



ALOYSIUS NDUNGU GAKUNGA PLAINTIFF

VERSUS

ANDREW JOSEPH KARANJA 1ST DEFENDANT

LUCY NYOKABI KARANJA 2ND DEFENDANT

RULING

The suit herein was commenced by way of a plaint on the 5th of May, 2006. A Chamber Summons was filed simultaneously with the plaint. The Chamber Summons sought for injunctive orders against the defendants. The plaintiff in his plaint sought for an order to transfer the subject matter of the suit namely Property L. R. No 21137/3 to himself. In paragraph 11 of the plaint, the plaintiff stated that he had paid the full purchase price. Save **Kshs. 200,000/=** the Plaintiff paid to their joint advocate. The parties used one lawyer for the conveyance of the property subject matter herein.

In the defence filed on the 9th June, 2006, the defendants stated that they were ready and willing to transfer the property as long so the balance of **Kshs. 200,000/=** was paid to them. They deemed the suit unnecessary.

It is a pity that a matter so straight forward should take so many years to complete. The advocates who ought to have assisted the parties unfortunately complicated the matter. Several applications were filed which left the matter pending unnecessarily. This includes the current application.

The matter was last in court before Kubo J. on the 25th of September, 2009, on the said date a consent was as recorded as follows:-

- “1. Plaintiff/Applicant to file and serve written submission within 14 days.**
- 2. Defendants to file and serve written submissions within 14 days of service, with corresponding leave to Plaintiff /Applicant to file a reply if necessary within 7 days of service.**
- 3. Mention on 17th November, 2008.**

On the 17th of November, 2008 the matter was mentioned and the date for ruling was set for 16th December, 2008. However the ruling was not delivered. Kubo J. has since retired. By a letter dated 9th July, 2009 the Honourable the Chief Justice allocated this file to me for directions. What was left pending by Kubo J. was ruling on the issue of costs, I am obliged to deliver the long outstanding ruling which I

hereby do.

My study of the file, as stated above indicate that the issues herein were simple and straight forward. In my view the matter dragged on due to the various applications, & adjournments sought by the counsels on record for the parties. That as it may the brief facts that will inform the ruling on the pending issues are as follows.

The parties entered into an agreement for the sale of the property known as **L. R. No. 21137/3** (I. R. No. 68134) on the 15th of April, 2003. The purchase price was **Kshs. 2.8 million**. A deposit of **Kshs. 280,000/=** being the 10% deposit was paid directly to the Defendants who were the vendors. The only condition relevant to the case was:-

“The balance of Khs. 2,520,000/= to be paid to the vender upon registration of the Title documents in the name of the purchaser and not later than 17th June, 2002.”

The Agreement for sale is annexed as Annexure No. “**ANGI**” to the Plaintiffs affidavit dated 4th May, 2006. From other annexures and the pleadings on record the transaction was not concluded on 17th June 2002 in accordance with the said sale agreement, as the plaintiff in the cause of the transaction requested and/or imposed other conditions i.e. provision of water and access road which did not form part of the conditions of sale upon signing of the agreement. It appears that this issue was the borne of contention for a while, the purchaser was given possession at some point however the Defendants did not then sign the transfer as the Plaintiff released a cheque for the balance to their joint advocates on condition that the same should not be released to the vendors. Upto this point **Kingori & Kariuki Advocates** acted for both parties.

By the 11th of February, 2005 the Plaintiff instructed **P. M. Wamae & Co. Advocates** and wanted confirmation he would receive completion documents if the balance of **Kshs.200,000/=** was to be paid to the Defendants. Several letters were exchanged between the respective counsels, on who should do what first, culminating with the institution of this suit.

I have considered the pleadings and the written submissions by learned counsel for the parties. The issue before the court is who of the 2 parties should be awarded costs of the suit.

The Plaintiff’s contention is that he substantially succeeded in the suit he filed and therefore he should be awarded costs unless for good reasons. On the other the defendants contend that the Plaintiff was in breach of the sale agreement by failing to clear the balance of the purchase price and that the suit was unnecessary and could have been avoided if the plaintiff had paid the balance of the purchase price on time, therefore the defendants ought to be awarded costs.

I take cognizant of the fact that this matter never went to full trial and the fact that no pre-trial steps had been taken. The suit was concluded through applications. Indeed the main contention was settled on 18th of August, 2006 and 23rd February, 2007 through the orders of **Emukule J.** and **Aganyanya J.** respectively. However the matter has remained pending due to the issue of costs.

Section 27 of the Civil Procedure Act provides:-

“(1) Subject to such conditions and Limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for purposes aforesaid, and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reasons otherwise order.

(2) The court or Judge may give interest on costs at any rate not exceeding fourteen percent per annum and such interest shall be added to the costs and shall be recoverable as such.”

I do not agree with the Plaintiff’s submission that he has substantially succeeded. To my mind both parties have heard their issues sorted in that.

1. The balance of the Purchase Price which the Plaintiff had withheld pending “new” conditions being fulfilled was released to the defendants.

2. The transfer and other completion documents that were withheld by the Defendants were released to the plaintiff.

I note once again that the matter became unnecessarily protracted partly due to the positions taken by advocates for both parties. For the aforesaid reasons I consequently decline to order costs of this suit in favour of any of the parties and order that each party bears its own costs.

These are the orders of the court.

Dated and delivered this 27th October, 2009.

ALI- ARONI

JUDGE