



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 566 OF 2009

YASIN MOHAMED

JAMAL.....PLAINTIFF

V E R S U S

ALI DAUD MOHAMED.....1ST
DEFENDANT

ANTONY MAKILYA MWANZA.....2ND
DEFENDANT

JOSEPH KIOKO MWANZA.....3RD
DEFENDANT

**(sued jointly as the Administrator of the Estate of PHILOMENA
MUENI (DECEASED))**

R U L I N G

This is an application under sections 1A, 1B, 3A and 7 of the Civil Procedure Act, Order 2 rule 15(1) (b), (c) and (d) and Order 50 rule 1 of the Civil Procedure Rules by which the 1st Defendant seeks the striking out of the Plaintiff's Amended Plaint and that costs of the application be borne by the Plaintiff's advocates, P. K. Kamau & Co. Advocates, and/or the Plaintiff. The application is supported by the grounds on the face and the supporting affidavit sworn by the 1st Defendant. It was opposed by the Plaintiff who swore a replying affidavit.

This suit was filed on 9th November 2009 by the Plaintiff who alleged that he had on 8th October 2007 entered into agreement to buy L.R. No. 36/11/159 ("the suit land") from the 2nd and 3rd Defendants at KShs. 22,000,000/= following which the Defendants had signed a Conveyance. They had provided an Assent signed by all the other beneficiaries of the deceased (Philomena Mueni Mwanza) who was the proprietor of the suit land. The 2nd and 3rd Defendants are the Administrators of her estate. The Plaintiff alleged that on presentation of the Conveyance for registration he had found that the 1st Defendant had

already presented his papers indicating that he had bought the suit land from the 2nd and 3rd Defendants. He contacted the 2nd and 3rd Defendants who denied selling the land to the 1st Defendant, or transferring it. They told him they had received some money from the 1st Defendant but that it was rent as he was their tenant on the suit land. The Plaintiff caused an investigation by the CID into the matter. The CID did a report to say the Indenture of Conveyance dated 23rd March 2007 that the 1st Defendant had presented for registration was a forgery as not all the beneficiaries had signed as it had been alleged. Fraud was alleged against the 1st Defendant. The suit sought the cancellation of the title to the 1st Defendant (although the Amended Plaintiff talks of the Plaintiff's title); specific performance of the contract between the Plaintiff and the 2nd and 3rd Defendants, and in the alternative the refund of the purchase price with interest.

The 2nd and 3rd Defendants did not enter appearance or file any papers in the case and application. The 1st Defendant denied the claim. His case is that he was indeed a tenant in the suit land. On 24th August 2001 he loaned KShs.4,300,000/= to the 2nd and 3rd Defendants and all the other beneficiaries of the estate of the deceased. A mortgage was duly executed between the parties. Subsequently, the 2nd and 3rd Defendants and all the beneficiaries of the estate did on 18th November 2002 enter into an agreement in which they sold the suit land to the 1st Defendant for KShs. 8,530,000/= which the 1st Defendant paid. The 2nd and 3rd Defendants executed a Vesting Assent and Indenture of Conveyance on 30th September 2003. When they were presented for registration by the Chief Land Registrar, they were rejected:-

“as the format required had since been changed and required parties’ photographs among other amendments in the relevant legal regime.”

The 1st Defendant sued the 2nd and 3rd Defendants, the Commissioner of Lands and the Chief Lands Registrar in **HCCC No. 152 of 2004 at Nairobi** seeking, *inter alia*, an order of specific performance of the agreement and its registration. Subsequent to the filing of the suit, the 2nd and 3rd Defendants and all the beneficiaries of the suit property willingly executed a Deed of Assent and a Conveyance in favour of the 1st Defendant following the new format. This was on 23rd March 2007. This was followed by the parties settling the suit by way of a consent which was recorded by the court.

The Plaintiff's case is that the settlement was a fraud as not all the beneficiaries as alleged had participated in it. The 1st Defendant's claim is that given the consent judgment to which the Plaintiff was not privy, this case is a non-starter and an abuse of the process of the court. During the arguments Mr. Sagana for the 1st Defendant argued that as long as the judgment has not been reviewed or set aside it binds the parties to it and cannot be questioned by the present suit. Mr. Kamau for the Plaintiff did not attend the hearing of the application, but the replying affidavit alleges that the consent judgment was obtained by fraud and non-disclosure of material facts given the revelations contained in the report by the Documents Examiner of the CID.

The Plaintiff cannot use this suit to question a consent judgment in **HCCC No. 152 of 2004**. If he feels aggrieved by the judgment he is entitled under section 80 of the Civil Procedure Act to apply for its review and setting aside, and it matters not that he was not a party to the suit or decision. (**Njoroge –Vs- Mbiti [1986] KLR 519**). Fraud or non-disclosure of material facts would be a basis for seeking the review or setting aside of a consent judgment (**Flora Wasike –Vs- Wamboko [1982 – 88] KAR 625**).

In the sense that the suit seeks to question a consent judgment by a court of concurrent jurisdiction in a

manner that the law does not allow, I find the claim to be an abuse of the process of the court. The suit against the 1st Defendant is consequently struck out with costs. Costs of the application shall be paid by the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E