

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 474 of 2008

JERRY MAGUTU.....1ST PLAINTIFF

JUSTINE MOKEIRA MAGUTU.....2ND PLAINTIFF

- VERSUS -

HENRY MWANGI MUNYIRI1ST DEFENDANT

DAVID GIKUNDA MIRITI

T/A GIKUNDA MIRITI & CO. ADVOCATES.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

R U L I N G

The plaintiffs, Jerry Magutu and Justine Magutu entered into an agreement for the purchase of L.R. No. 209/7989 (*hereinafter referred to as the suit property*) situate within the city of Nairobi from the 1st defendant, Henry Mwangi Munyiri. The purchase consideration for the suit property was agreed at KShs.25,000,000/= . The 1st defendant, through his advocate, Messrs Gikunda Miriti & Co. Advocates (*the 2nd defendant*), demanded that the plaintiffs pay a deposit of the sum of KShs.10,000,000/= on execution of the sale agreement. The plaintiffs paid the paid sum of KShs.10,000,000/= to the 2nd defendant in two instalments of KShs.2,500,000/= and KShs. 7,500,000/= respectively. The said amounts were deposited with the 2nd defendant on the understanding that he would hold the said amounts as stakeholder pending the completion of the sale agreement.

Before the agreement was completed, the plaintiffs undertook due diligence on the identity card of the 1st defendant at the Registrar of Persons. They discovered that the particulars given by the 1st defendant to the plaintiffs, including his signature, were not similar to the particulars available at the Registrar of Persons. The plaintiffs, upon realizing the discrepancy in the particulars of the 1st defendant, sought to rescind the sale agreement. They wrote to the 2nd defendant, through their advocates, demanding the refund of the purchase consideration that the 2nd defendant was required in the said agreement to hold as stakeholder pending the completion of the sale agreement. The 2nd defendant declined to refund the said amount to the plaintiffs. He offered no explanation for his refusal to refund the amount so deposited.

On 21st August 2008, the plaintiffs filed the present suit against the defendants seeking various reliefs from the court, including an order declaring the sale agreement entered on 30th May 2008 null and void and of no legal effect. Contemporaneous with filing suit, the plaintiffs filed an application under **Order XXXIX Rules 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking an order of the court to restrain the 2nd defendant from operating his account to the extent of KShs.10,000,000/= which had been paid to the said defendant as stakeholder. The plaintiffs further prayed for an order of the court restraining the 2nd defendant from dealing or paying or transferring the said sum of KShs.10,000,000/= from his account to the account of any other person pending the hearing and determination of the suit. In essence, the plaintiffs are seeking the preservation of the said sum of KShs.10,000,000/= pending the hearing and determination of the suit. The application is supported by

grounds set out on the face of the application and on the annexed affidavit of Jerry Magutu, the 1st plaintiff.

The application is opposed. The 2nd defendant filed grounds in opposition to the application. For some strange reason, the 2nd defendant did not deem it necessary or appropriate to file an affidavit in reply to the facts which the 1st plaintiff deposed in his affidavit in support of the application for injunction. As it were, the issues of facts that were deposed to by the plaintiffs in their application were not controverted. In his grounds of opposition, the 2nd defendant stated that the orders sought by the plaintiffs could not be availed to them since an advocate could not be barred from operating his accounts. The 2nd defendant was of the view that the conduct of an advocate and his accounts is regulated by the **Advocates Act** and not by the **Civil Procedure Act**. He stated that the plaintiffs had failed to produce any tangible evidence to connect him to the 3rd defendant. The 2nd defendant was of the view that since the plaintiffs were not certain whether the 3rd defendant held any accounts on behalf of the 2nd defendant, it could not issue an order based on hearsay, speculation or conjecture. He further stated that the plaintiffs failed to establish or offer any evidence that the 2nd defendant operated any account in any bank within the Republic of Kenya or that he had deposited the said sum of KShs.10,000,000/= in such a bank. The 2nd defendant urged the court not to allow the application since to do so would compromise the constitutional rights of the 2nd defendant and other third parties who may not be involved in any dealings with the parties to the present suit. Finally, the 2nd defendant stated that there were other proceedings in other courts pending between the plaintiffs and the defendants.

The plaintiffs appeared before court on 26th August, 2008. The court granted the plaintiffs *ex parte* orders restraining the 2nd defendant from operating his office/client's accounts held at the 3rd defendant bank pending the hearing of the application interparties. At the hearing of the application this morning, I heard the rival submissions made by Mr. Wetangula on behalf of the plaintiffs and by Mr. Mbaabu on behalf of the 2nd defendant.

Having read the pleadings filed herein, and having considered the arguments made before me, the issue for determination before this court is whether the plaintiffs made a case to enable this court grant them the orders of injunction sought in the application. As stated earlier in this ruling, there are certain facts which are uncontroverted. It is not disputed that the plaintiffs and the 1st defendant entered into an agreement for the purchase of the suit land. It is further not disputed that the plaintiffs paid to the 2nd defendant the sum of KShs.10,000,000/= (*on behalf of the 1st defendant*) as deposit for the purchase consideration and for the purposes of the 2nd defendant to hold the said amount as stakeholder. The plaintiffs later performed due diligence on the particulars of the 1st defendant provided at the Registrar of Persons. According to the plaintiffs, they discovered that the particulars given to them by the 1st defendant in relation to his identity card and his signature were not similar to the particulars held by the Registrar of Persons. It was then that the plaintiffs formed an opinion that fraud was being perpetrated against them. They sought to rescind the sale agreement and further sought the refund of the deposit paid to the 2nd defendant as stakeholder. The 2nd defendant was unwilling to refund the said deposit of the purchase consideration, hence the plaintiffs' decision to file present suit.

As stated earlier in this ruling, the 2nd defendant for some strange reasons failed to file a replying affidavit in response to the allegations made against him by the plaintiffs in the affidavit in support of their application. This court was thus deprived of an opportunity to get the facts from the point of view from the 2nd defendant. It was not enough for the 2nd defendant to file grounds in opposition, basically throwing the ball regarding the facts on the court of the plaintiffs: The 2nd defendant had a duty as an officer of the court to provide information that would assist the court in reaching a decision in view of the fact that his conduct as an officer of this court had been brought into question. It will not do for the 2nd defendant to claim that the plaintiffs had failed to establish that he held or operated any account, either office or client in any bank within the Republic of Kenya. The plaintiffs established, on a balance of probabilities, that the said sum of Kshs.10,000,000/= was deposited with by the 2nd defendant, firstly, in

his capacity as an advocate (*and therefore bound by the rules governing the conduct of advocates*) and secondly, as stakeholder. Both as an advocate and stakeholder, the 2nd defendant was not supposed to part with possession of the said amount deposited with him pending completion of the sale agreement. If the 2nd defendant was of the view that he could not refund the amount due to specific instructions that he had been given by his client (*the 1st defendant*), the 2nd defendant was required to give such explanation, firstly, to the plaintiffs, through their advocates, and secondly, to the court when the present application was filed. He did not neither. Instead, he sought to use his status as an advocate to shield himself from the court of equity. That will not do. As an officer of the court, the 2nd defendant's conduct in the circumstances of this case left a lot to be desired. It is such conduct that brings disrepute to the honourable profession.

In the premises therefore, I will allow the application in terms of **prayers 6 and 7** of the application pending the hearing of the suit. This court further orders the 2nd defendant to avail the said sum of Kshs.10,000,000/= within seven (7) days of today's date to the court so that the same can be deposited in a joint interest earning account in the names of the counsel for the plaintiffs and counsel for the 2nd defendant pending the hearing and determination of this suit. For the purpose of giving effect to the second limb of this court's order, the 2nd defendant is hereby ordered to appear before this court on 15th September 2008 at 9.00 a.m. to confirm compliance. The plaintiffs shall have the costs of this application.

DATED at NAIROBI this 8th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE