



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 276 OF 2011

ELIZABETH WANJIRU KAMAU.....1ST PLAINTIFF

EUNICE NJAMBI GITAU.....2ND PLAINTIFF

VERSUS

JAMES MUBIA GITONDU.....1ST DEFENDANT

NANCY WARIGIA t/a NANCY WARIGIA & COMPANY ADVOCATES...2ND DEFENDANT

RULING

The Plaintiffs/Applicants filed an application dated 10th June 2011 seeking orders that the 2nd Defendant/Respondent releases the Original Certificate of Titles Number IR 71936 for the parcel of land known as Land Reference Number 9363/7 (hereinafter referred to as the suit property), pending determination of this suit. The Plaintiffs/Applicants are joint administrators of the Estate of their father, the late Gitau Kiongi, and they have attached a copy of the certificate of confirmation of Grant dated 3rd June 2008, issued in High Court Succession Cause Number 370 of 2006. The grounds for the application are that Plaintiffs/Applicants entered into a sale Agreement dated 27th March 2009 with the 1st Defendant/Respondent for the sale of the suit property which is registered in the name of Gitau Kiongi, whereof the Plaintiffs/Applicants were the vendors and the 1st Defendant/Respondent was the purchaser in the said agreement. The 2nd Defendant/Respondent was the advocate and legal counsel of both parties to the sale agreement. The Plaintiffs/Applicants deposited the said Original Title Number IR 71936 with the 2nd Defendant/Respondent for safe keeping and custody pending the finalization of the transaction of sale. The Plaintiffs/Applicants have annexed a copy of a letter dated 27th March 2009 from the 2nd Defendant/Respondent acknowledging receipt of the original title.

The Plaintiffs/Applicants state that they then rescinded the contract arising from the 1st Defendant/Respondent's breach of contract, and that 2nd Defendant/Respondent has failed, ignored or refused to release the Original Certificate of Title Number IR 71936 given to her in her capacity as advocate for safe keeping and custody, despite the contract being rescinded and despite several demands to do so the Plaintiffs/Applicants. Further that the refusal by the 2nd Defendant/Respondent to release the Original Certificate of Title has prevented the Plaintiffs/Applicants from getting a new buyer for their land, or even approaching a financier to get a loan to offset Land Rates and Land Rents of the suit land

which as a result of the 1st Defendant/Respondent's breach now stand at over Kenya Shillings 5 million.

These grounds are elaborated upon in a Supporting Affidavit sworn on 10th June 2011, a Supplementary Affidavit sworn on 27th June 2011, and a Further Affidavit sworn on 13th October 2011 by the 1st Plaintiff on behalf of the Plaintiffs/Applicants. The Plaintiffs/Applicants state that the purchase price was agreed at Kshs.7,920,000, and that it was a term of the contract that the 1st Respondent pays Kshs.2,000,000.00 two million at the time of signing the contract and that the balance of Kshs.5,920,000/= was to be paid less the sum expended by the 1st Defendant/Respondent for rates, land rent and any other expenses incurred by him in respect to the transaction. The Plaintiffs/Applicants allege that the 1st Defendant/Respondent only paid Kshs.1,000,000/= at the time of signing of sale agreement but failed to pay both the remaining Kshs.1,000,000/= deposit, and that he later deposited Kshs.1,000,000/= in their bank account on 2nd March 2010 and made another payment of Kshs.1,000,000 on 5th May 2010 after they had rescinded the contract in the 2nd Defendant/Respondent's office

Further, that the 1st Defendant/Respondent refused and failed to pay land rates and land rents in respect of Land Reference Number 9363/7 in accordance with the terms of the sale agreement, and the reason the Plaintiffs/Applicants require release of the original Certificate of Title is to tender the same as security for monies advanced to them to save the suit property from auction by the City Council of Nairobi for nonpayment of outstanding land rent and land rates. The Plaintiffs/Applicants in their Further Affidavit explain how they attempted to sell the land to a buyer who did pay the outstanding land rates and land rent on 18th July 2011. They state that the potential buyer opted out of the transaction due to this suit not progressing, and demanded a refund of the monies paid for the outstanding land rates and land rent. The Plaintiffs/Applicants thereafter then entered into a friendly loan agreement with one Dr. Godfrey Kiongi Mwaura and one James Kiongi Mwaura in order to refund the monies paid by the potential buyer, on the understanding that they deposit the Original Certificate of Title Number IR 71936 as security.

The Plaintiffs/Applicants further state that they engaged new Counsel, namely the firm of S. M. Muhia & Company Advocates to represent them, which Counsel issued a completion Notice to the 1st Defendant/Respondent on 16th June 2010, and that the 1st Defendant/Respondent failed, neglected and ignored to complete the transaction in time and the completion Notice expired on 9th July 2010. That the 2nd Defendant/Respondent on instructions of the 1st Defendant/Respondent then wrote to the Plaintiffs/Applicants' Advocate on 28th June 2010 stating that the balance owing for the entire transaction was Kshs.364,910, and that the 1st Defendant/Respondent was willing to complete the sale. Further, that on 29th July 2010 the Plaintiffs/Applicants' Advocate refunded all the money paid less 10% forfeiture as per the terms of the sale agreement and in the same letter asked for the Original Certificate of tile No. I.R 71936 from the 2nd Defendant/Respondent.

The Plaintiffs/Applicants deny giving any authority to the 2nd Defendant/Respondent to release the original title, and state that the same should not have been released without their written authority. The Plaintiffs/Applicants have annexed as evidence the said sale agreement dated 27th March 2009, and copies of the afore-mentioned letters and Completion Notice, a demand for payment of rates and interest amounting to Kshs 4,714,517/= from the Nairobi City Council dated 31/1/2011 in relation to L.R. No. 9363/7, and a copy of a Friendly Loan Agreement dated 26th September 2011 between the 1st Plaintiff and Dr. Godfrey Kiongi Mwaura and James Kiongi Mwaura.

The 1st Defendant/Respondent responded by filing a replying affidavit sworn on 24th June 2011 in which he confirms that he did enter into the said sale agreement with the Plaintiffs/Applicants, and that the 2nd Defendant/Respondent herein was to act for both parties. He however states that the said agreement provided that the completion date was to be 90 days from the date of execution of the agreement or any date as may have been mutually agreed on by the parties, and that the parties did orally and by consent verbally vary the sale agreement. Further, that it was orally agreed that he would pay a deposit of Kshs.1,000,000/= at the time of execution of the Sale Agreement and the Plaintiffs/Applicants would

provide a joint account whereby he would deposit funds on their instructions from time to time.

The 1st Defendant/Respondent admits making the payments as stated by the Plaintiffs/Applicants save for an additional payment of Kshs.200,000/= he states he made to one Mirica Nyambura Gitau, a sister to the Plaintiffs/Applicants, and with the express authority and consent of the Plaintiffs/Applicants on 4th September, 2009. The 1st Defendant/Respondent also states that on 12th July 2010 following the failure of the Plaintiffs/Applicants' Advocates to confirm the balance due and owing to the Plaintiffs he instructed the 2nd Defendant/Respondent to forward a cheque for the sum of Kshs.364,910/= to the said Advocates, being the balance of the purchase price due and owing to the Plaintiffs/Applicants.

The 1st Defendant/Respondent denies being informed by the Plaintiffs/Applicants that they had rescinded the Sale Agreement either verbally or in writing, and states that on 4th March 2010, he proceeded to the offices of the 2nd Defendant/Respondent who prepared the Transfer by Assent for the signature of the Plaintiffs/Applicants and after signing the said Transfer, the 1st Plaintiff verbally and in his presence authorized the 2nd Defendant/Respondent to release the Certificate of Title to him. The 1st Defendant/Respondent further states that the cheques sent to him in purported refund of the sums he had paid to the Plaintiffs/Applicants were sent back to the firm of M/S S.M. Muhia & Company Advocates by a letter dated 3rd August 2010 by his then lawyers J. W. Ngetho & Company Advocates, and he has annexed a copy of the said letter.

The 2nd Defendant/Respondent's response is in a replying affidavit sworn on 24th June 2011 wherein she reiterates the facts stated by the 1st Defendant/Respondent. The 2nd Defendant/Respondent's also states that she has a professional duty to protect the interests of both the Plaintiffs and the Defendant in the matter, and that the Certificate of Title should be released to the deserving party upon the determination of the validity or otherwise of the Agreement of Sale between the Plaintiffs/Applicants and the 1st Defendant/Respondent.

The 2nd Defendant/Respondent's also states that the certificate of Title was forwarded to her by the 1st Defendant/Respondent upon her professional undertaking that the title shall not be released until the dispute between the parties is resolved. She has attached an Affidavit sworn by the 1st Defendant/Respondent on 18th February 2011 as evidence that the Plaintiffs/Applicants authorized her to release the Certificate of Title to the 1st Defendant/Respondent. The 1st Defendant/Respondent in the said affidavit also states that he handed over the Original Certificate of Title back to the 2nd Defendant/Respondent upon her having given the professional undertaking she refers to in the foregoing. Further, the 2nd Defendant/Respondent's also states that if the Court is inclined to grant the orders sought, the Plaintiffs/Applicants should fully indemnify her from any claims filed by the 1st Defendant/Respondent against her or any other party when and if it is established that the agreement is valid and enforceable.

Ms Mburugu, the Plaintiffs'/Applicants' Advocate, made oral submissions at the hearing of the application on 30th January 2012, and also filed written submissions dated 2nd September 2011, and Further Submissions dated 18th November 2011. The Plaintiffs/Applicants' Advocate submitted on various issues which are respectively not ripe for determination at this stage, including the issue of whether there has been a breach of contract by the Defendant, the effect of the completion notice and whether there was variation and rescission of the contract.

The submissions I found to be relevant were those on the establishment of a *prima facie* case whereby the Plaintiffs/Applicants' Advocate relying on the authority of ***Giella v Cassman Brown & Co Ltd, (1973) EA 358*** argues that they have shown that they are likely to lose their property by way of public auction. The Plaintiffs/Applicants also submitted that they had shown special circumstances for the grant of a mandatory injunction, relying on the authority of ***Kenya Airports Authority v Paul Njogu Mungai Civil Application No. NAI 29 of 1997***. The special circumstances include that of the

Plaintiffs/Applicants being the owners of the suit property; that the 1st Defendant/Respondent has been in possession of the original certificate of Title for over two years and denied the Plaintiffs/Applicants the rightful use and enjoyment of their property; and that the contract was rescinded.

Mr. Kibera, the 1st Defendant/Respondent's Advocate, made oral submissions at the hearing of the application and filed written submissions dated 5th October 2011, and Further Submissions dated 22nd November 2011. The 1st Defendant/Respondent's Advocate submitted that the application is fatally flawed as it does not indicate to whom the certificate of title is to be released, and that it had also failed the test for a grant of a mandatory injunction as the Plaintiffs/Applicants have not demonstrated any special circumstance. Further, that this is not a clear case as the validity of the completion notice and the alleged rescission by the Plaintiffs/Applicants can only be determined at the trial of the suit.

The 1st Defendant/Respondent in this respect relied on the decisions in **Rift Valley Agricultural Contractors Ltd v Githae & Co Accountants and Anor (2005) eKLR** and **Susan Gatheri Rimberia (suing thro' Samuel Mwenda) v Amina Bashani & 19 others (2007) eKLR**. The 1st Defendant/Respondent also submitted that the orders sought are simply to facilitate the sale of the suit premises to a third party, which would negate the 1st Defendant/Respondent's counterclaim for specific performance. Further, that by offering the disputed property for sale to a third party during the pendency of the suit filed herein, the Plaintiffs/Applicants have acted in bad faith and have not come to the court with clean hands, and are also in contravention of section 52 of the Transfer of Property Act.

The 2nd Defendant/Respondent's Advocate was Mr. Macharia Nderitu, and he associated himself with the 1st Defendant/Respondent's submissions in his oral submissions at the hearing of the application, and also relied on his written submissions dated 5th October 2011. The Advocate in addition argued, relying on the authority of **Shariff Abdi Hassan v Nadhif Jama Adan, Civil Appeal 121 of 2005 (Nairobi)**, that the threshold of a mandatory requirement has not been met as the only special circumstance existing at the time of filing of the Plaintiffs/Applicants' application was that the suit property was at risk of being sold for non-payment of rates. Further, that the Plaintiffs/Applicants had since admitted in their Further Affidavit that the said rates have been paid, and that in any case the original title is not a requirement in the payment of rates. He also submitted that the friendly loan agreement attached to the Plaintiffs/Applicants' Further Affidavit is inadmissible as it has not been stamped, and is also made for the sole purpose of creating a belated justification for the order sought.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage what I need to decide is whether the mandatory injunction sought for the release of the Original Certificate of Title No. I.R 71936 in relation L.R No. 9363/7 can be granted. On the submission by the 1st Defendant/Respondent's Advocate that the prayer sought is vague as it does not specify to whom the title is to be released to, and the orders if granted will be in vain and incapable of being enforced, I am of the view that this is a defect that can be remedied by this Court pursuant to the powers granted to it by sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act (Cap 21). The issues of variation of, completion, rescission and breach of the sale agreement will not be considered at this stage for reasons that they are not in my opinion relevant to the order sought, and secondly cannot be decided at an interlocutory stage without the benefit of further evidence.

For a mandatory injunction to issue the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**, and as elaborated upon in **Benir Investments Ltd v Commissioner General & Anor (2010) eKLR** must be met. The main issue therefore is whether the Plaintiffs/Applicants have shown a *prima face* case to entitle them to the injunction sought. The evidence produced by the Plaintiff in relation to the order sought is the sale agreement dated 29th March 2009 and which in clause 12 states that the Advocates for the Plaintiffs and 1st Defendant/Respondent will be the 2nd Defendant/Respondent, a letter dated 27th March 2009 addressed to the Plaintiffs in which the 2nd Defendant/Respondent acknowledged receipt of the original title document for the L.R. No. 9363/7, a Completion Notice dated 16th June 2010, and a letter dated 29th July 2010 from S.M Muhia & Co. Advocates, the then Plaintiffs'/Applicants'

Advocate sent to the 2nd Defendant/Respondent refunding the money paid under the sale agreement less 10% and asking for the Original Certificate of Title No. I.R 71936.

Also produced as evidence is a letter dated 16th August 2010 from the 2nd Defendant/Respondent to S.M Muhia & Co. Advocates confirming that the said Original Certificate of Title had been handed over to the 1st Defendant/Respondent, and referring them to the 1st Defendant/Respondent's lawyer, and a letter sent by S.M Muhia & Co. Advocates to Kibera & Associates the 1st Defendant/Respondent's lawyer dated 17th December 2010 and copied to the 2nd Defendant/Respondent, reiterating that the 2nd Defendant/Respondent forwards the title document to them.

I am of the opinion that this evidence is enough to show that the Plaintiffs/Applicants have a case to be considered by this court. I am also of the view that a plea that damages will be an adequate remedy cannot be sustained in relation to the orders sought, as monetary compensation cannot guarantee the acquisition of a Title Deed with respect to a specific property. The Plaintiffs/Applicants have therefore established a *prima facie* case. The only issue left to determine is whether the Plaintiffs/Applicants have established special circumstances to warrant the grant of a mandatory injunction as decided in in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, wherein the Court of Appeal held that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

I agree with the Defendants/Respondents' submissions that the original title is not a requirement in the payment of rates, that the Plaintiffs/Applicants have admitted that the said rates have been since paid, and that the circumstance of the original title being required as security for the friendly loan was not in existence as at the filing of this application. I also agree with the submissions that an attempt by the Plaintiffs/Applicants to dispose of the property during the pendency of the suit was contrary to section 52 of the Transfer of Property Act which states as follows:

“During the active prosecution in any Court having authority..... of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

It is therefore my finding that the above-stated circumstances as pleaded by the Plaintiffs do not qualify for the grant of a mandatory injunction.

The special circumstance that I do find existing in this case arising from the pleadings made by the parties, is the conflict of interest arising from the 2nd Defendant/Respondent being retained as Advocate for both the Plaintiffs/Applicants and 1st Defendant/Respondent in the sale agreement and this agreement subsequently having been rescinded by the Plaintiffs/Applicants while she was on retainer, compounded by the fact that the 2nd Defendant/Respondent has now been sued by the Plaintiffs/Applicants arising from the disputed sale agreement. The 2nd Defendant/Respondent cannot consequent to these developments act in any fiduciary capacity with regard to the Plaintiffs/Applicants, or in their interests. The Court of Appeal in **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & Anor v Kaplan & Straton Advocates (1993) KLR 273** held that the general principle is that an Advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients, and that in such a retainer each client has a separate retainer relationship with the common advocate.

In addition the Court of Appeal also held that the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to any one without the client's consent, and that this confidentiality continues even after the conclusion of the matter for which the Advocate was retained. Further that this principle applies equally where an Advocate acts for two or more clients in the same

transaction or subject matter, because the retainer is specific between the individual client and the common advocate. The Court of Appeal also held that there exists no fiduciary relationship between the two or more clients of the common advocate.

In my opinion the 2nd Defendant/Respondent breached the confidentiality that existed between herself and the Plaintiffs/Applicants by releasing the original certificate without evidence of the Plaintiffs/Applicants' express authority and any provision in the sale agreement authorising her to do so. Further, my opinion is also that the 2nd Defendant/Respondent should not have given a professional undertaking to the 1st Defendant/Respondent about the Plaintiffs/Applicants' title, at a time when she was not only no longer retained by either the Plaintiffs/Applicants or 1st Defendant/Respondent, but there was also a dispute between the two parties, and when she was also already in a conflict of interest with the Plaintiffs/Applicants.

For the reasons given in the foregoing, the Plaintiffs/Applicants' application dated 10th June 2011 is allowed, and it is hereby ordered that the 2nd Defendant/Respondent releases the Original Certificate of Titles Number IR 71936 for the Parcel of Land known as Land Reference Number 9363/7 to the Registrar of the High Court, to be kept in safe custody pending the determination of the suit filed herein and further orders.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____March____, 2012.

P. NYAMWEYA
JUDGE