brought by Plaintiff under Order 40 Rule 1 of the Civil Procedure Code and section 3A of the Civil Procedure Act where the Plaintiff is seeking the following orders:-

1. That an order of injunction do issue restraining the 2nd Defendant, her agents, servants and all and any persons acting/claiming through or in the name of the 2nd Defendant from proceedings to carry on any construction, additions or alterations to the suit properties those being Land Reference Nos. 5955/22 situated in Karen, Nairobi pending hearing of this suit.
2. That the Officer Commanding Police Station Hardy Police Station do assist in the implementation of the orders herein as against the 2nd Defendant.

Both applications were heard on 10th December 2012, and the parties relied wholly on the pleadings and submissions filed. The applications will be considered separately as follows:

The 3rd Defendant's Notice of Motion dated 6th March 2012

The application is premised on the ground that the Amended Plaintiff does not disclose a reasonable cause of action against the 3rd Defendant as he has been sued in place of a known and disclosed principal.

The 3rd Defendant's counsel filed submissions on the application dated 8th August 2012 wherein it was averred that when a court is considering to strike out a pleading on the ground of non-disclosure of a cause of action or defence, the court is enjoined to look at the pleading only as no evidence is admissible to support an application Order 2 rule 15(1)(a) of the Civil Procedure Rules. Counsel for the 3rd Defendant relied on **Halsbury's Laws of England, 4th Edition, Volume 36 at paragraph 73** in this regard.

It was further submitted that in the transaction the subject matter of this suit, the 3rd Defendant was retained by Intra Africa Assurance Company Ltd to act on its behalf and therefore, that the Plaintiff cannot purport to sue the 3rd Defendant when he knew on whose behalf he was acting. Counsel submitted that the general rule is that the principal is responsible for all acts of his agents within the authority of the agent, whether the responsibility is contractual or tortious, and that an agent will only be liable if his actions falls within the exceptions of the general rule as captured by Wright J. in the case of **Montgomerie & Others -vs- United Kingdom Mutual Steamship Association Ltd, (1891) 1 QB 370.** Reliance was also placed in the case of **National Security Social Fund Board of Trustees -vs- Ankhan Holdings Ltd & 2 Others, Milimani HCCC No. 268 of 2004,** where the court cited with approval the authority the decision in **Anthony Francis Wareheim t/a Wareheim & 2 Others -vs- Kenya Post Office Savings Bank, Nairobi CA No. 5748 of 2002** that the respondent's claim against the second and third appellants should have been dismissed for they were impleaded as agents of a known principal, contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.

Counsel for the 3rd Defendant further submitted that under Order 52 Rule 7(1)(b) of the Civil Procedure Rules, an undertaking can only be enforced once the court has been approached by way of Originating Summons, and not by way of plaint as in the instant suit. He further argued that professional undertakings are only enforceable by a party to whom it is given. Therefore, that since the Plaintiff was not privy to the undertaking, he has no claim against the 3rd Defendant.

Lastly, the 3rd Defendant's counsel submitted that the transaction upon which the Plaintiff purports to found a cause of action was an undertaking given to the 1st Defendant that the 3rd Defendant would not release the amount Kshs 4,600,000/= until registration of the transfer had been done. It is the 3rd Defendant's submission that the amount was not released until after registration had been effected.

The application is opposed by the Plaintiff, who filed grounds of opposition dated 21st March 2012 and written submissions dated 31st August 2012. In summary, the Plaintiff states that the 3rd Defendant's application is incurably defective, has no merit, is brought in bad faith and is an abuse of the court process. The Plaintiff contends that an advocate is in law personally liable for professional undertakings that he gives, and such professional undertakings once given and breached by an advocate cannot, as implied in the 3rd Defendant's application, be enforced against the advocate's client. The Plaintiff maintains that there are pertinent and triable issues of law and fact that arise from the pleadings already exchanged between the Plaintiff and the 3rd Defendant, and states that he ought to be accorded an opportunity to prove his case against the 3rd Defendant at trial.

The Plaintiff's counsel in the submissions filed contended that Order 2 Rule 15(1)(a) ought to be read together with sub rule 2 which states that no evidence shall be admissible on an application under sub rule

1. Counsel for the Plaintiff submitted the application's only ground that the amended plaint discloses no reasonable cause of action as against the 3rd Defendant is not fully adequate to fully inform the court of the issues at hand, and that the application is therefore incurably defective and liable for dismissal.

It was also submitted on behalf of the Plaintiff that the amended plaint discloses a reasonable cause of action against the 3rd Defendant and that paragraphs 9, 10 and 10A of the plaint state the particulars of fraud and breach of undertaking by the 3rd Defendant. Further, that triable issues are discernible in paragraph 3 of the grounds of opposition dated 21.03.12. Counsel relied on the case of **DT Dobie & Co - vs- Muchina (1982)KLR 1** and **Swapan Sadhan Bose -vs- Nyali Beach Hotel & 3 others(2011)eKLR** where it was held that the power to strike out should be exercised sparingly and cautiously.

Finally, it was submitted for the Plaintiff that the 3rd Defendant has not been sued as an agent to any principal as alleged in the application, but as person who gave the undertaking. Counsel relied on **Halsbury's Laws of England, vol 44(1) para 354** for the proposition that a solicitor cannot defend himself on the ground that his undertaking is not enforceable as contract against him.

I have considered the pleadings and submissions made with regard to the 3rd Defendant's Notice of Motion dated 6th March 2012. The issue to be decided is whether the Amended Plaint and suit herein should be struck out as against the 3rd Defendant in the circumstances presented in the said application. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15 (1) and (2) provide that:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1 as follows at page 9:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

An examination of the Amended Plaint dated 21st December 2011 as amended on 7th February 2012 shows that the 3rd Defendant is being sued with respect to alleged breach of professional undertakings he gave to the 1st Defendant. The 3rd Defendant was the Advocate for the mortgagee of the Plaintiff's property known as Land Reference Number 5955/8, which property was sub-divided and the sub-

divisions namely L.R. Nos. 5955/21 and 5955/22 sold to the 2nd Defendant. The 1st Defendant was the 2nd Defendant's Advocate in the sale transaction of the said sub-divisions. The Plaintiff has given particulars of the said professional undertaking and breach by the 3rd Defendant, which he claims resulted in a loss of the balance of the purchase price. He has also sought an alternative prayer for orders against the 3rd Defendant for payment of Kshs 4,600,000/= and interest thereon being the said loss of the balance of the purchase price.

It is my finding that it is not evident from the Amended Plaint that the 3rd Defendant was acting as an agent and within his authority as claimed, without the court having the benefit of perusing the agreements that were entered into by the parties in the disputed sale transaction. In addition, there are triable issues raised, particularly as to the effect of the professional undertaking given by the 3rd Defendant to the 1st Defendant, and whether the 3rd Defendant can be sued on this professional undertaking. These issues can only be determined once the court has the benefit of further evidence and arguments canvassed at full trial. It is therefore my finding that this is not a clear case for striking out of the pleadings, and the 3rd Defendant application dated 6th March 2012 fails.

The 3rd Defendant shall meet the costs of the application.

The Plaintiff's Notice of Motion dated 21st December 2011

The Plaintiff's Notice of Motion is supported by an affidavit he swore on 21st December 2011 and a further affidavit sworn on 17th February 2012. The Plaintiff's case is that on 8th February 2006 he and the 2nd Defendant entered into an agreement for the sale of L.R. Nos. 5955/21 and 5955/22 (the "suit properties"). Further, that the 2nd Defendant was to have possession after payment of the full purchase price.

It is the Plaintiff's claim that the 2nd Defendant has not paid the full purchase price and that despite a balance of Kshs.4,600,000/= remaining, the 2nd Defendant has fraudulently registered herself as the proprietor of the suit properties, has taken possession and has now begun construction. The Plaintiff contends that the 2nd Defendant has failed to pay up the balance of the purchase price despite a completion notice being issued to her, and that as a result the sale agreement between the parties stands rescinded. The Plaintiff states that unless the orders sought are granted, he stands to suffer irreparable loss as the 2nd Defendant will continue to trespass upon his property and complete the construction whilst the purchase price is unpaid and the contract stands rescinded.

The Plaintiff maintains that the balance of the purchase price which was Kshs.4,950,000/= was paid to the 1st Defendant to hold under a professional undertaking to not release the funds until all the necessary steps had been taken for the registration of the conveyance. Further, that since it is the 2nd Defendant who authorized the 1st Defendant to release the funds to a third party not privy to the sale agreement, she cannot be heard to say she paid the Plaintiff.

While admitting the existence of a meeting held on the 6th August 2007, the Plaintiff insisted that the issue of release of part of the sale proceeds to the 3rd Defendant's client – Intra Africa Assurance Ltd, was a proposal which the Plaintiff rejected. The Plaintiff stated that further negotiations and proposals were made between him and Intra Africa Assurance Co. Ltd with the knowledge of the 2nd Defendant, who still went ahead to authorize the 1st Defendant to pay part of the sale proceeds that were lawfully due to the Plaintiff to a third party not privy to our sale agreement. The Plaintiff also denied withholding the fact of the encumbrance from the 2nd Defendant.

According to the Plaintiff, the resulting Partial Re-conveyance drawn in favour of the 2nd Defendant was an illegal document for among other reasons having been drawn by an advocate who no longer had instructions to act for the Plaintiff and further, that the unilateral execution of the document whose effect

was to mortgage the remainder of the Plaintiff's property offended the provisions of section 3 of the Law of Contract Act. The Plaintiff maintains that the 2nd Defendant cannot be distanced from the fraud since instead of issuing a completion notice to rescind the agreement pursuant to Condition 4 of the Law Society Conditions of Sale 1989 Edition to which the Sale Agreement was subject to, the 2nd Defendant circumvented the Plaintiff's interests, and with the help of the 1st and 3rd Defendants took it upon himself to pay off a disputed debt to a 3rd party without the Plaintiff's authority.

The Plaintiff's written submissions are dated 20th February 2012 and were filed in court on the same date. It is submitted for the Plaintiff that a *prima facie* case with a high probability of success has been demonstrated. The Plaintiff submits that the 2nd Defendant's continued occupation and construction on the suit properties is a position favorable to the 2nd Defendant which was acquired through an illegality and the 2nd Defendant ought not continue benefitting from the same.

The application is opposed by the 2nd Defendant in a replying affidavit sworn on 3rd February 2012 by Ernest Murimi, one of its Trustees, and in written submissions dated 25th May 2012. The 2nd Defendant's admits to the sale agreement entered into with the Plaintiff on 8th February 2006, for the purchase of the suit properties at a purchase price of Kshs.11,000,000.00. The 2nd Defendant states that the entire purchase price for L.R No. 5595/21 in the sum of Kshs.5,500,000/= was settled on 26th July 2006 in exchange for the completion documents of the said parcel of land, and an entitlement by the 2nd Defendant to take possession of L.R. No. 5955/21.

It is the 2nd Defendant contention that on 15th September 2006, she paid to the Plaintiff a further Kshs.550, 000/= being 10% deposit for the 2nd parcel of land namely L.R Number 5592/22, and that the balance in the sum of Kshs.4, 950,000/= was paid to the Plaintiff on 14th December 2006 through his then advocates, Kimani Kairu & Co. Advocates. Further, that in a letter dated 10th May 2011 annexed to its Replying affidavit as "EM 3", Kimani Kairu & Co. Advocates acknowledged that the 2nd Defendant paid the entire purchase price in the sum of Kshs.11 million, a fact admitted by the Plaintiff at paragraph 3 of his supporting affidavit to the application.

According to the 2nd Defendant, the respective conveyances were duly executed by the Plaintiff. and that it is only after the Plaintiff's then advocates had received the entire purchase price for the respective parcels that the completion documents were released to the 2nd Defendant who took possession of the suit properties. The 2nd Defendant maintains that the Plaintiff's claim cannot be sustained for reasons that the Plaintiff executed the respective conveyances transferring the suit properties to the 2nd Defendant and acknowledged receipt of the entire purchase price as consideration thereof.

It is the 2nd Defendant's case that on obtaining completion documents, she took possession of the suit property in 2007 and went ahead to lodge the conveyances at the land registry for registration in her favour, where she discovered that the suit properties were encumbered by a charge issued by the Plaintiff and registered against the titles in 1988 in favour of Middle Africa Finance Company Limited to secure a sum of Kshs.1,000,000/=. The 2nd Defendant states that the information on the encumbrance was not within her knowledge at the time of entering into the sale contract as the due diligence search at the lands office prior to the sale did not reveal the existence of the encumbrance. The 2nd Defendant contends that the Plaintiff is estopped from benefitting from his own willful misrepresentation to the 2nd Defendant.

The 2nd Defendant states that upon rejection of the conveyances for registration owing to the encumbrance, the 2nd Defendant sought partial re-conveyances of the suit property from the Plaintiff's then advocates to allow for registration of the conveyances. Further, that in a meeting held on 8th June 2007 in which the Plaintiff was present, it was agreed that the Plaintiff through his then advocates would pay Kshs.4,600,000/= of the sale proceeds held by the advocate to secure execution of the partial re-conveyances of the suit properties from Intra Africa Assurance Company Limited, the Mortgagee. It is the

2nd Defendant's case that on 28th July 2008, she forwarded a banker's cheque to Waruhiu K'Owade & Ng'ang'a Advocates, the advocates for the mortgagee in exchange for the partial re-conveyance.

The Counsel for the 2nd Defendant filed submissions dated 25th May 2012, and argued that that under Order 40 Rule 1, the Plaintiff has a burden of proving that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the Defendant intends to remove or dispose the same, which evidential burden has not been discharged.

It was submitted that the contract the subject matter of this suit was willfully and freely executed by the parties and the suit properties have since been registered in favour of the 2nd Defendant who has been in possession since 2007. Further, that the Plaintiff had not established a *prima facie* case to warrant the order of injunctions, and reliance was placed in the case of **Kenya Anti-Corruption Commission -vs- Bhangra Limited & Another, Mombasa CA No. 112 of 2008** where the court cited with approval the decision in **Mrao Ltd -vs- First American Bank Ltd & 2 Others (2003) KLR 125** that a *prima facie* case must show an infringement of a right the enforcement of which the appellant has a probability of succeeding.

Counsel for the 2nd Defendant submitted that since what is in dispute is whether the amount of Kshs 4,600,000/= paid to secure the partial discharge was part of the purchase price, an order for injunction should not issue as the Plaintiff can be adequately compensated in damages. In support of this submission, counsel relied on the cases of **Kenya Anti-Corruption Commission -vs- Bhangra Limited & anor, Mombasa CA No. 112 of 2008** and **Kirkdale Ltd -vs- Mount Agencies Ltd & 3 Others Nairobi CA no. 42 & 45 of 2008(consolidated)** where the court stated that irreparable harm cannot be suffered where the damages suffered can be quantified and paid in damages.

It was also submitted for the 2nd Defendant that it is unlawful to utilize the police in a civil action for the purpose of interfering with a registered proprietor on a property that has been lawfully acquired and the case of **Simon Gathuku -vs- James Njuguna,(2006)eKLR** where it was held that the police should never be involved in enforcement of injunctions as there is a specific provision for enforcement under Order XXI rule 28 of the Civil Procedure Rules.

I have read and carefully considered the pleadings and annexed evidence, and the submissions made by the parties with respect to the Plaintiff's Notice of Motion. The issue before the court is whether the Plaintiff is entitled to the injunction sought on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The first question I must ask is whether the Plaintiff has established a *prima facie* case.

The Plaintiff in his Amended Plaintiff claims loss of ownership and possession of the suit properties or alternatively loss of the balance of the purchase price of the suit properties in the sum of Kshs 4,600,000/=. He is thus seeking various declarations as to his ownership of the suit properties or in the alternative payment of the said balance of the purchase price. The Plaintiff has not brought any evidence of title to the suit properties namely LR 5595/21 and 5595/22 and relies mainly on a reconveyance in his favour of LR 5955/4 dated 30th September 1993 as evidence of his ownership and/or entitlement to the suit properties.

The 2nd Defendant has on the other hand brought evidence of executed and registered conveyances in its favour with respect to the suit properties, which are annexures "EM4" and "EM5" to its replying affidavit. The Defendant also brought evidence of the payment of the total purchase price as annexures "EM1-3", and the fact that the 2nd Defendant paid the balance of Kshs 4,600,000/= to the 3rd Defendant is not disputed. The issue as to whether the Plaintiff was aware of, or consented to this payment to the 3rd Defendant is a matter that can only be determined after further evidence has been canvassed at full trial. Likewise the issues surrounding the loan account and mortgage transactions between the Plaintiff, Intra Africa Assurance Company Ltd and the 3rd Defendant including the allegations made of fraud, can only be resolved after full trial, and not at this stage.

Lastly, the Plaintiff relied on a completion notice dated 7th November 2011 annexed as “KKW 24a” to his supporting affidavit sworn on 21st December 2011, and stated that as a result of the failure by the 2nd Defendant to remit Kshs 9,890,000/= within 21 days as demanded, the sale agreement thereby stood rescinded. I note that this completion notice was issued after the payment of the balance of the purchase price by the 2nd Defendant to the 3rd Defendant on 28th July 2008, and after the receipt of completion documents and registration of the conveyances in the 2nd Defendant’s favour on 19/8/2009. The effect of the said completion notice in the circumstances will therefore have to be canvassed by the parties at full trial.

The upshot of the foregoing is that it is my finding that the Plaintiff has not established a *prima facie* case, and in addition, having sought an alternative prayer for payment of the balance of the purchase price, that he can be adequately compensated by way of damages were he to succeed in his claim. The prayers sought in The Plaintiff’s Notice of Motion dated 21st December 2011 are therefore hereby denied.

The Plaintiff shall meet the costs of the application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____25th_____ day of _____February_____, 2013.

P. NYAMWEYA

JUDGE