



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 110 of 2009

JOHN KARUGA WAHINYA. PLAINTIFF/APPLICANT
VERSUS
VIOLET WANJA GATE. DEFENDANT/RESPONDENT

J U D G M E N T

The Plaintiff/Applicant by an Originating Summons dated 16th March, 2009 and taken out on 17th March, 2009 sought the following: -

- a) The Defendant/Respondent do forthwith or within such reasonable time as this court may set, refund Ksh.5 Million deposit paid by the Plaintiff/Applicant on 27th February, 2008 towards purchase of part of land reference No. 170/30/Redhill Original No. 170/21/8 belonging to the Defendant/Respondent.
- b) That in default to comply with order (a), a decree to issue against the Defendant/Respondent in the sum of Kshs.5 million.
- c) That the Defendant do pay interest at the rate of 20% from 28th February, 2008 until payment in full together with costs and interest.
- d) Any other relief that this Honourable court may deem fit to grant.

The Defendant/Respondent filed a Replying Affidavit dated 14th April, 2009. She stated that she has been advised that the Originating Summons is bad in law and fatally defective as drawn. She however admits that by an Agreement of Sale dated 28th February, 2008 the Plaintiff/Applicant was to pay to her a purchase price of Kshs.8 million in respect of part of her land known as Kiambu L. R. NO. 170/36 Redhill (Original No. 170/21/8 Kiambu). She averred however, that the Plaintiff purchased the land with knowledge that the land was at the time mortgaged to Barclays Bank of Kenya and with knowledge that part of the purchase price was to clear the said mortgage indebtedness to set the land free for subdivision and transfer to the Plaintiff/Applicant.

Furthermore, the Defendant/Respondent admits in her Replying Affidavit that she received Kshs.5 million from Defendant in payment under the said agreement but that the Plaintiff has defaulted in the payment of the balance of Kshs.3 million. She demands for the said balance immediately and seeks for an order of specific performance to force the Plaintiff to complete the deal so that she, the Defendant can also complete her part.

The Defendant/Respondent, however, seeks in the alternative, a reasonable period within which to identify a new buyer from whom to raise a purchase funds to refund the Plaintiff/Applicant.

The Defendant/Respondent, nevertheless seeks a dismissal of the suit with costs on the basis that it is *mala fides* and incurably bad in law.

No supplementary affidavit in response to the Replying Affidavit was filed by the Plaintiff/Applicant.

By a statement of Preliminary Objection on a Point of Law, dated 23rd July, 2009, the Defendant/Respondent on 24th July, 2009 raised the point that the suit is wrongly instituted under Order XXXVI. In her written argument on the point, through Mbaluka & Company Advocates, she argues that the Indenture under which the parties agreed to sell and buy the suit property was a contractual agreement. That being so, as the Court understands, the Plaintiff could have approached the court as he did, only through or by a Plaint and not an Originating Summons. The Defendant then quoted Order XXXVI Rule 1 & 3 which states: -

“Rule 1. Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

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3. A Vendor or a purchaser of immovable property or their representatives respectively may, at any time or times, take out before the judge sitting in Chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract.)

The Defendant/Respondent then proceeded to argue that this suit for recovery of part purchase price paid to them, is connected with a contract of sale and therefore ought to have been brought under a plaint.

I have carefully perused the indenture under which the sale is arranged. I have also perused the above quoted Civil Procedure Rules. I understand the rules to mean that a vendor or purchaser of an immovable property, may take out an originating summons for determination of any question which may arise in respect of any requisitions or objections, any claim for compensation or any other question arising out of or connected with the contract of sale except a question affecting the existence or validity of the contract.

Perusal of the Replying Affidavit or the Originating Summons averments show that neither party raises any issue concerning or affecting the existence or validity of the contract between them. If anything both parties confirm in their Replying and Supporting Affidavits, the validity and existence of their Agreement. Although the Plaintiff/Applicant wants a refund of his money, his reason for it, is not that their agreement was invalid or that there was no contract of

sale. His apparent reason is that the defendant had not disclosed the fact that the suit property was subject of mortgage while the Defendant states otherwise.

Furthermore, the Defendant shows willingness to refund the sum of Kshs.5 million received but asks the court to grant a reasonable time to identify another able purchaser from whom she can raise funds to refund. I therefore do not understand the Defendant/Respondent to be saying that she wishes to retain or keep for herself the sum of Kshs.5 million on the basis that the manner of approaching the court for its recovery, is bad in law.

Reverting to main issue raised in this preliminary objection, however, it is my view and finding that the exception under rule 3 aforementioned, which would require the Plaintiff to file his claim through a plaint does not exist in this case. That is so because neither of the two parties questions the existence or validity of the contract in their pleadings. Furthermore both want to part ways, provided the Defendant is given reasonable time to raise the money.

The court also observes that although the Plaintiff/Applicant instituted his suit by an Originating Summons, he nevertheless from the start terms himself the Plaintiff as well as the Applicant. The Defendant is shown as Defendant/Respondent. The issue between the parties is refund of the sum of Kshs. 5 million received by the Defendant. The Defendant admits receiving the money and admits having not done her part of the contract because the Plaintiff still owes the balance of Kshs.3 million. In circumstances where as in this case there is no denial of receipt of the money and there is a request for time to refund, this court would not find it difficult or improper to adopt the discretion given it under Order XXXVI rule 10(1).

Under the cited rule this court would in the circumstances of this case, and indeed does direct, that the Originating Summons herein be henceforth be continued as if began by way of plaint and the affidavits filed be regarded as pleadings. The Replying Affidavit hereby becomes the Defence.

The conclusion I come to is that the Preliminary Objection in point of law hereinabove considered, has little merit. It is hereby rejected and dismissed with the costs arising therefrom, to the Plaintiff. Orders accordingly.

It appears proper that the suit should now be fixed for a hearing unless the Plaintiff wishes to proceed by way of summary procedure in view of the Defendants wish to settle within a reasonable time within which she identified a new purchaser. Otherwise in my view, the pendency of this suit in our registry is unnecessary.

Dated and delivered at Nairobi this 8th day of February, 2010.

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D A ONYANCHA

JUDGE