



Raghvani v Kirigia; Momanyi t/a Momanyi & Co Advocates (Interested Party) (Environment & Land Case 115 of 2016) [2022] KEELC 2452 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 115 OF 2016
LC KOMINGOI, J
JULY 14, 2022**

BETWEEN

MAVJI HARJI RAGHVANI APPLICANT

AND

FRANKLIN KARIUKI KIRIGIA RESPONDENT

AND

HESBON MOMANYI T/A MOMANYI & CO ADVOCATES INTERESTED PARTY

JUDGMENT

1. This is the originating summons dated 11th February 2016.
2. It is brought under Order 37 Rule 3 of the *Civil Procedure Rules* 2010, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law.
3. The Applicant seeks orders that;
 - a. Spent.
 - b. The Respondent be compelled to execute a Transfer in respect of the parcel of land registered at the Land Titles Registry in Nairobi as number I.R 53391/1 and known as Land Reference No.209/10690 in favour of the Respondent registered to the Applicant after payment of all the requisite rates and rent, on the professional undertaking from the Applicant's Advocates issued on 1st February 2016 for the amount outstanding from the sale agreement dated 13th March 2105.



- c. In the alternative, this Honourable Court direct the Registrar of Titles to execute and register the aforesaid transfer in the name of the Applicant after payment after payment of all requisite rates and rent upon the said undertaking by the Applicant's Advocate dated 1st February 2016.
 - d. Any other order this Honourable court deems fit to grant.
 - e. That the costs of this application be borne by the Respondent.
4. The grounds are in the face of the originating summons and are:-
1. That the applicants herein entered into a sale agreement dated the 13th March 2015 upon which the applicant deposited Kenya Shillings one million five hundred thousand (Kshs.1,500,000/-) being 10% of the purchase price with the Respondent's Advocate as specified in the sale agreement.
 2. That however the Respondent has since refused to execute the Transfer documents in favour of the Applicant and his nominee and is insisting on being given a further Kenya Shillings two million (Kshs.2,000,000) before executing.
 3. That the completion date of the transaction has since lapsed on 5th September 2015 and the transaction has been frustrated by the respondent who is keen on denying the Applicant physical occupation as he continues to enjoy proceeds of the property.
 4. That the Respondent is currently in possession of the deposit amount of Kenya Shillings one million five hundred thousand only (Kshs.1,500,000/-) and has defiantly refused to execute the transfer being one of the most crucial completion documents despite numerous attempts by the Applicant's advocate to have them executed.
 5. That the transaction and completion of the transaction is now stalled and there is need for the court to intervene since the Applicant whose main aim was to develop the property is greatly prejudiced.
5. The summons is supported by the Applicant's affidavit sworn on 11th February 2016. He stated that he entered into a sale agreement dated 13th March 2015 with the Respondent for purchase of a piece of property known as Land Reference No.209/10690 measuring 0.1282 Ha situated in Nairobi. He further deponed that he paid a deposit of Kshs.1,500,000/= as 10% deposit of the purchase price through the Respondent's Advocates via two cheques numbers 001159 and 001160 of ksh.750,000/= each.
6. He further stated that all the documents as stipulated in clause C-2 of the said sale agreement were later released to his Advocates without a duly executed Transfer of lease but on 4th August 2015, his Advocates received a letter from the Respondent's Advocates requesting for an additional amount of Ksh.2, 000,000/= on account of balance of the purchase price which was contrary to the sale agreement.
7. He averred that his Advocates declined the variation to the sale agreement vide the letter dated 6th August 2015 addressed to the Respondent's Advocates and further informed the Respondent's Advocates that the balance of the purchase price was available upon handing over of completion



- documents. He further deponed that on 7th September 2015, his Advocates issued a completion notice to the Respondent but the Respondent failed to comply. He added that he instructed his Advocates to register a caveat on the title in which he claimed purchaser's interest. The caveat is dated 22nd June 2015.
8. He averred that his Advocates made efforts to resolve the issue amicably but they were thwarted by the Respondent's silence and that he is prejudiced by the stalled transactions.
 9. The Respondent opposed Originating Summons. He filed a replying affidavit sworn on 31st January 2017. He deponed that he is the registered owner of the property known as LR No.209/10690 registered at the lands registry in Nairobi as I.R 53391/1. He denied offering the said property for sale to the Applicant or to any person. He also denied knowing Mr. Hesbon Momanyi of M/S O. H. Momanyi & Company Advocates and denied instructing him to receive any money on his behalf. He further deponed that the Applicant has lodged a caveat against his title deed based on a forged sale agreement and urged the court to remove it and dismiss the suit so that he may be able to deal with his property as he pleases.
 10. The originating summons was canvassed by way of viva voce evidence.

Evidence of the Applicant

11. PW1, Mavji Harji Raghvani, the Applicant, testified on 27th September 2021. the Applicant. His supporting affidavit to the Originating Summons sworn on 11th February 2016 was adopted as part of his evidence in chief.
12. He told the court that the suit property was advertised for sale in one of the Daily Newspapers. He further stated that he called the number on the advertisement and they agreed to meet with the person who received the phone call. The person stated that he knew the owner of the suit property. He testified that they met with the real owner and proceeded to his lawyer's office; M/S O.H Momanyi & Company Advocates. He added that they agreed on terms of sale and the purchase price and a sale agreement was prepared by the vendor's lawyers M/S O.H Momanyi & Company Advocates.
13. He produced the sale agreement dated 13th March 2015 and stated that he paid a deposit of 10% of the purchase price through cheque to M/S O.H Momanyi & Company Advocates. He added that completion date was in ninety (90) days. It was his testimony that the vendor complied with the terms of the sale agreement and gave his lawyers the original Title deed and provided rates clearance certificates but he did not execute the transfer.
14. He testified that M/S O.H Momanyi & Company Advocates requested for Kshs.2,000,000/= before they could execute the transfer documents through their letter dated 4th August 2015 but by a letter dated 6th August 2015, his (Applicant's) lawyers replied annexing transfer documents for execution. He told the court that the Respondent's Advocates did not send back executed transfer documents prompting his lawyers to send the completion notice dated 7th September 2015 and a caveat was registered against the title on 22nd June 2015. He stated that M/S O.H Momanyi & Company Advocates was acting for the vendor. He prayed that the sale agreement be enforced. In the alternative, he sought a refund of the deposit with interest as well as costs of the suit.
15. When he was cross-examined and referred to the replying affidavit sworn by the Respondent on 31st January 2017, PW1 stated that the suit property was advertised for sale in the Daily Nation newspaper but he did not have a copy of the advertisement. He further stated that he talked to someone who said that he knew the owner of the suit land and that he met the person when he went to his office. He saw him again when he introduced the owner of the suit property. He stated that he conducted a search of



- the suit property. When referred to the sale agreement, he stated that it is the owner of the suit property who provided the names and the address therein.
16. When he was referred to clause B-2 of the sale agreement, he stated that the purchase price of the suit property was khs.15 million and he paid a deposit of Ksh.1.5 million. He added that he drew cheques but he cannot tell the date his account was debited with the amount of the cheques as he did not have a bank statement to show the same. When referred to the letter dated 9th February 2017, he stated that he did cancel some cheques he had issued to the vendor's Advocate but he cannot recall when he cancelled them.
 17. When he was referred to Clause C of the agreement, the stated that completion was 90 days from 13th March 2015 but he does not recall when he issued the cheques. When referred to clause M on variation, he stated that his Advocates would know if the agreement terms were varied. When referred to the claim in his supporting affidavit sworn on 11th February 2016 that all documents were released to his Advocates without the transfer, he stated that the vendor submitted the title deed to his lawyer in his presence but the completion documents referred in clause C-2 are not in court. He added that the averment in paragraph 4 of his supporting affidavit is not true. When he was referred to the caveat registered on 22nd June 2015, he stated that 90 days had expired by the time it was registered and that he attached the sale agreement in the application to register the said caveat.
 18. He also stated that he did not report the matter to the police but his lawyer made a complaint to Law Society of Kenya and he did not get a reply. He further stated that he did not seek to recover the deposit from M/S O.H Momanyi & Company Advocates and that he (Advocate) is not enjoined in this suit.
 19. When he was re-examined and referred to the sale agreement, he stated that the same was drawn by M/S O.H Momanyi & Company Advocates and refers to the title and the suit property. When he was referred to the letter dated 4th August 2015, he stated that his Advocates confirm in response to the Respondent's Advocates that the rates clearance certificate was availed to his (Applicant's) lawyers.
 20. He also stated that M/S O.H Momanyi & Company Advocates is an interested Party in this suit and that he has not given any evidence to the contrary. He further stated that his Advocates demanded a refund of the deposit and that he has also sought the same. He added that the vendor is Franklin Kariuki Kurigia and his Advocate has not denied that he received the money on behalf of the Respondent.
 21. PW2, Gildine Gatwiri Karani, the Principal Land Registrar testified on 23rd November 2021. She had the file in respect of L.R No.209/10690(IR NO.53391). She told the court that there was a caveat placed against the title by Mavji Harji Raghvani claiming purchaser's interest. She added the requirements for registration of caveat in this case is to present a sale agreement, Kenya Revenue Authority Pin Certificate and a National Identity Card. He further stated that he cannot tell if a search was conducted on the title but there is a sale agreement between the Applicant and the Respondent, the Respondent's Identity Card, Kenya Revenue Authority (KRA) Pin Certificate and special resolution for Multiline Services Limited.
 22. She stated that the two titles in court are in respect of the same parcel of land and that both have same entries in terms of registered names. He added that the current owner is Franklin Kariuki Kirigia. He further stated that the title to the suit land is an old title registered in 1991 when a different quality of paper was used. He added that the title produced as PEX1 is printed on a paper that is currently being used thus it cannot be the one used in 1991. He testified that the endorsement of 'stamp duty' is bigger than the one in the title in their records and the receiving stamp is also different from the one in their records. It was also her testimony that the seal is not clear and it does not bear a correspondence file.



23. She also told the court that EX-D1 has No.119432 and the signature therein fully tallies with the one in their records while EX- P1’s signature does not tally with the signature on the title in their records and neither do the entries tally but in EX-D1 and the copy in their record, the entries correspond. It was his testimony that EX-P1 does not emanate from their office. She was not cross-examined.

Evidence of the Defendant

24. DW1, Franklin Kariuki Kirigia testified on 23rd November 2021. He told the court that he is the registered owner of the suit property LR No.209/10690(IR 53391) measuring 0.128 ha. His witness statement dated 30th November 2018 and his replying affidavit sworn on 31st January 2017 were adopted as part of his evidence in chief.
25. He told the court that he does not know the Plaintiff, he only saw him in this court. He stated that he did not sign any agreement to sell the suit property to the Plaintiff or anyone else. Referring to the vendor’s name on the sale agreement dated 13th March 2015, he stated that his name is Kirigia not Kirigi as indicated and that the signature therein is not his. Referring to the letter from M/S O.H Momanyi & Company Advocates dated 4th August 2015, he stated that he does not know about the firm and that he has never dealt with anybody from the said firm. He testified that he did not receive any money relating to the suit property as he was not selling the suit property. He produced an extract of OB No.45/1/2/2017 and stated that he reported the matter at Langata police station on 1st February 2017. He prayed that the suit be dismissed and the caveat entered using a forged document be lifted. He also prayed for damages, costs of the suit and interest.
26. When he was cross-examined, he stated that he learnt of this matter through an advertisement in the Daily Newspapers and his lawyers informed him of the notice. He further stated that he reported to the police on 1st February 2017 and that the people who allegedly sold the suit property were fraudsters. He stated that Mr. OH Momanyi Advocate was not arrested and he does not know the outcome of the investigations. When referred to his claim for damages, he stated that he did not file suit to claim damages but he did so through the replying affidavit.
27. When he was re-examined, he stated that he saw the advertisement seeking him to appear in court but he did not see the one they advertised his suit property for sale.
28. At the close of the oral testimonies, parties tendered final written submissions.

The Applicant’s submissions

29. They are dated 26th April 2022. Counsel for the Applicant submitted that issues for determination are as follows:-
- a. Whether there was an agreement for sale with regards to the property title L.R No 209/10690?
 - b. Whether it was the Respondent who signed the sale agreement and whether it was valid?
 - c. Which of the two titles held by both the Applicant and the Respondent is genuine?
30. It was counsel for the Applicant’s submission that the only dispute is whether the Respondent is the same person who signed the agreement dated 13th march 2015. He further submitted that the



Respondent who gave evidence declined that he was the person who signed the documents and that the Applicant equally admits that he had never seen the Respondent who was in court before.

31. On the issue of the genuine of titles held by the Applicant and the Respondent, counsel conceded that the land registrar who attended court confirmed that the title belonging to the Respondent was the one issued by the lands office of Nairobi and it is the one to be recognized.
32. He submitted that the interested party being an advocate intentionally assisted in defrauding the Applicant of Kshs 1.5 million. He urged the court can make a recommendation to the law society of Kenya to take action against him for his conduct. He also urged the court to exercise its mandate as enshrined in Article 47 of [the constitution](#) to ensure that fair administrative action is undertaken and proceed to order the police to investigate the interested party for the fraudulent transaction herein.

The Respondent's submissions

33. They are dated 18th February 2022. Counsel for the Respondent submitted that the following issues arose for determination:-
 - a. Whether the Respondent entered into a sale agreement of the suit property with the Applicant vide the sale agreement dated 13th March 2015.
 - b. Whether the Respondent received any monies from the Applicant as proceeds of sale of the suit property.
 - c. Which of the 2 original titles held by the Applicant and the Respondent respectively is the genuine title to the suit property.
 - d. Whether the Applicant is entitled to any reliefs as against the Respondent.
34. It was counsel for the Respondent's submission that the Applicant failed to discharge his burden of proof by failing to prove allegations against the Respondent. He added that the Applicant failed to establish that the sale agreement dated 13th March 2015 was executed by the Respondent and failed to establish that he paid the Respondent Kshs.1.5 million as deposit of the purchase price of the suit land. He relied on the Supreme Court case of [Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others](#) [2014] e KLR.
35. On the issue of authenticity of the titles held by the Applicant and the Respondent, he submitted that PW2 testified that the genuine/authentic title to the suit property was the one in possession of the Respondent. He put forward the case of [Jonathan Namulala Nyongesa v Muli Business Schoolers Investors Ltd & 3 others](#) [2017] e KLR.
36. On whether the Applicant is entitled to any relief, he submitted that in the absence of evidence that the Respondent received money from the Interested Party who was acting for the purported vendor in consideration for the suit property, the Applicant is not entitled to the equitable relief of specific performance. He relied on the case of [Reliable Electrical Engineers Ltd v Mantrc Kenya Limited](#) [2006] eKLR to submit that the Applicant cannot invoke the relief of specific performance on a defective contract that lacks the key ingredient of consideration.
37. He also submitted that since the Respondent proved that he did not execute the sale agreement, he cannot be bound by the terms of the said agreement. He relied on the case of [Gallie v Lee & Another](#) [1969] 1 ALL ER 1062 which was quoted with approval by the Court of Appeal in [Josephine Mwikali Kikenye v Omar Abdalla Kombo & Another](#) [2018] e KLR.



38. He prayed that the court directs that the caveat registered against title to the suit land by the Applicant be removed and that the fake title in possession of the Applicant be surrendered in court or the director of criminal investigations for directions.
39. I have considered the Originating Summons, the affidavits in support and the response thereto. I have considered the evidence tendered, the written submissions and the authorities cited. The issues for determination are:-
1. Was the Respondent the vendor in the sale agreement dated 13th March 2015?
 2. Did he receive Ksh.1.5 million being the deposit of the purchase price?
 3. Is the Applicant entitled to the reliefs sought?
 4. Who should bear costs of this suit?
40. It is the Applicant's case that he entered into a sale agreement with the Respondent on 13th March 2015. It was in respect of LR No 209/10690 (IR 53391) situated in Nairobi. The purchase price was agreed at Kshs.15 million. The applicant paid 10% which translates to Kshs.1.5 million to the Respondent who was represented in the transaction by the firm of M/S O.H Momanyi & Company Advocates (Interested Party). It is the Applicant's case that the Respondent has refused to sign the transfer in his favour. He prays that he be compelled to execute the said transfer.
41. The Applicant in his testimony told the court that the suit property was advertised on the Daily Nation Newspaper. He called the telephone number provided and the person told him he knew the owner of the suit property that was being offered for sale. In his testimony the Applicant stated:-
- “We agreed to meet. I asked the person to come to my lawyer's office. The real owner came to my lawyer's office. He came with Mr. O.H Momanyi Advocate. They agreed on the terms of the sale and the purchase price. A sale agreement was prepared by my lawyers.....”.
42. From the above averments it appears the Applicant was not at his lawyer's office when the person, the “real owner” and Mr. O. H. Momanyi went to his lawyer's offices.
43. The Applicant was represented in the transaction by M/S Lalji Raghvani Advocates while the vendor was represented by Mr. Hesbon Momanyi of M/S O. H Momanyi & Company Advocates.
44. The Applicant in his testimony did not tell the court whether the real owner of the suit property is the Respondent herein. When he was cross-examined by the Respondent's counsel he stated:-
- “I met the person when he came to my office. I saw him again when he introduced the owner of the suit property”.
- I find that the Applicant could not say for certain that the said owner of the suit property he intended to buy was the Respondent herein. I find that he failed to identify the Respondent as the vendor in the said transaction.
45. The Respondent on the other hand, told the court that he is the registered owner of the suit property LR NO 209/10690 (IR 53391). He stated that he did not know the Applicant before he saw him in court. He denied that he had sold the suit property to the Applicant or anyone else. He denied that he executed the sale agreement dated 13th March 2015 and that the signature is not his.



46. He stated that he did not know any advocate from the firm of M/S O. H. Momanyi & Company Advocates who purported to act for him in the transaction. He said that he only learnt of this suit in an advertisement on the Daily Nation Newspapers. He was not aware of the transaction and that his original title is intact. He has never surrendered it.
47. From the foregoing, it is clear that the Respondent herein was not the vendor in the sale agreement dated 13th March 2015.
48. PW1, the Applicant told the court that the deposit of Kshs.1.5 million was paid to the firm of M/S O. H. Momanyi & Company Advocates. The money was paid through cheques which were received by someone in the said law firm by the name Catherine Omoke on the 5th June 2015. The Applicant did not produce copies of the said cheques as exhibits. When he was cross examined by the Respondent's counsel he stated that he did not make any report to the police regarding the failed transaction nor did he seek to recover the money from M/S O. H. Momanyi & Company Advocates.
49. The Respondent denied that he received any money as he was not selling the suit property. He reported the matter to Langata Police Station when he learned that someone was claiming to have bought the suit property. He produced an extract of OB No 4/5/1/2/2017 as exhibit in this case. This is someone who was certain that he had not sold the suit property. It is clear that Kshs.1.5 million was paid to the firm of M/S OH Momanyi & Company Advocates and not the Respondent herein.
50. There are two titles produced in respect of the suit property one by the Applicant and the other by the Respondent. The Respondent told the court that he has always had his original title to the suit property. PW2, Gildine Gatwiri Karani a Principal Land Registrar confirmed that the title in the Respondent's possession is the genuine title according to the records held by the Chief Land Registrar. She confirmed that the signature in exhibit D1 (Respondent's title) tallies with the one in the custody of the Chief Land Registrar. She concluded that the title produced by the Applicant Exhibit P1 did not emanate from the office of the Chief Land Registrar and that it did not have a correspondence file.
51. The Respondent also pointed out that the name in the sale agreement dated 13th March 2015 is given as Karigia on the first page yet his name is Kirigia. On the last page his name is given as Kirigi yet he is Kirigia. He has also denied the signature on the last page. It is not his.
52. It appears that the Applicant is a victim of fraudsters. His lawyers also failed to do due diligence. It is not clear whether the Applicant visited the suit property before entering into the sale agreement.
53. The person at the center of this fraud is Mr. Hesbon Momanyi Advocate, the Interested Party. Despite being joined to these proceedings he refused and/or neglected to attend court to shed light on this matter. He declined to honour summons by this court requiring him to attend court. There is evidence that he received Kshs.1.5 million being the 10% deposit. He authored the letter dated 4th August 2015 requesting for additional Kshs.2 million from the Applicant contrary to the terms of the Agreement dated 13th March 2015.
54. The Applicant ought to take the necessary steps to hold the said Advocate accountable in the manner in which he handled the alleged transaction. He should seek to recover the deposit from the said Advocate. The said Advocate's unwillingness to honour summons from this court and his conduct in the transaction makes him an accomplice to fraud. The interested party and the imposter knew the sale transaction was fraudulent. I find that the Applicant is not entitled to the reliefs sought.
55. The Applicant admitted that he caused a caveat to be placed against the Respondent's title on 22nd June 2015 claiming purchaser's interest. He had only paid 10% deposit.



56. In paragraph F of his replying affidavit, sworn on the 31st January 2017, the Respondent states:-

“The Applicant has also lodged a caveat against my title based on a fake sale agreement. I urge this honourable court to remove the said caveat so that I may be able to deal with my property as I please. The caveat is an encumbrance over my property. It should be removed forthwith”

57. In my view, this response amounts to a cross suit. The caveat was improperly placed since the Respondent has not sold the suit property. He has not been able to deal with the suit property since 2015. He has suffered loss and he is entitled to compensation.

58. I find that the caveat was improperly placed and it ought to be removed. Section 75 of the Land Registration Act, 2012 provides that:-

“Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

59. I award Kshs.200,000/- which I think is reasonable.

60. In conclusion, I find that the Applicant has failed to prove his claim as against the Respondent on a balance of probabilities. The Applicant’s suit is dismissed with costs to the Respondent.

61. The Chief Land Registrar is hereby ordered to remove the caution registered against the Title LR NO 209/10690 (IR 53391) forthwith. The Respondent is awarded Kshs.200,000/- being compensation for the wrongful caution.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 14TH DAY OF JULY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wanyama for Mr. Kangethe advocate for the Applicant

Ms Ndinda for Mr. L. Mbaabu for the Respondent

Steve - Court Assistant

