



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

Civil Suit 610 of 2005

EDWARD KITHINJI RINJAUGUPLAINTIFF

VERSUS

ROSE WAKUTHI MWANGI NJUNUDEFENDANT

RULING

This is an application for summary judgement. In effect, it were to be granted, the plaintiff would become entitled to the reliefs sought in the Amended Plaintiff. Therefore, I deem it essential to set out herein the said reliefs, so as to facilitate a better and easier understanding thereof.

They are as follows;

"REASONS WHEREFORE the plaintiff prays for claims;

- (a) Possession of the suit property.**
- (b) Judgement for Kshs.600,000/- be entered against the Defendant for mesne profits from 21st June 2005 to 18th October 2005 at the rate of Kshs.5,000/- per day together with interest thereon at court rates.**
- (c) Mesne profits at Kshs.5,000/- per day from the date of filing suit i.e. 19th October 2005 until delivery of possession.**
- (d) Interest on the mesne profits from the date of filing suit until payment.**
- (e) Costs of the suit.**
- (f) Any further or other relief this Honourable court deems fit to grant."**

By way of a brief background to this matter, it is necessary to point out that the defendant herein was the widow to the late **Julius Mwangi Njuru Njuru**, who shall hereinafter be cited as "the chargor".

It is common ground that the chargor sought and was granted a loan of Kshs.6,300,000/-, by Housing Finance Company of Kenya Limited (hereinafter cited as "HFCK"). As security for that loan, the chargor, who was then the registered proprietor of the property **L. R. NO. NAIROBI/BLOCK/99/244**, ("the property"), caused it to be charged in favour of HFCK.

Thereafter, the chargor experienced difficulties in servicing the loan, prompting HFCK to set in motion the process of exercising its statutory powers of sale. At that point, the chargor approached HFCK, with a view to obtaining its concurrence for the sale of the suit property, through a sale by private treaty. It is evident that HFCK did give to the chargor, the requisite authorisation to enable him sell-off the suit property. However, the said sale was allowed on the understanding that the chargor would retain Kshs.1,500,000/- from the proceeds of sale amounting to Kshs.12,000,000/-. The balance of the purchase price was supposed to be paid over to HFCK, who had agreed to utilize the same to pay off any such balance as may otherwise have still been outstanding in the chargor's loan account.

The reason why I have set out those facts with such finality as can be, at this interlocutory stage of the case, is that there has been some element of finality in the adjudication on the said issues of fact and of law.

The first decision was arrived at by the Hon. Azangalala J., in a ruling which he delivered on 6th February 2006, in the case of **ROSE WAKUTHI MWANGI NJUNU (Administrator of the Estate of the late Julius W. Mwangi Njunu) –vs- EDWARD KITHINJI & 2 OTHERS, MILIMANI HCCC NO. 504 of 2005.**

By that suit, the defendant herein had challenged the sale of the suit property, and the transfer thereof to the plaintiff herein. She also sought protection against her threatened eviction.

Simultaneously with the *Plaint* in that suit, the defendant herein filed an application for an interlocutory injunction. In the first instance, that application was heard on 16th September 2005, when the Hon. Ransley J. granted the reliefs **ex parte**.

Thereafter, the application was dealt with *inter partes* before the Hon. Azangalala J. In his considered ruling, the learned judge set out the issues for his determination as follows;

- "(1) The validity of the ex parte order of temporary injunction given by Ransley J. on 16.9.05.**
- (2) Whether or not the plaintiff is guilty of material non-disclosure.**
- (3) Validity of the sale agreement between the 1st defendant and the late Njunu**
- (4) Whether or not the plaintiff is entitled to the prayers sought in the application in the absence of such prayers in the *Plaint*.**
- (5) Validity of the Charge and Transfer documents.**
- (6) Whether or not the plaintiff has a legal right to protect.**
- (7) Generally, whether the orders sought could be issued as prayed."**

As regards the validity of the *ex parte* orders which the Hon. Ransley had given on 16th September 2005, the learned judge held that it was rather late in the day to challenge the said order, on the grounds that no reasons were recorded. In his considered view, as the application had been subsequently argued fully before him, the challenge based on failure to record reasons for proceeding *ex parte* were merely academic.

As regards the assertion that the defendant herein was guilty of material non-disclosure, the learned judge held that the inescapable conclusion was that the defendant was guilty.

On the question as to the validity of the sale agreement between the plaintiff herein and the chargor, the learned judge found that;

"the argument that the sale agreement between the late Njunu is void for lack of consideration appears to be without merit. As regards the submission that the sale agreement is a nullity on the grounds that it is tainted with fraud, I am afraid, I have not been persuaded that that is so. The allegation that the late Njunu was too sick to enter into the contract of sale of the suit property with the 1st defendant has not been supported by the material on record.

...

In the premises, on a prima facie basis, I have not been persuaded that the sale agreement between the 1st defendant and the late Njunu is invalid."

Meanwhile, on the issue as to the validity of the Charge and Transfer instruments, the learned judge held that the challenge thereto was not serious. Not only had the challenge come some eight years after the instrument of charge had been executed, but the chargor himself never challenged it, in his lifetime. For that reason, the learned judge said;

"Indeed a court of equity would frown upon such challenge made long after benefit had been enjoyed under the charge."

And in relation to the Transfer instrument, the learned judge noted that the chargor had never complained about it. And in any event, it was observed that the said Transfer was prepared by Messrs Kamocho, Maiyo & Mbatia Advocates, who were acting for the chargor at the material time. For that reason, the judge came to the conclusion that;

"the challenge made by the plaintiff against the said transfer is, in my view, a red herring."

I have highlighted the foregoing portions of the ruling dated 16th February 2006 because, it helps to illustrate the issues which have already been adjudicated upon, by another court, whose competence is not in doubt.

That notwithstanding, the defendant herein was dissatisfied with the decision by the Hon. Azangalala J., to dismiss her application for an injunction. She therefore exercised her inalienable right to invoke the jurisdiction of the Court of Appeal, by way of an application pursuant to the provisions of **Rule 5 (2) (b)** of the Court of Appeal Rules. The said application was in **ROSE WAKUTHI MWANGI NJUNU (Administrix of Estate of the late JULIUS MWANGI NJUNU –VS- EDWARD KITHINJI & 2 OTHERS CIVIL APPLICATION NO. NAIROBI 46 OF 2006 (UR 27/2006).**

In dismissing the application, the Court of Appeal observed that applicant's intended appeal was not arguable and was frivolous. Therefore, the said court declined to grant the injunction which would have restrained the plaintiff herein from **"evicting or harassing the applicant, trespassing into L.R. Nairobi/Block 99/244, charging, mortgaging, transferring, sub-dividing or in any other manner interfering with her peaceable possession of the suit land."**

In my considered view, once the Court of Appeal had upheld the findings by the Hon. Azangalala J., in Milimani HCCC NO. 504 of 2005, it was not open to the defendant herein to canvass any of the issues already adjudicated upon.

I say so because the Court of Appeal said;

"The superior court dealt with all the issues raised in the dispute in an elaborate ruling. All the issues raised in this application were raised before the superior court and were fully considered. The superior court found, *inter alia*, that a valid statutory notice was issued and served, that the applicant did not exhibit any evidence that the deceased was forced to enter into an agreement of sale or that the deceased was incapable of understanding the agreement due to mental sickness; that on a *prima facie* basis, he was not persuaded that the sale agreement was invalid; that the challenge to the validity of the charge on the ground that it does not indicate how the deceased was

identified and the challenges to the validity of the charge on the ground that it does not indicate how the deceased was identified and the challenge to the validity of the transfer on the ground that it showed that the deceased was identified merely by his identity card were frivolous; that the deceased acknowledged the indebtedness and did not challenge the validity of the charge or transfer in his life time.

The applicant has notattempted to show that the learned judge erred in the manner he exercised his discretion or that grounds exist for interfering with the exercise of discretion by the judge."

On my part, I can only add that as the learned judge of the superior court holds a jurisdiction that is concurrent with mine, it is not open to me, to appear to sit on appeal over his decision, by re-visiting the issues which he has already adjudicated upon.

For that reason, and also because the Court of Appeal has upheld the findings by the learned judge of the superior court, I will not make any findings on the issues which the defendant had raised previously.

If anything, I find guidance from the ruling by the Court of Appeal, wherein (at page 7 thereof), it was held as follows;

"The suit property is a leasehold registered under the Registered Land Act (RLA). The deceased transferred the property to the first respondent in his life time and the first respondent was registered as the proprietor and thereby became indefeasible owner of the lease (S. 27 (b) and 28 of RLA)."

I understand that holding to mean that the plaintiff's rights, as the registered proprietor of the suit property, were incapable of being defeated, save on the grounds of a fraud to which the plaintiff was a party.

From the facts of this case, no such fraud is apparent because even subsequent to the execution of the sale agreement, the chargor still acknowledged the sale, and then agreed to give vacant possession of the suit property by 18th July 2005.

In **CHERUIYOT -VS- BARTIONY [1988] KLR 422**, the Court of Appeal held that the legal owner of land is the person who is entitled to possession against the whole world. At page 427 of that law report APALOO J.A. (as he then was) said;

"And it is trite learning, that one of the acknowledged rights of ownership of land is the right to its possession.

.....

The matter of substance is, that the contest of title joined between the appellant and the respondent finally terminated in the respondent's favour and he is entitled, as a necessary incident of that ownership, to have full and exclusive possession of the suit land as against the appellant."

Therefore, in my considered opinion, had the suit herein been one solely for possession of the suit property, I would not have hesitated in finding for the plaintiff, without any further ado.

However, as already enumerated at the outset of this ruling, the plaintiff also seeks mesne profits at the rate of Kshs.5,000/- per day from 21st June 2005 upto the date when he is given possession.

It is with regard to that relief that I find some difficulty. I say so because on the one hand, the fact of being the registered proprietor entitles the said proprietor to possession of the property. However, in this case, it was an express term of the agreement between the parties that:

"The property is sold in vacant possession to be given on the completion date upon payment of the full purchase price."

The completion was to have been in ninety (90) days from the date of the Agreement for Sale. That Agreement bears the date 8th February 2004, but both the superior court as well as the Court of Appeal have made a finding that the said date was a typographical error. Accordingly, it has been held that the Agreement for Sale is dated 8th February 2005.

The question that then arises is whether the said clause means that the chargor would only give vacant possession on the completion date, even if the plaintiff paid the balance of the purchase price earlier. Or did the clause mean that the chargor would only give possession upon payment of the full purchase price.

In other words, could the chargor have been compelled to hand over vacant possession by 10th May 2005 (if my calculations of 90 days from 8th February 2005 is accurate), even if the plaintiff had not paid the full purchase price? From my reading of the Agreement of sale, that would not necessarily be the case, because the plaintiff would not have met the second limb of clause 9 of the Agreement, which required him to have paid the full purchase price.

In any event, the two plaintiffs herein also executed an Agreement dated 23rd June 2005, with the chargor. By that Agreement, the chargor was granted an extension of time, upto 18th July 2005, to vacate the suit property.

At paragraph 8 of the Amended Plaintiff, it was expressly pleaded that the chargor was given permission to vacate the suit property by 18th July 2005. The said permission was said to have been given by HFCK, but without the knowledge or consent of the plaintiff. However, the question that arises is whether or not such permission had any effect on the terms of the Agreement for Sale.

Ordinarily, the answer would be in the negative. However, in this case, there are circumstances which might make the answer to be anything but straightforward. The circumstances that I make reference to are to be derived from the chargor's letter dated 25th October 2004, in which he explained that the prospective buyers of the suit property were being received by him (and his wife) from HFCK's mart. Because of that fact, the chargor had requested that there be an improved mode of communication;

"including how third parties are introduced to the other party, this includes lawyers, agents, brokers and prospective clients."

It is therefore possible that the said modes of communication were not sorted out in such manner as should have excluded HFCK from any further contact with the chargor or the defendant herein.

But that is not the most significant question in relation to the mesne profits. Assuming that the chargor was supposed to have granted possession by 21st June 2005, as pleaded by the plaintiff, could that have happened regardless of whether or not the plaintiff had paid the balance of the purchase price of Kshs.8,500,000/=.

Of course, I appreciate the plaintiff's contention that he has always been ready and willing to remit payment of the said balance of the purchase price.

The question that arises in the circumstances is whether the defendant should get vacant possession before he remits payment to HFCK, or thereafter. If the defendant should hand over vacant possession before the plaintiff had made payment to HFCK, would that be an act of compliance with the terms of the Agreement for Sale?

Whilst it may not be the obligation of the defendant to ensure that HFCK was paid off, the Agreement for Sale, which the plaintiff is seeking to have specifically performed, stipulates that vacant possession would be handed over **" on the completion date upon payment of the full purchase price."**

That appears to suggest that the payment of the full purchase price was a prerequisite to the handing over of suit property, in vacant possession. At the least, that is a possible reasonable interpretation of that clause in the agreement. To my mind, that gives rise to a triable issue.

In **PROVINCIAL INSURANCE COMPANY OF EAST AFRICA LIMITED –VS- LENNY M. KIVULI, CIVIL APPEAL No. 216 of 1996**, the Court of Appeal stated;

"In an application for summary judgement even one triable issue if bona fide, would entitle the defendant to have unconditional leave to defend."

It ought to be appreciated that by finding that there is a triable issue, the court is not making any assessment of the strength of such an issue. As I understand the principles governing applications for summary judgement, it is not the role of the court handling such an application to ascertain the strength of such a defence, after coming to the conclusion that it raised a triable issue.

In **KENYA TRADE COMBINE LIMITED –VS- M. M. SHAH, CIVIL APPEAL No.193 of 1999**, the Court of Appeal said;

"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."

Before concluding this ruling, I feel obliged to comment on one or two matters. First, the defendant submitted that her **"late husband after repaying the loan fell into arrears."**

In my considered opinion that contention is wholly inconsistent in itself. It is not conceivable that after a loan had been repaid, the borrower could fall into arrears.

Secondly, I consider that it will be essential for the trial court to ascertain and determine whether or not the money which had been paid to the firm of Kamotho Maiyo & Mbatia Advocates, as stakeholders, was ever remitted to HFCK thereafter. I say so because a perusal of the statement of accounts appears to suggest that the said sum was credited to the chargor's account at HFCK, on 31st March 2005.

In conclusion, I hold that the defence herein has raised at least one triable issue. Accordingly, the application for summary judgement is hereby dismissed. The costs of the said application are awarded to the defendant.

Dated and Delivered at Nairobi this 31st day of January 2007.

FRED A. OCHIENG

JUDGE