



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

Environmental & Land Case 252 of 2009

FRANCIS WACHIRA NDERITUPLAINTIFF

VERSUS

JOHN WAWERU KINYANJUIDEFENDANT

RULING

The plaintiff and the defendant entered into an agreement for sale in respect of property described as LR. No. Nairobi/Block 105/6003 and LR. No. Nairobi/block 105/6004. This property belonged to the plaintiff and the defendant offered to buy the same. The agreement is dated 17th February 2009.

Upon execution of the said agreement, the defendant paid the sum of Kshs.200,000/= and also surrendered to the plaintiff his motor vehicle registration No.KAU003F Honda CRV valued at Kshs.600,000/=. The purchase price of the parcels of land was Kshs.2 million.

As a result of the payment of Kshs.200,000/= and the surrender of the motor vehicle valued at Kshs.600,000/= there was a balance of Kshs.1,200,000/=This was to be paid within thirty (30) days of executing the said agreement. Immediately the said agreement was executed, and specifically the following day, the plaintiff moved to rescind the same on the ground thatthe defendant took advantage of his drunken state and that he never intended whatsoever to sale his property.

He offered to return the amount of money paid i.e. Kshs.200,000/= and also surrender the motor vehicle aforesaid. There is evidence on the pleadings that the defendant accepted therefund of Kshs.200,000/= but to date has refused to accept the return of the motor vehicle.

This prompted the filing of the present suit. The prayers sought out in the plaint are that there should be an injunction to restrain the defendant, his servants or agents from interfering, alienating and/or

remaining or carrying on any activity on the suit premises pending the hearing and determination of the suit, and an order declaring the purported contract a nullity. There is also a prayer that an order be issued directing restitution of the plaintiff's title documents to the suit premises and return of the defendant's motor vehicle registration No.KAU003F unconditionally.

Alongside the plaint, the plaintiff filed an application by way of Chamber Summons under Order XXXIX rules 1 and 2 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act asking for restraining orders aforesaid until the application and the suit are determined.

The grounds upon which the said application is based are that the purported sale agreement has fallen through and is incapable of being enforced and that the defendant's remedy lies in damages. It is also the plaintiff's case that the defendant has threatened to enter the suit premises by force and has refused to release the title documents to the plaintiff despite the agreement having fallen through. The defendant has also refused to accept back his said motor vehicle for no apparent or justifiable reason.

On 29th May, 2009, Nambuye J gave restraining orders pending the hearing of the application inter-partes. Both learned counsel have filed written submissions in addressing the application which I have read.

The allegation of whether or not the plaintiff was duped to sign the agreement while he was drunk and incapable of making a sound decision is a triable issue. I note that the defendant has accepted a refund of Kshs.200,000/= which had been paid by the plaintiff in part compliance of the said agreement. In my view, this would point to the fact that the defendant accepts that the agreement is incapable of compliance. The only issue that has remained is that of the return of the motor vehicle and payment of any damages if any, which the plaintiff has denied.

In cases of this nature, the applicant must confirm or prove that, he has a prima facie case with a probability of success and that damages would not be adequate compensation in the circumstances of the case. If the court is in doubt, it would decide the matter on a balance of

convenience. It is not clear why the defendant has accepted the refund of the deposit paid to him by the plaintiff and at the same time refused to accept the return of the motor vehicle which was part and parcel of the agreement aforesaid.

That notwithstanding, it is apparent that this agreement is incapable of enforcement. I agree with the submission by the learned counsel for the plaintiff that specific performance may not be ordered where damages would be adequate compensation in the event a party succeeds and so, with that in mind, I find that the plaintiff has established a prima facie case with a probability of success and that restraining orders as sought in the Chamber Summons dated 28th May, 2009 should be confirmed. I hasten to add that it may be difficult for the defendant to mitigate his loss if he continues to refuse to take possession of the motor vehicle allegedly in possession of the plaintiff.

I order in the circumstances that, the said motor vehicle shall be returned to the defendant through an appropriate party if the defendant is unwilling to take possession of the same. The costs of this application shall be in the cause. Orders accordingly.

Dated, signed and delivered at Nairobi this 9th day of December, 2009.

A. MBOGHOLI MSAGHA

JUDGE