

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

Civil Suit 214 of 2004

KAGUANJAI BUILDERS LIMITED.....1ST PLAINTIFF

CHARLES KINYANJUI MWAURA.....2ND PLAINTIFF

-VERSUS-

MATIC CONTRACTORS LIMITED.....1ST DEFENDANT

STEPHEN MBURU KINYANJUI.....2ND DEFENDANT

MILTON NJOROGE.....3RD DEFENDANT

R U L I N G

The 1st and 2nd defendants filed this application purportedly under the provisions of **Order VI A Rule 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking the following orders of the court:

- (a) That the 1st and 2nd defendants be granted leave to amend their defence in terms of the Draft Amended Defence annexed hereto.
- (b) That the suit be transferred to the Civil Division or the Land and Environmental Law Division of the High Court of Kenya.

The grounds in support of the application are on the face of the application. The 1st and 2nd defendants contend that Mr. P. M. Gachoka, the advocate for the plaintiff, had participated in the sale and purchase transaction which is the subject matter of the suit. The said defendants were of the view that it would be necessary to amend their defence so that they can bring out clearly the played by the said advocate in the said transaction. The 1st and 2nd defendants further stated that the issues in dispute in this case relate to the construction and interpretation of the sale and purchase contracts and further, matters affecting or ancillary to land law. It is for that reason, that the 1st and 2nd defendants were applying that this suit be transferred to the newly created Land and Environmental Law Division of the High Court from this court which only deals with commercial and tax matters. The said defendants were of the view that the plaintiffs would not be prejudiced by the said transfer.

The application is opposed. Charles Kinyanjui Mwaura, the 2nd plaintiff swore a replying affidavit in opposition to the application. He deponed that the application was frivolous and yet another mischievous attempt by the said defendants to frustrate the hearing of the case. He deponed that, at no time did his present advocate act on his behalf during the sale transaction that is the subject matter of the suit. He deponed that the advocate who drew the agreement was one Kabiro Ndaiga and not P. M. Gachoka. He deponed that the issue in dispute relate to refund of the purchase consideration which was a monetary claim properly before this court and not *per se* a land dispute. He urged this court not to order the transfer of the suit to another division of the High Court.

At the hearing of the application, I heard the submissions made Mr. Amolo on behalf of the 1st and

2nd defendants and by Mr. Gachoka on behalf of the plaintiff. Mr. Amolo abandoned the prayer in respect of which the 1st and 2nd defendants had sought to amend their defence so as to plead the alleged role played by the advocate for the plaintiffs. He made submission in respect of the second limb of the 1st and 2nd defendants' application seeking an order of transfer of the suit from this court to the Land and Environmental Law Division of the High Court. He submitted that since the creation of the above division which dealt exclusively with land matters, this court should exercise discretion and order the transfer of this suit to the said division for hearing and final disposal. He submitted that the matters in dispute in this case basically related to land. He submitted that the 1st and 2nd defendants were aggrieved by the decision of the Minister of Lands who had issued a gazette notice to the effect that the land which was the subject matter of the suit was a road reserve and could not therefore be alienated to individuals. He submitted that the said defendants were lawful beneficiaries of letters of allotment issued by the Government in respect of the land that is the subject matter of this suit. He maintained that although the plaintiffs were seeking the refund of the purchase consideration and restitution of stamp duty and registration fees, the subject matter of the suit was actually land which should be ideally heard and determined in the new Land and Environmental Law Division of the High Court. He urged the court to allow the 1st and 2nd defendants' application.

Mr. Gachoka for the plaintiffs opposed the application. He submitted that this was yet another application by the defendants to frustrate the hearing of the case. He submitted that the 1st and 2nd defendants had made previous applications before this court which were dismissed as lacking in merit. He maintained that this court had jurisdiction to hear and determine the matters in dispute in this court. He submitted the creation of the Land and Environmental Law Division of the High Court did not imply that all cases touching on land would be heard in the said division. He insisted that the issues in dispute in the present suit related to the refund of the purchase consideration which was paid to the 1st and 2nd defendants. The fact that the purchase consideration was paid in respect of land, did not mean that the dispute related to land. He submitted that the issue before the court was not the validity of the titles in respect of the suit parcels of land, but rather whether the plaintiffs are entitled to be refunded the purchase consideration which they paid in respect of land which could not be availed. He reiterated that the plaintiffs' suit against the defendants related to the plaintiffs' assertion that the defendants had fraudulently obtained money from him under the guise that they were selling land to him. He urged the court to disallow the application.

I have carefully considered the rival submissions made by the opposing parties to this application. The issue for determination by this court is whether the 1st and 2nd defendants have made a case to enable this court order the transfer of this suit from this court to the newly created Land and Environmental Law Division. The 1st and the 2nd defendants argued that since a division of the High Court had been created that dealt specifically with land cases, this court ought to order the transfer of this suit to the said division for hearing and final disposal. The 1st and 2nd defendants are of the view that the issue in dispute in this suit relate to land. The plaintiffs are of the contrary view. They opposed the application and insisted that this suit is properly before this court because the plaintiffs were seeking to be refunded money which they paid to the defendants for a consideration that wholly failed. The plaintiffs are of the view that the issue in dispute is of a commercial nature and therefore the suit is properly before this court.

It appears to this court that the 1st and 2nd defendants are labouring under misconception that the establishment of the new Land and Environmental Law Division of the High Court at Nairobi divested this court of jurisdiction to hear and determine the matters of this court. The creation of the Land and Environmental Law Division of the High Court does not imply that this court has ceased to have jurisdiction donated to it under Section 60 of the Constitution. I have perused the plaint and the statement of defence filed by the defendants. It is evident that the plaintiffs are seeking refund of the purchase consideration which they paid to the defendants. The fact that the purchase consideration allegedly paid was in respect of land, did not transform the dispute to a land dispute. The plaintiffs are not claiming to be awarded land, neither are they claiming title to land. They are seeking this court's intervention for the purchase consideration which they had paid to be refunded to them. That is a dispute which this court has jurisdiction to hear and dispose of.

I therefore hold that the application by the 1st and 2nd defendants is unmeritorious. It is for dismissal. It is hereby dismissed with costs.

DATED at NAIROBI this 21st day of May 2008.

L. KIMARU

JUDGE