



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

Civil Case 114 of 2009

SIMON ERIC MITEMA & ANOTHER.....PLAINTIFF

VERSUS

LUCY MENEL & 3 OTHERS.....DEFENDANT

RULING

The plaintiffs have filed this action against the four defendants vide a plaint dated 6th day of March 2008 and filed on 11th March 2009. The main complaint in the same is briefly that in the month of February 2009 the 1st, 2nd and 3rd defendants made representations to the plaintiffs that the first defendant was offering for sale LR No 196/23 Karen.

- In pursuance of the said representations, the first plaintiff who holds bank account number 1633/03 with the 4th defendant and in agreement with the second plaintiff approached the 4th defendant and issued instructions to the 4th defendant to issue bankers cheques, and one was issued dated 27th February 2009. The second plaintiff who holds account number 8391201 also with the 4th defendant gave similar instructions and was issued with bankers cheque number 637862 dated 25th February 2009.

Despite compliance on their part of the contract, the first defendant refused to sign the sale agreement and it transpired that it came to the plaintiffs knowledge that in fact the 1st defendant was not infact selling her said property. By reason of this revelation, the plaintiffs concluded that they had been misled into participating into an apparent fraudulent transaction. They quickly moved to this court, presented the current suit, simultaneously with an interim application.

The application is brought under certificate of urgency brought under order 39 rules 1,2 and 3 of the CPR and section 3A of the CPA and all enabling provisions of the law. Four prayers are prayed for. The centrol prayer is found in prayer 2 and 3 which is to the effect that the honourable court, be pleased to issue a temporary order for injuction to restrain the 4th defendants whether by themselves their servants, agents and or employees from clearing for payment and or releasing the sum values of Bankers cheque number 637862 for Ksh 2 million dated 25th February 2009 drawn in favour of Sarah Mutinda & company advocates and bankers cheque number 379171 for Ksh 1 million dated 27th February 2009 drawn in favour of Sarah Mutinda & Company Advocates and a consequent order that the subject sums be released to the plaintiffs in the first instance, pending the hearing and determination of the application and in the second instance pending the hearing and determination of the suit.

The application as well as the accompanying documents were served on all the defendants. A return of service affidavit sworn on this 18th day of March 2009 and filed on the same 18th March 2009 indicates

that all the defendants were served. Two namely the second and the 4th defendants' acknowledged receipt of the processes and filed replying affidavits. Where as the other two namely the 1st and 3rd defendants declined to acknowledge service of the said papers and filed no replies.

The sum total of the 2nd defendants' reply in his replying affidavit sworn on 19th March 2009 and filed on 19th March is found in paragraph 4,5,7 and 8. It is to the effect that he does not know the plaintiffs, he has never met them, and that his letter head exhibited was a forgery. The 4th defendant on the other hand has filed a replying affidavit deponed on 18th March 2009 and filed on 19th March 2008. The total effect of the content in that deponement is that indeed the plaintiffs gave instructions for the issuance of bankers cheques. Upon receipt of the interim orders they withheld the release of the funds to the 1st defendant.

Due consideration have been made by this court, of the above facts and the court, proceeds to make the following findings.

- There is no dispute that there was a purported sale transaction.
- No dispute that the plaintiff moved to pay for the said transaction.
- The defendants failed to meet their obligation.
- When the deal failed to materialize, the plaintiffs moved to protect their money and prevent the same from being released to the 1st defendant.
- The 1st and 3rd defendants have not come to defend or refute the averments and the deponements. There is therefore nothing to stand in the path of the plaintiffs and prevent them from getting back their money. The defendants stand to loose nothing as no prejudice will be suffered by them.

There is merit in the applicants' complaint. Prayer 3 is allowed to the extend that money currently held by the 4th defendant being proceeds of bankers cheques No. 637862 and 379171 be released to the plaintiffs.

(2) The 1st and 3rd defendants will pay costs of the application.

(3) No order for costs will be made against the 2nd and 4th defendant.

Dated, Read and delivered at Nairobi this 25th day of March 2009.

R.N.NAMBUYE

JUDGE