REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 351 of 2010

1. LIBEY NJOKI MUNENE
2. JAMES CHEGE MUNENE.....PLAINTIFFS/APPLICANTS
[jointly suing as executors of the will of James Flavian Chege Munene (deceased)]

-VERSUS-

LEBAN EGAL.....DEFENDANT/RESPONDENT

RULING

The applicants moved the Court by Chamber Summons dated ***1st October, 2010*** and brought under s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and the earlier edition of the Civil Procedure Rules, O.XXXIX, Rules 1, 2 and 3. The application, at this stage, carries two main prayers:

(i) THAT a temporary injunction do issue restraining the defendant whether by himself, his employees or his agents or others claiming through or under him, from entering upon, occupying, alienating, transferring, leasing, mortgaging or in any way interfering with L.R. 503 Sec V, MN (original 378/2) Miritini, Mombasa or in any way whatsoever from interfering with the plaintiffs' property rights accruing on the said land pending the hearing and determination of the suit herein;

(ii)THAT leave be granted to the plaintiffs to serve this application as well as interim orders by combination of registered post through his last known address, by service upon the law firm of Onyancha Nyakundi & Co, Advocates who represented him in the transaction giving rise to this suit, as well as by advertisement once in a daily newspaper with national circulation.

The application is founded on grounds set out (in summary) as follows:

*(i) the plaintiffs are the executors of the will of **James Flavian Chege Munene** (deceased) who was at all material times the registered owner of L.R. 503 Sec. V M.N. (original 378/2), Miritini, Mombasa;*

*(ii) by a sale agreement dated **11th November, 2009** the plaintiffs agreed to sell and the defendant to purchase the suit property for a consideration of Kshs.38 million;*

*(iii) the defendant failed to pay the purchase price, which was agreed to be paid by initial deposit of 10%, upon signing, and the balance by the date of completion, **11th January, 2010;***

(iv) the purchaser, despite the non-payment of the purchase price, has proceeded to transfer the suit property to himself;

(v) the plaintiffs believe their consent to the purchase agreement was obtained by fraud or false pretences on the part of the defendant – that he was ready and willing to pay the price;

(vi) the sale agreement is void for failure of consideration, and should be annulled;

(vii) the plaintiffs apprehend that unless the Court issues injunctive orders barring the defendant from effecting any transactions upon the suit property, the defendant may proceed to do so, in which event, the said property may be taken out of the reach of the plaintiffs who may be left with no remedy;

(viii) despite notice by the plaintiffs, the defendant has failed to honour the land-sale agreement;

(ix) the plaintiffs are unaware of the defendant's physical address, and hence it is fair and just that service be by substituted means;

(x) the plaintiffs will suffer irreparable damage, unless the Orders sought herein are granted.

Libey Njoki Munene, 1st applicant, swore an affidavit on ***1st October, 2010*** in support of the application, annexing relevant documentation such as the grant of probate for the deceased's estate, issued on ***11th June, 2008***; certification of confirmation of grant, dated ***25th March, 2009***; copy of the title document for the suit property; copy of the sale agreement made with the defendant on ***11th November, 2009;*** certificate of postal search, in relation to the suit property, as at ***22nd September, 2010*** – showing the registered owner as the defendant herein.

On ***22nd November, 2010*** the plaintiffs filed ***a second application***, by Notice of Motion dated ***19th November, 2010***. This was brought by virtue of Order XXXV [Rules 1(1)(b), 2 and 8] of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act.

The plaintiffs' prayers were: (i) that the firm of *M/s. Onyancha Nyakundi & Co., Advocates* be directed to surrender the original title to the suit premises to the Court, pending *inter partes* hearing; (ii) that Judgment be entered summarily in favour of the plaintiffs, as prayed in the suit; (iii) that the original title to the suit premises be released to the plaintiffs; (iv) that, as an alternative, as a condition to defend the suit, the defendant do, within 14 days, deposit in a joint interest-earning account the sum of Kshs.38,000,000/= with interest at 25% per annum as from ***11th January, 2010***.

The second application rested on the following grounds:

(i) the plaintiffs' claim is for recovery of land, arising from a breached contractual undertaking;

(ii) the defendant has no defence whatsoever, since the subject of the contract is also void, for a totally failed consideration;

(iii) the defendant is truly indebted to the plaintiffs;

(iv) the defendant has not filed or served any defence, despite the time allowed therefor having expired.

Only after the filing of the 2nd application did the defendant serve a copy of his statement of defence dated ***3rd December, 2010***.

But on ***19th November, 2010*** the defendant/respondent, through the firm of *M/s. Ndegwa Muthama & Katisya, Advocates* filed a "*Statement of Respondent's Grounds of Opposition*", against the plaintiffs' Chamber Summons of ***1st October, 2010.*** This is a long document which engages in argument, in the style of submissions, and in my opinion, is not suitable as a statement of grounds of opposition as contemplated in the Civil Procedure Rules.

Certainly, the defendant contends in his grounds that: the plaintiffs have not demonstrated "*irreparable damage*" – and so are not entitled to injunctive orders; the plaintiffs' loss is quantifiable in damages, and hence this is not a fit case for injunction; the defendant is able to make good the loss, if the suit succeeds.

To the plaintiffs' Notice of Motion of ***19th November, 2010*** the defendant filed a replying affidavit on ***17th February, 2011*** averring, *inter alia*, that –

(i) there were later oral agreements changing the original terms of the sale agreement;

(ii) the defendant had made rates-payments on behalf of the plaintiffs, and this should be reckoned as part of the value of the property;

(iii) further negotiations had placed obligations upon the plaintiffs to remove squatters occupying the suit land;

(iv) transfer of title pending payment of the purchase price had been agreed upon, between the parties;

(v) the applicants were in breach of the re-negotiated agreement, through failure to remove the squatters;

(vi) the "obligation to pay the balance of the purchase price has not arisen but [the deponent] is ready and willing to pay the balance of the purchase price upon the applicants removing the squatters and delivering vacant possession";

(vii) the applicants "are not entitled to a retransfer of the suit property but [are], to the contrary, contractually bound to remove the squatters and deliver vacant possession";

(viii) the applicants were well aware of the defendant's registration as proprietor of the suit premises, as well as of the reasons why they had not received the full purchase-price;

(ix) the applicants are attempting to renege on a valid and partly-performed agreement.

Against the foregoing background of claims, assertions and conflicting fact, learned counsel ***Mr. Githara*** and ***Mr. Ndegwa*** made their submissions for the plaintiffs and the defendant, respectively.

The facts before the Court at this interlocutory stage, will not support the premise relied upon by ***Mr. Githara:*** that "*the plaintiff seeks to recover land from the defendant for a consideration that has totally failed*." While the evidence, conflicting as it is must be properly tested only *at the trial* it, at this stage, emerges that the parties have, since the making of the sale agreement, been involved in further consents or secondary agreements; and that since the making of the principal agreement the respondent has made certain payments inuring to the benefit of the suit property – and such, of course, fall into the account of *values attached to the suit property.*

On that account, it is clear to me that the prayer for summary Judgment is not for granting. On this point I am, besides, not persuaded by counsel's further argument founded on the exercise of judicial discretion under s.3(2) of the Judicature Act (Cap.8, Laws of Kenya) and on the overriding objectives of civil litigation, as provided for in ss.1A and 1B of the Civil Procedure Act (Cap.21). This position does not change on account of the invocation by counsel of a plurality of decisions on the play of judicial discretion under the said ss.1A and 1B of the Civil Procedure Act.

Learned counsel also raised the old principle of contract as weighing against the respondent's reliance on the alleged re-negotiated positions of the parties. Counsel called in aid *Phipson on Evidence*, 16th edition, especially the following passage (p.1240):

"…where a private transaction is required by law to be in writing or evidenced by a memorandum in

writing…no extrinsic evidence is admissible to supersede the document, or to prove the terms of the transaction independently."

Counsel submitted that by s.3(3) of the Law of Contract Act, (Cap. 23, Laws of Kenya), all transactions for the disposition of an interest in land must be in writing; and he urged that "*the extrinsic evidence sought to be relied upon by the defendant is manufactured solely to defeat the plaintiffs' claim."*

Learned counsel, ***Mr. Ndegwa*** urged that the application for summary judgment be dismissed: because summary judgment if granted, *"will have the manifestly unjust effect of delivering purchase price to a vendor who has committed a fundamental breach of the contract of sale by failing to deliver vacant possession of the suit property, or whose consideration has totally failed by reason of hostile possession of the property by squatters."* In this regard, counsel relied on an issue of fact: "*the plaintiffs [have] never denied in [their] pleadings or otherwise that [the suit] property is full of hostile squatters and that neither the [plaintiffs] nor the defendant [are] able to enter or take possession."*

Counsel submitted that this is not a case for summary judgment: for summary judgment "*applies to the clearest of cases…where there is not a single, bona fide triable issue"*. Counsel urged that in the instant case, the pleadings alone show triable issues in considerable numbers, e.g.: whether the land-sale contract is a nullity as claimed in the plaint; whether the agreement was made in a context of fraud; whether rescission of the contract was allowable without the possibility of *restitutio in integrum*; whether the original agreement had been re-negotiated; whether the plaintiffs were in breach by not delivering the suit property with vacant possession; whether the defendant's obligation to pay had already arisen; whether the suit property is in the possession of the plaintiffs, the defendant, or third parties; the ***locus*** of the contractual obligation to remove the squatters; whether the plaintiff is able, ready and willing to deliver the suit property with vacant possession.

Counsel submitted that the allegations of fraud made by the plaintiffs (para.13 of plaint) and denied in the statement of defence (para.13) cannot be tried by affidavit evidence; and the contentions regarding oral evidence bearing on the sale agreement, cannot be disposed of except by full trial. Counsel supported these contentions with case authority; in ***Westmont Power Kenya Ltd. v. Frederick & Another t/a Continental Traders & Marketing*** [2003] KLR 357 the Court of Appeal thus stated (p.359):

"[***The] first issue we have to decide is whether the intended appeal is arguable. It is quite unusual to enter summary judgment when serious allegations of fraud and other wrongdoings are made. Such issues can only be decided during a proper trial and not on conflicting affidavits."***

Counsel contested the submission made for the plaintiffs, that oral evidence had no place in a land-purchase agreement: on the basis that s.98(i) of the Evidence Act (Cap.80, Laws of Kenya) *"specifically entitles a party to a written contract to introduce parole evidence to prove want, or failure of consideration in a written contract."*

Counsel urged the Court, besides, to take judicial notice of the fact that *"no party to a contract [would] have…intended to pay Kshs.38,000,000/= for a property it cannot enter or take possession of";* and so, *"there must have been collateral agreements or negotiations"* – and "*evidence of what the parties really intended or agreed outside the written agreement is surely admissible in evidence."*

Counsel admitted, lastly, that "*both the Notice of Motion dated **19th November, 2010** seeking summary judgment, and the Chamber Summons of **1st October, 2010** seeking an injunction are incompetent [and] do not satisfy the established principles for grant of either…"*

In the discharge of its especial adjudicatory mandate, the Court must assume, at the beginning, that those invoking its jurisdiction have a gravamen of ***merit,*** and thus, without good cause, their pleadings are entitled, *prima facie*, to comprehensive hearing. In the instant case, it is the plaintiffs who have moved the Court, with a sixteen-paragraph plaint in which they seek a declaration that *"the sale contract between the plaintiffs and the defendant in respect of L.R. 503 Sec. V MN (Original 378/2) Miritini, Mombasa is void on account of fraud by the defendant as well as for a consideration which has totally failed";* they

seek an Order annulling the registration of the suit property in favour of the defendant "*and reverting ownership of the same to the plaintiffs*"; they seek an Order of injunction "*barring the defendant from alienating, transferring, leasing or in any way interfering with the plaintiff's ownership [of the suit property]"*; they seek damages for breach of contract; they seek *mesne profits*.

The defendant in his statement of defence, pleads that he has already made certain payments under the land-sale agreement, and so *part-performance* has taken place; that the suit land is occupied by *squatters*, and the plaintiff is unable to deliver the same with *vacant possession* (contrary to the terms of the purchase agreement); that *fraud* had not featured in the making of the contract of sale and purchase.

These pleadings by the parties, insofar as they all directly raise contentious fact-scenarios, in relation to the sale agreement, have the effect of joining issue in a manner most apposite for judicial resolution, through examination-in-chief and cross-examination; and in this way, the parties have properly come before the Court for the determination of the dispute. A case falling in such a category is for full hearing, and certainly not for premature termination through summary judgment; and this is quite apart from the fact that the pleadings of fraud cannot, in their very nature, be resolved except through the taking of evidence.

In that context, the substance of the plaintiffs' application cannot be sustained; but in view of the evidence brought before the Court at this stage, and of the essential points emerging from the submissions of learned counsel, I will make Orders as follows:

(1) The plaintiffs' prayer for summary Judgment, in the Notice of Motion of 19th November, 2010 is refused.

(2) The Plaintiffs' prayer in the Notice of Motion of 19th November, 2010 that the original title to the suit premises be released to the plaintiffs is refused.

(3) With regard to the plaintiffs' application by Chamber Summons of 1st October, 2010, prayer No. 3 is refused; and instead I will order as follows:

Neither the plaintiffs nor the defendants, whether by themselves or their employees or agents or anyone else, shall occupy, alienate, transfer, lease or mortgage or in any way interfere with the suit property, L.R. 503 Sec V MN (Original 378/2) Miritini, Mombasa pending the hearing and determination of the suit, save with consent duly recorded before the Court.

(4)The plaintiffs' alternative prayer (No.5) in the Notice of Motion of 19th November, 2010, which imposes a condition on the basis of which the defendant may prosecute a defence to the suit, is refused.

(5) The firm of M/s. Onyancha Nyakundi & Co., Advocates, for the respondent, shall within ten days of the date hereof, surrender for custody in the hands of the High Court's Deputy Registrar, the original title to the suit premises, pending the hearing and determination of the suit herein.

(6)The parties herein shall complete the preparatory stage for the trial by filing and duly serving their lists and bundles of documents and making the necessary arrangements, within 21 days of the date hereof.

(7) This matter shall be listed for mention and hearing directions within 35 days of the date hereof.

(8) The costs of the Chamber Summons application of 1st October, 2010 shall be in the cause.

(9) The costs of the Notice of Motion application of 19th November, 2010 shall be borne by the plaintiffs/applicants.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 21st day of November, 2011.

H.M. OKWENGU
JUDGE