



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 156 of 2008

KHEIRA OMAR MAALIM ..... PLAINTIFF

VERSUS

NEW LOOK ESTATES LIMITED ..... 1<sup>ST</sup> DEFENDANT

PRESTIGE HOUSING LIMITED ..... 2<sup>ND</sup> DEFENDANT

R U L I N G

The application before the Court is brought by a Chamber Summons dated 18<sup>th</sup> December, 2009, and taken out under **Order VI Rules 13 (1) (b), (c) and (d) and 16 of the Civil Procedure Rules**. By the application, the 2<sup>nd</sup> Defendant applies for orders that this honourable Court be pleased to strike out the plaint filed herein on 27<sup>th</sup> March, 2008, and that costs of this application be provided for.

The application is supported by the annexed affidavit of Birre Hussein Miri, a Director of the 2<sup>nd</sup> Defendant, and is brought on the grounds that –

- 1. The Plaintiff entered into an agreement of sale with the 1<sup>st</sup> Defendant and its nominee in respect of parcel of land known as L.R. No.36/II/4 Eastleigh Estate, Nairobi.*
- 2. The said agreement was duly executed by the parties and therefore binding.*
- 3. Despite the foregoing, the Plaintiff now seeks to avoid the agreement under the guise of amendment and/or rectification.*
- 4. For the above reasons, the plaint is frivolous, scandalous, vexatious and otherwise an abuse of this honourable Court.*
- 5. A transfer of the suit land has already been effected and for that reason there is nothing arguable in the suit.*

**6. It is in the interests of justice that the plaint herein be struck out or in the alternative the case against the 2<sup>nd</sup> Defendant be dismissed.**

Opposing the application, the Respondent, Mrs. Kheira Omar Maalim, filed a replying affidavit sworn on 17<sup>th</sup> March, 2010. In that affidavit, she avers that upon filing the said suit, her Advocates subsequently filed a Chamber Summons application dated 26<sup>th</sup> March, 2008, seeking *inter alia* for injunctive orders against the Defendants herein and in which Justice L. Kimaru delivered a ruling on 6<sup>th</sup> June, 2008, dismissing the application with costs. Dissatisfied with that decision, the deponent instructed her Advocates to lodge an appeal and they duly filed a notice of appeal dated 6<sup>th</sup> June, 2008. Subsequently, **Civil Application No. 132 of 2008** was filed in the Court of Appeal seeking a temporary injunction and/or stay of execution. The said application was also unsuccessful.

As a result of her failure in the High Court and also in the Court of Appeal, the Respondent now deposes that if the reliefs sought are granted, the matter will be supposedly determined at an interlocutory stage whereas there are very grave and weighty triable issues that need to be adjudicated upon, and therefore a determination at this stage would only amount to a miscarriage of justice. Furthermore, she contends that this Court lacks the jurisdiction to entertain the reliefs sought by the Applicant as it has not been demonstrated as to what is scandalous, frivolous, vexatious or being an abuse of the process of the Court. She therefore urges the Court to maintain the suit pending the determination of her appeal by disallowing the prayers sought in this application.

With the leave of the Court, the parties herein filed written submissions. After considering those submissions, I find that the only issue to be determined in this matter is whether or not the plaint in this suit ought to be dismissed or struck out.

The plaint filed herein sought judgment against the Defendants, jointly and severally, for –

- (a) A declaration that the sale agreement and sale transaction concerning the agreement for sale executed on 1<sup>st</sup> November, 2007, between the Plaintiff and the 1<sup>st</sup> Defendant has wholly failed and is unenforceable and is cancelled and/or declared null and void and of no effect.**
- (b) A declaration that the Plaintiff on the sale agreement aforesaid being rectified, cancelled, rescinded and/or declared null and void as aforesaid is entitled to deduct and indemnify herself against the special damages suffered as shown in paragraph 12 herein above and to pay to the 1<sup>st</sup> Defendant a refund of the sum of Kshs.79,352,087.40 and/or such other sums as may be found fair and just.**
- (c) A permanent injunction restraining the Defendants and/or anyone of them, their agents, employees and servants in singular and/or in plural**

*from trespassing and registering and/or attempting to register and/or from transferring the dispute property to the Defendant and/or to anyone of them, their agents, nominees and/or other person obtaining title from any of the Defendants herein.*

- (d) A mandatory injunction order be issued directing the Defendants to return, release, surrender the Title and/or completion documents to the Plaintiff's order and/or the concerned Chase Bank Advocates namely, Anjarwalla & Khanna Advocates.*
- (e) General and exemplary damages.*
- (f) Costs of the suit.*
- (g) A declaration that interest on (ii) above does not accrue against the Plaintiff.*
- (h) Interests on damages and costs aforesaid.*

Contemporaneously with the plaint, the Plaintiff also filed an application by Chamber Summons dated 26<sup>th</sup> March, 2008 and filed in Court the following day. The application sought two main orders –

- (i) That the Defendants by themselves, agents, servants, employees, their legal counsels or anyone taking title from any of them howsoever described be and are hereby restrained from transferring, interfering with the Plaintiff's possession and peaceful and quiet enjoyment, processing the transfer and/or the indenture for registration, alienating, assigning, letting and/or subletting any of the business stalls and premises situated in the building and the property otherwise known as L.R. No.36/II/4 situated in Eastleigh, Nairobi, until this suit is heard and determined and/or further orders of this Honourable Court.*
- (ii) An interlocutory mandatory injunction order be hereby issued directing and/or ordering the Defendants by themselves or any of them, their agents, servants, employees and/or howsoever described to deliver, surrender, and/or return the Title and indenture and/or completion documents concerning the agreement for sale dated 1<sup>st</sup> November, 2007 between the 1<sup>st</sup> Defendant and the Plaintiff to the Plaintiff and/or to her order and/or to her Advocates, and her bankers namely, Chase Bank (K)*

***Ltd. of Wabera Street, Nairobi pending the full hearing and determination of the suit herein and.or further orders of the Court.***

After hearing this application, the Hon. Justice Kimaru dismissed it with costs, stating in the last two paragraphs of his ruling as follows –

***“Can this Court grant the orders of interlocutory injunction sought by the Plaintiff? I do not think so. The Plaintiff has failed to establish a prima facie case to enable this Court find in her favour. Her undue concern for the interest of the tenants in the suit premises is just but an excuse to justify her change of mind regarding the agreement for the sale of the suit property. If the Plaintiff is aggrieved in the manner by which the agreement was executed, damages would be adequate remedy. In fact, the Plaintiff has quantified the damages she expects to be awarded in the event her case were to be successful.***

***I therefore find no merit with the Plaintiff’s application dated 28<sup>th</sup> March, 2008. The said application is dismissed with costs to the Defendants. For the interest of justice, this Court will invoke its inherent jurisdiction and direct that the Defendants are at liberty to proceed to the Lands Office and have the 2<sup>nd</sup> Defendant registered as the owner of the suit premises being L.R. No.36/II/4 Eastleigh, Nairobi.”***

Aggrieved by this ruling, the Respondent filed **Civil Application No.132 of 2008** in the Court of Appeal. Among the orders she sought was a stay of the orders made in the penultimate paragraph of Hon. Justice Kimaru’s ruling quoted herein above. In their reaction to that request, the Justices of the Court of Appeal remarked as follows –

***“In all the circumstances of this case we are not persuaded that the Applicant has shown that her intended appeal is arguable and that if we refused to grant the reliefs sought her intended appeal would be rendered nugatory. In the result, we order that the application be and is hereby dismissed with costs.”***

Resulting from the ruling of Kimaru, J. and the decision of the Court of Appeal, it is on record that the 2<sup>nd</sup> Defendant to the suit has already been registered as the proprietor of the suit property. Consequently, it would seem that the prayers sought in the plaint filed in Court on 27<sup>th</sup> March, 2008 have since been overtaken by events. One of the Plaintiff’s concerns is that the agreement leading to the sale of the property was riddled with irregularities. However, all that is now history. Although by the completion date the Applicants had not remitted all the money, without raising a voice, the Respondent accepted all the balance of the purchase price even though it was paid out of time. By so doing, she certainly waived her right to claim any breach for non payment of the purchase price within the agreed period. And not only did she accept late payment of the final instalment of the purchase price, but she also forwarded to the purchasers Advocates all the conveyance documents. And, as of now, the 2<sup>nd</sup> Defendant is already the registered proprietor of the suit property.

Against that background, it seems to be reasonable to deduce that the claim that the agreement leading to the sale was faulty was an afterthought. In the case of **NATIONAL BANK OF KENYA LTD. v. PIPEPLASTIC SAMKOLIT (K) LTD & ANOR.** (2001) KLR 112, the Court of Appeal observed at page 118 –

*“... A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud, or undue influence in regard to the terms of the charge as was stated by Shah, J.A. in the case of FINA BANK LTD. v. SPARES & INDUSTRIES LTD. CIVIL APPEAL No.51 of 2000*

*‘It is clearly beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is no part of equity’s function to allow a party to escape from a bad bargain.’*

If the Respondent herein envisages that she entered into a bad bargain, she has only herself to blame. It is too late in the day to reverse the agreement upon which the sale was based. Otherwise the Court would not have ordered the 2<sup>nd</sup> Defendant to be registered as the proprietor of the suit premises. In the context of the ruling of Hon. Justice L. Kimaru, and that of the Court of Appeal, the plaint in this matter is deprived of all substance and is a mere shell. It does not pay to retain it on the Court records. It is accordingly struck out with costs as prayed.

It is so ordered.

**Dated and delivered at Nairobi** this 27<sup>th</sup> day of May, 2010.

**L. NJAGI**

**JUDGE**