



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 230 OF 2010

WILSON KIPLETING KOSACHEY.....
.....1ST PLAINTIFF

ANTHONY MACHARIA.....2ND
PLAINTIFF

KARIUKI GATHATA.....3RD
PLAINTIFF

VS

METRA INVESTMENTS LIMITED.....1ST DEFENDANT

KUKAM LIMITED.....2ND DEFENDANT

KARTAR SINGH DHUPAR & CO. LIMITED.....3RD
DEFENDANT

RULING

1. By a Building Works contract entered into on or around 4th July 2006 between the 1st and 2nd defendants on the one part and the 3rd defendant on the other, the 3rd Defendant was engaged as contractor to develop 34 semi-detached maisonettes on the 2nd Defendant’s parcel of land L.R. No. Nairobi/Block 72/3081 situate within Langata area of Nairobi. The works commenced but the 1st and 2nd defendants eventually defaulted in paying for the works. The 3rd Defendant instituted suit being HCCC NO.261 of 2008 claiming a sum of Kshs. 30,019,854.00 and further placed a caution against the title on 29th June 2007. On 3rd June 2009, the parties recorded a consent in the said suit before Khaminwa J in which the parties agreed inter alia that an inhibition order be registered against 5 of the 37 sub-divisions on which the maisonettes had been constructed to secure the sums payable to the 3rd Defendant. The court further ordered that a sum of Kshs. 18 Million be paid to the 3rd Defendant by or before 23rd September 2009 failing which the 3rd Defendant would execute by selling any of the sub-divided titles that will have been completed without further stay of execution or injunctive relief.

2. Meanwhile, by agreements of sale entered into between the Plaintiff/Applicants and the 2nd Defendant on or around 21st January 2009, the Applicants agreed to Purchase a unit each (then under construction) within the 1st and 2nd Defendant’s aforesaid development project. The agreed price per unit was Kshs. 6.5

Million out of which the Applicants paid a sum of Kshs. 650,000/- as down payment. The balance of the purchase price was payable within six months which was the set completion date.

3. By a Chamber Summons application dated 22nd July 2010, the Plaintiffs applied to this court for orders that the court vacates the consent order given in this court on 3rd June 2009 in HCCC No. 261 of 2008 on the grounds that the consent was fraudulently entered into and was highly prejudicial to the Plaintiffs in this matter. The Applicants further contended that the defendants were guilty of non-disclosure of material facts and therefore the consent order should not be sustained.

4. In a supporting affidavit sworn by the 1st Plaintiff on behalf of all the Plaintiffs, the Plaintiffs state that they purchased House No.s 25, 19 and 13 from the 2nd Defendant by each paying 10% deposit with the balance payable six months from the date of the agreements. When the said houses were almost complete they learnt of the 3rd Defendant's suit seeking payment of Kshs. 30,019,854/- from the 1st and 2nd Defendants. They further established that consent had been agreed upon between the parties in that suit which they claim was entered without their knowledge. They contend that they are entitled to possession of the houses purchased and are ready to abide by any terms imposed by this court.

5. The 1st and 2nd Defendants in a defence filed on 23rd March 2012 acknowledged the Plaintiff's interest in Maisonette Nos. 13, 19 and 26 but deny attempting to defeat the Plaintiff's interest. They contend that the suit filed by the 3rd Defendant viz. HCCC No. 261 of 2008 did not take away their right to dispose of the property. They further deny that the consent of 3rd June 2009 amounted to attachment of the Plaintiff's property. They deny any deliberate attempt not to disclose the consent order to the Plaintiffs.

6. The 3rd Defendant on its part through a replying affidavit sworn by Nirmal Singh Dhupar on 5th August 2010 states that it is not aware and could not have been aware of any purchase arrangements between the Plaintiffs and the 1st and 2nd Defendants as it was not a party to the arrangements. It confirms having been originally contracted to develop the houses by the 1st and 2nd Defendants and having filed suit against them for breach of contract which resulted in the consent of 3rd June 2009. Sale of the houses was duly sanctioned by the court through the consent order. The Plaintiffs should have carried out due diligence well before entering into the sale agreement which would have revealed that the 3rd Defendant had registered a caution against the title to the suit property. The allegations of fraud in relation to the consent are therefore scandalous as the 3rd Defendant had no knowledge of the arrangements between the Plaintiffs and the 1st and 2nd Defendants. In any event, ownership of land is determined by registration of interests in the land. The agreements of sale are not registered interests in land and in any case, the conditions as to completion were never fulfilled. It was apparent that the 1st and 2nd Defendants misdirected the Plaintiffs by not disclosing the existence of a caution and of the 3rd Defendant but the Plaintiff's remedy for any such misdirection should be directed at the latter without interfering with the 3rd Defendant's efforts to recover its money.

7. I have carefully considered the application, the affidavits in support of and in opposition to the application as well as the submissions by counsel for the parties.

8. The main contention in support of the application is that the consent order entered into by the court in HCCC NO.261 of 2008 was fraudulently entered into. Although I have not had the benefit to peruse the court record in HCCC No. 261 of 2008 to appreciate the full background to the said consent, I have cited a copy of the Plaintiff exhibited in the supporting affidavit of the Plaintiff as 'WKK5' as well as the application by the 3rd Defendant for attachment before Judgment annexed in the 3rd Defendant's a replying affidavit as "NSD2". There is also a replying affidavit to that application annexed as "NSD3". From these instruments, it is evident that the reasons why the 3rd Defendant filed suit seeking attachment of the property before judgment in HCCC NO. 261 of 2008 were that the 1st and 2nd Defendants in the present suit had made attempts to have the caution placed against the title by the 3rd Defendant removed. The attempt to remove the caution was an indication that the 1st and 2nd Defendants in the present case

were intent on selling the property without addressing their indebtedness to the 3rd Defendant. The consent order of 3rd June 2009 was reached upon an application by the 1st and 2nd Defendants for orders to lessen the severity of the attachment orders by removing the caution placed by the 3rd Defendant so as to allow sub-division and sale of the individual maisonettes. For the 3rd Defendant to accede to this, its interests had to be factored in the consent. Given the circumstances under which the consent order was agreed, and in absence of any further particulars of fraud, I am unable to decipher any overt or covert fraud in the manner in which the consent order was entered into. The 3rd Defendant had a genuine and substantial claim against the 1st and 2nd Defendants and could not in the premises be said to have entered into the consent order merely to defeat the interests of the Plaintiffs in purchasing three units from housing project of the 1st and 2nd Defendants.

9. From the affidavit in support of the present application, it is apparent that no particulars of fraud have been laid before the court. As submitted by counsel for the 3rd Defendant, it is trite law that allegations of fraud must not only be specifically pleaded but must be proved as well. This is expressly provided in Order 2 Rule 10(1)(a) of the Civil Procedure Rules. The particulars of fraud rendered in the Plaint at paragraph 17 in my view are generalized and do not capture a conspiracy amongst the three Defendants to specifically defraud the Plaintiffs. Courts have held that the standard applicable to prove fraud go beyond a balance of probabilities (*See inter alia, Urmila w/o Mahendra Shah vs. Barclays Bank International Limited & Another (1976-80) 1KLR*). The Plaintiffs ought to have done better in supporting the allegation of fraud if this court were to believe their claim.

10. In addition, it is not disputed that the 3rd Defendant registered a caution against the property on 29th June 2007 which was two years before the Agreements of Sale entered into between each of the Plaintiffs and the 2nd Defendant on 21st January 2009. In that event, it would be stretching any degree of imagination to allege that there was fraud in the consent order when such consent was entered into to ameliorate the strict effect of the caution over the suit property.

11. As to whether this court can set aside the consent order within the precincts of the current suit, I find difficulties arising owing to two main reasons. Firstly, the plaintiffs were not a party to the consent order. *Ipsa facto*, the Plaintiffs have no locus standi to compel the parties to the consent order to enter into a consent varying the terms of the said consent order. Secondly, barring setting aside by the parties to the consent, the only other established legal basis for setting aside a consent is by demonstrating that the same was procured by fraud, misrepresentation or other factors as would justify the setting aside of a contract. This position is well anchored in law and was so upheld by **Hancox JA**(as he then was) in **Flora Wasike vs. DestimoWamboko (1989) KLR 429** where the learned judge held:

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside...”

Given that the Plaintiffs have not shown any cogent evidence of fraud or misrepresentation in relation to the consent order, I find myself unable to make an order setting aside the consent.

12. On the contention that the consent order is prejudicial to the Plaintiff’s interests as constituted in the Agreements for Sale between the Plaintiffs and 1st and 2nd Defendants, I take the view that the consent order does not fully impede enforcement of the Agreements of Sale. Clause 3 of the consent order provides that the inhibition order would only be registered in 5 out of the 37 sub-divisions on which the maisonettes were to be developed. Further the consent order does not specify which units would be attached. It is therefore likely that the specific units the Plaintiffs purchased do not fall within the 5 sub-divisions envisaged in the consent order. In any case, even if these specific units are attached, the Plaintiffs would still have the option of choosing other units. At the worst, I do not think that the quantum of the claim by the 3rd Defendant would take up all the units in the project. The Plaintiff’s interests are therefore not considerably prejudiced as appears in the application before the court. In any event, even if the consent order were to be set aside, the Plaintiff’s would still have to contend with the caution placed upon the title to the property and so removal of the consent would not found a panacea to the Plaintiff’s

concerns in this matter.

13. For these reasons, the Plaintiff's Chamber Summons application dated 22nd July 2010 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2012

J.M. MUTAVA

JUDGE