



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Environmental & Land Case 25 of 2012**

**FATUMA ABDALLA AHMED.....PLAINTIFF**

**=VERSUS=**

**KAHIRO KIMANI.....DEFENDANT**

**RULING**

1. What is before me is the Application dated 4<sup>th</sup> June, 2012 and filed on 12<sup>th</sup> July, 2012. The Application is seeking for the following reliefs;

**(a) THAT the Defence filed be struck out for non-service.**

**(b) THAT the Defendant be restrained from selling the suit property pending the hearing of this suit.**

**(c) THAT the original documents be deposited in court for security.**

**(d) THAT an interlocutory judgment be entered in favour of the Plaintiff herein.**

**(e) THAT the costs of this application be borne by the Respondent.**

2. The Application is supported by the grounds enumerated therein and the Supporting Affidavit of the Plaintiff.

**The applicant's case:**

3. According to the Applicant's deposition, she has filed this suit with a view of compelling the Defendant to return to her the original documents pertaining to the suit property for his failure to adequately represent her as her advocate and for breach of the Sale Agreement by the Purchaser.

4. The Applicant has deponed that upon perusal of the Defence filed by the Defendant, she realised that the Defendant had initiated negotiations with another Purchaser and yet the Defendant did not have bona fide interest nor title in the suit property; that the Defendant acted as her advocate and the Purchaser's Advocate in the Sale Agreement where she was the vendor and that she is surprised that the Defendant has gone ahead and identified a buyer for the suit property despite not having a good title to the suit property.

5. The Applicant has finally deponed that the Defendant's defence should be struck out because the same has not been served on her since it was filed.

### **The Respondent's case**

6. The Defendant/Respondent filed his Replying Affidavit on 30<sup>th</sup> August, 2012 in which he deponed that he is an advocate of the High Court of Kenya of more than 30 years standing; that this court has the discretion under the provisions of Order 7 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules to enlarge the time within which service of the defence may be effected.

7. The Defendant/Respondent has deponed that he entered into a Sale Agreement with the Plaintiff for the sale by the Plaintiff of the suit property known as L.R. NO. 303, Lamu at a consideration of Kshs.10,000,000; that the Plaintiff signed an agreement to that effect and that the agreement provided that completion was conditional upon the Plaintiff as vendor pointing out all the beacons and boundaries of the suit property to the Defendant.

8. The Respondent further depones that the Plaintiff has not complied with the Sale Agreement in that she has not replaced the numerous missing or misplaced beacons and that there is a massive and uncontrolled encroachment by third parties on the suit property. Consequently, the Defendant has deponed that the Plaintiff is not entitled to either the balance of the purchase price or to surrender of title documents as claimed or at all.

9. The Respondent finally deponed that the Plaintiff acknowledged receipt of Kshs.2,000,000/- from him and also acknowledged that the balance of the purchase price shall only become due after the fencing and erection of the beacons in terms of the Agreement for sale.

10. The Plaintiff filed a Supplementary Affidavit on 3<sup>rd</sup> September 2012, whose main depositions are that the Respondent was an advocate in the transaction between Regina Coeli Trading Company Limited and herself. The Defendant, as her advocate did inform her that the Purchaser would undertake to fence the property and to erect beacons and that she believed the Defendant.

11. The Defendant filed a Reply to the Plaintiff's Supplementary Affidavit in which he stated that it was not true that the Plaintiff did not know that the Defendant/Respondent was the Purchaser of the suit property since the Plaintiff and her sister swore an affidavit on 10<sup>th</sup> August 2011 in which they deponed that the property was sold to the Defendant by the Plaintiff through the Defendant's nominee's company.

12. The Defendant/Respondent finally deponed that the Plaintiff is unable to give vacant possession and consequently all proceedings herein should be stayed until the Plaintiff is able to demonstrate her ability to hand over possession.

13. The parties filed their respective submissions which I have considered, and which I wish to summarize as follows:

14. Mr. Khatib, counsel for the Plaintiff submitted that prayers number 1 and 4 of the Application were compromised on 12<sup>th</sup> September 2012 by the consent of the parties.

15. According to the Plaintiff's counsel, the Defendant was an Advocate for the Plaintiff in an agreement of sale between the Plaintiff and a company known as Regina Coeli Trading Company Limited. The Defendant later on purported to wear the shoes of the purchaser without the consent of the Plaintiff. Counsel submitted that the Defendant abused his position as an advocate for the Plaintiff by transferring the suit property to himself.

16. The Plaintiff's/Applicant's Advocate finally submitted that the actions of the Defendant are contrary to the provisions of section 3 (3) of the Law of Contract and Section 38 of the Land Act, Act No. 3 of 2012.

17. The Defendant counsel submitted that it was not illegal for the Defendant to have entered into an agreement for sale of land as a nominee of the purchaser and that it was not necessary for the Defendant to have exhibited an assignment between himself and Regina Coeli Trading Company Limited, the Vendor.
18. The Defendant's counsel further submitted that the Plaintiff executed the transfer documents simultaneously with the Agreement for sale and that she was paid a deposit of Kshs. 1,000,000. The Plaintiff further acknowledged the receipt of Kshs. 2,000,000 from the Defendant and acknowledged that the Defendant was the purchaser of the suit property.
19. Counsel finally submitted that the Plaintiff signed a document in which she agreed and confirmed that the balance of the purchase price shall be paid upon erection of the beacons and fencing of the property by herself which action she has not undertaken to date.
20. According to the Defendant's counsel, the Defendant has established that the Plaintiff can neither deliver vacant possession of the suit property nor can she erect beacons and fence as agreed because the Government, through G. K. Prison Hindi has laid claim to the suit property.
21. The only issue that I am supposed to decide on at this stage is whether the Defendant should be restrained from selling the suit property pending the hearing of the suit. This is an injunctive order which can only be allowed once the Plaintiff has established that she has a prima facie case with chances of success and she is likely to suffer irreparable damages that cannot be compensated by way of damages.
22. The Plaintiff's case, as I understand it, is that the Defendant has without lawful authority transferred the suit property to himself. Consequently, the Plaintiff has prayed in her plaint for a declaration that the said transfer is null and void and for an order compelling the Defendant to return the original documents to her.
23. On the other hand, the Defendant claims that the Plaintiff is in breach of the agreement and that he has suffered substantial loss and damages. The Defendant has particularised his loss in the Counter Claim to the tune of Kshs.178,000,000.
24. Section 3(3) of the Contract Act Cap 23 states that a memorandum of disposition in land must be in writing, and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
28. I have perused the contract of sale between the Plaintiff and Regina Coeli Trading Company Limited dated 16<sup>th</sup> December 2009. The said Sale Agreement was prepared by Kimani Kahiro and Associates who were acting for both the Purchaser and the Vendor.
29. According to the said Agreement, the completion date for the sale was 30<sup>th</sup> January 2011, or such other date as the parties may agree in writing. The purchase price for the suit property was agreed at Kshs.10,000,000.
30. Clause 2.2 of the agreement provides that the vendor shall point out all the beacons and boundaries of the property and replace any that are missing or misplaced and ensure that the boundaries of the property are fully cleared of any encroachment prior to the completion. This clause together with an acknowledgement dated 25<sup>th</sup> June, 2011 signed by the Plaintiff is what the defendant is relying on to refuse to complete the transaction.
31. Clause 3.1.2 of the Sale Agreement provides that the balance of the purchase price shall be paid to the vendor on completion and in any event within seven (7) days of the successful registration of the transfer in favour of the purchaser or its nominee.
32. According to the provisions of clause 4.2, on execution of the agreement, the vendor was obliged to deposit with the parties advocates, the defendant herein, the original Title Deed and duly executed

Transfer on the Professional Undertaking, which was given by the Defendant as the purchaser's advocate, that upon successful registration of the Transfer in the name of the vendor or its nominee, they will pay the balance of the purchase price. In default of completion and upon the vendor refunding the deposit the Original Title shall be returned to the Vendor.

33. The Reading of clause 4.2 of the sale agreement clearly shows that the registration of the title in the name of the purchaser or its nominee was supposed to be the final act in the transaction whereupon the balance of purchase price became due and owing. This clause is in conformity with the traditional concepts of conveyancing where the disposition of land is normally undertaken in two stages. The first stage involves the contract for the sale of land and the second stage involves completion of the contract. After these two stages, the transfer of the interest of land is effected.

34. The pointing out of beacons was a condition precedent to the registration of the title in the name of the purchaser or its nominee. Indeed, clause 2.2 of the sale agreement provided that completion could only occur after the vendor had pointed out the beacons.

35. After registration of the title in the name of the purchaser or its nominee, the purchaser's advocate was under a professional obligation to release the balance of the purchase price to the vendor unconditionally.

34. An undertaking, like one that was given in the sale agreement, is personally binding on an advocate. Professional obligations may accrue even though the advocate has not made an undertaking in writing, like in a situation where a person deposits documents to an advocate under escrow to be held subject to the fulfillment of certain conditions. The advocate cannot purport to act on such documents without his client's instructions or upon the fulfillment of the agreed conditions.

35. In the case of **Peter Ngariga Mumiri VS Credit Bank and Charles Ayaku Nyachae t/a Nyachae and Company Advocates**, the Court of Appeal held as follows;

***“An undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officials”***

36. The firm of Kimani Kahiro & Associates gave an undertaking on 16<sup>th</sup> December 2009 when the Agreement for sale was signed to pay the balance of the purchase price upon successful registration of the Transfer in the name of the Vendor or its nominee. They cannot now turn around and say that their client cannot pay the balance of the purchase price because the Plaintiff has not identified the beacons.

37. It does not matter that the Plaintiff agreed to identify the beacons, which she has failed to do. That is what should have been done before the advocate proceeded to transfer the property to himself. The undertaking crystallized upon the transfer of title from the Plaintiff to the Purchaser or his nominee.

38. In any event, the Defendant has the option of rescinding the contract and claiming for damages if he is of the view that the Plaintiff is in breach of the sale agreement. The Defendant cannot claim that he has established that the Plaintiff can neither deliver vacant possession nor erect beacons and at the same time refuse to deliver documents to the Plaintiff.

39. It is common knowledge that contracts of sale of land, like any other contract, may be breached by parties. In such circumstances, the remedy of rescission of the contract is available. Rescission is only available in cases in which *restitution in integrum* is possible.

40. Rescission of a Sale Agreement must be done in accordance with the Agreement, or in accordance with the Law Society Conditions of Sale. In the case of **Kukal Properties Development Limited VS Maloo and Others (1990-1994) EA 281**, the court of Appeal stated as follows:

***“At the time of the repudiation of the agreements by the appellant the respondent had neither paid nor tendered the purchase price. On their own admission, they did not have money and could not***

***therefore be said to be ready and willing to perform their part of the bargain. As they had failed to pay the full purchase price they could not in law obtain an order for specific performance of the agreement to sell the two maisonettes from them”.***

41. The House of Lords clarified further the obligation of parties in the contract of sale of land in the case of **Johnson VS Agnew (1979) 1 ALL ER 883** as follows:

***“In this situation, it is possible to state at least some incontrovertible proposition of law. First, in a contract for the sale of land after time has been made, or has become of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accepts the repudiation and proceed to claim damages for breach of the contract both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance”.***

42. The other issue on which I have to make a *prima facie* finding is the legality or otherwise of the transfer of the suit property to the Defendant and not Regina Coeli Trading Company Limited, the Vendor.

43. The Defendant herein has admitted that he was the Advocate who was acting for both the Vendor (the Plaintiff herein) and Regina Coeli Trading Company Limited, the Purchaser

44. The Sale Agreement has defined the Purchaser as a limited liability company, which expression shall include its successors and assigns.

45. The Defendant has stated in his affidavit that the suit property was transferred to him as a nominee of Regina Coeli Trading Company Limited. He has however not annexed on his affidavit any document to show how the company nominated him to have the property registered in his name.

46. It is common knowledge that companies conduct their businesses through the Board of Directors. In the absence of a resolution by the purchaser’s Board of Directors nominating the Defendant to be its nominee in the transaction, the transfer of the property to the Defendant is *prima facie* irregular.

47. The transfer of the suit property to the Defendant becomes even more curious and one that should be frowned upon by the court considering that the Defendant was the Advocate for both the Vendor and the Purchaser and the vendor put him in possession of the original title documents because of the fiduciary duty that he owed her. The Defendant, as the vendor's advocate went further to give the vendor a professional undertaking to release to her the balance of the purchase price which he has now declined to do. Instead, the Defendant is now claiming for over 178,000,000 from the Plaintiff for breach of contract. The conduct of the Defendant in the transaction, in my view, is a breach of the fiduciary duty which the Defendant owed the Plaintiff as her advocate in the transaction, and which this court cannot and should not allow.

48. When an advocate, like in this case, acts for both the purchaser and the vendor, ethical and professional responsibility issues arise. The general principal in law is that an advocate is obliged to refrain from acting for both parties where there is a conflict of interest or where such a conflict is likely to arise. The Defendant in this case cannot purport to have acted for the Plaintiff in the sale of land and then proceed to transfer the suit property in his name, purportedly as a nominee of the Vendor. He should not have acted for the Vendor from the very beginning if he knew that he was the one who was purchasing the property and just used the company to hide that fact from his client.

49. In the circumstances and for the reasons I have given above, I find and hold that the Plaintiff has established a *prima facie* case with chances of success. In the event that the injunctive orders do not issue, the Plaintiff will suffer irreparable damages if the Defendant transfers or deals with the suit property further. I therefore allow the Plaintiff's Application dated 4<sup>th</sup> June 2012 in the following terms:

- a) **THAT the Defendant be and is hereby restrained from selling the suit property pending the hearing of this suit.**
- b) **THAT this order be registered against the title of the suit property by the Registrar of Titles.**
- c) **THAT the costs of this application be borne by the Respondent.**

**Dated and delivered at Malindi this 6<sup>th</sup> day of  
June, 2013**

**O. A. Angote  
Judge**