



REPUBLIC OF KENYA

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

Civil Case 872 of 2006

CAROLINE NJERI MWICIGI PLAINTIFF

VERSUS

MANOHAR SINGH SAGOO 1ST DEFENDANT

SURINDER KAUR SAGOO A.K.A. MRS SAGOO.....2ND DEFENDANT

PRAMOD PATEL 3RD DEFENDANT

KANDIE KIMUTAI & CO. ADVOCATES 4TH DEFENDANT

RULING

The Plaintiff along with the plaint, filed a Chamber Summons dated 10th August, 2006 premised under Section 3A of the Civil Procedure Act and Order XXXIX Rules 1(a), 2 and 9 of Civil Procedure Rules.

The substantive interim prayers sought by the Plaintiff are (1) to restrain the 1st and 2nd Defendants/Respondents from being or remaining or entering upon the property situate in Runda Estate Nairobi known as L.R. No.7785/92, (hereinafter referred to as '*The suit property*') and (2) In the alternative to prohibit any dealings in respect of the suit property.

The plaintiff also asks for costs of the application.

The application is supported by the grounds on the face thereof and on the affidavit sworn by the plaintiff on 10th August, 2006.

The facts which are largely undisputed are:-

1. The Plaintiff was the registered proprietor of the suit premises.
2. She entered into an agreement of sale with 1st and 2nd Defendants in respect of the suit property. The agreement was dated 28th June, 2005.
3. Her advocates were, as per the sale agreement M/s A.G.N. Kamau Advocates but later on and as per the facts on the record, her advocates were M/s Kandie Kimutai and Co. Advocates (4th Defendant).

As per the Agreement of sale the completion date was 15th September, 2005.

4. However, she has enclosed a further agreement for sale dated 1st November, 2005 wherein her advocate is now shown as M/s Kandie Kimutai and Co. Advocates. The completion date is 5th October, 2005 as per this agreement. The Plaintiff has denied to have executed the said agreement.

5. By a letter dated 24th November, 2005 her advocate issued a notice to complete by 22nd day after the service thereof as per condition 5 of the sale agreement of Law Society. The letter is annexed as annexure (NM 4) of the affidavit in support.

6. The Advocate of the purchaser Pramod Patel (3rd Defendant) responded to the said notice vide his letter of 26th November, 2005.

It was stated therein that by 29th November, 2005 the purchaser shall place the funds with him and asked the vendor's Advocates (4th Defendant) to obtain an extended clearance certificate. (Ann. NM 5).

7. The vendor's Advocate (4th Defendant) wrote a letter dated 14th December, 2005 forwarding the rates clearance certificate. It also indicated that:

“We trust that the transfer has already been stamped and all that is remaining is lodging the same for registration. Kindly proceed with dispatch to have the said transfer registered”

The said letter was received by the office of the 3rd Defendant on 16th December, 2005.

8. The application to register the transfer which was signed on 10th November, 2005 by both parties was applied on the same day and was registered on 19th December 2005.

9. The Plaintiff wrote a letter dated 19th December, 2005 to her Advocate (4th Defendant) asking him to inform the 1st and 2nd Defendants that she has rescinded the agreement as notified. She wrote similar letter on 10th January, 2006 to her Advocate indicating also that she had entered into an agreement to sell the same plot to some other people.

10. Thereafter the Plaintiff wrote a letter dated 13th January, 2006 to the Advocate of the purchasers (3rd Defendant) stating inter alia that after the expiry of the notice on 16th December, 2005 she did not give any further instructions or consent on the expiry of the notice. Thus according to her the agreement of sale stood rescinded.

11. On 26th January, 2006 the 4th Defendant returned the cheque for the balance of purchase price to the Advocate of the purchasers (3rd Defendant) under instructions.

12. On 23rd December, 2005 the Advocate of the Plaintiff (4th Defendant) requested the Advocate of the purchasers (3rd Defendant) to release Shs.20,000/- to one Mr. Gichere being part of his commission in respect of the transaction of the suit property.

13. The balance of the purchase price is deposited in the court by the purchasers (1st and 2nd Defendant).

With these undisputed facts, I shall consider the submissions made.

Mr. Macharia, the learned counsel for the Plaintiff/Applicant, submitted that the transfer was fraudulent. The sale agreement is admitted and the notice dated 24th November, 2005 also is admitted and acknowledged. The said notice of rescission came into effect on 16th December, 2005 and any

transactions beyond 16th December, 2005 is not valid and there was no further consent or agreement in writing. He relied on clause 13 of the agreement for sale. It reads as follows:

“No failure or delay to exercise any powers, rights or remedy shall operate as waiver of that right, power or remedy and no singular or partial exercise of any right power or remedy shall preclude its further exercise or the exercise of any other right power or remedy”.

Mr. Macharia only stuck to the word ‘waiver’ and did not respond to my question on the effect of the second part of the said clause.

He also stressed that the Defendants (1st, 2nd, and 3rd Defendants) imputed the delay on the part of the 4th Defendant, the Advocate of the Plaintiff, but the certificate of rates clearance was sent to the 3rd Defendant vide letter of 14th December, 2005. Once again, he avoided making any response to the fact that, as per his own document, the 3rd Defendant’s office received the certificate on 16th December, 2005 which is the date when the plaintiff claims that the notice of rescission came into effect.

He concluded his submissions by stating that the plaintiff did not sign the second agreement drawn by the 4th Defendant and there cannot be an extension of the time by implication.

Mr. Hira the Learned Counsel for 1st, 2nd and 3rd Defendants began his submissions in opposition of the application by contending that the applicant cannot allege that the transfer of the suit property in the names of 1st and 2nd Defendants was fraudulent as in her affidavit in support she has neither averred particulars of fraud nor has she averred that the particulars of fraud in the plaint and as well as contents of other pleadings in the plaint were true. Thus the affidavit in support cannot be relied upon in support of the application based on the ground of fraud.

Mr. Hira further strongly relied on the letter dated 14th December, 2005 (annexed to both, the plaintiff’s affidavit as well as that of the 3rd Defendant). I have already referred to the contents of the said letter hereinbefore. Relying on the last two paragraphs (already specified earlier) he contended that by hoping that the transfer had been stamped and requesting to proceed with dispatch to have the transfer registered, the notice of rescission was explicitly and in writing withdrawn. The letter was written by the recognized agent of the plaintiff.

He also stressed that if the time was to be made the essence of the contract, the party to benefit should act with due diligence. The certificate of clearance was received on the date when the notice of rescission was to take effect. That fact and the contents of the letter of 14th December, 2006 made it clear that the plaintiff did not intend to make the time an essence of the contract as well as he stressed that the notice was in any event explicitly waived.

He also placed reliance on the note of 23rd December 2005 from the Advocate of the plaintiff asking for the payment of Shs.20,000 to be made towards commission.

He also wondered why the plaintiff did not take immediate action against her own Advocate if she suspected collusion or fraud. She filed this suit on 11th August, 2006 after receiving a letter of 10th March, 2006 from the 3rd Defendant in response to her demand notice of 12th February, 2006).

It was added that although she has alleged that she has not signed the sale agreement of November, 2005 but even after many months she has not put any proof of alleged forgery.

It was thus finally submitted that the suit and application is nothing but an improper attempt of enrichment, by the plaintiff and the application be dismissed with costs.

Mr. Macharia did not make any rejoinder to the submissions even though points of law and facts were raised.

I do tend to agree with Mr. Hira's contention that in absence of averments under oath by the plaintiff in respect of the particulars of fraud, the applicant cannot proceed with the application based on allegation of fraud as its ground. I do find that the issue of fraud not having averred cannot be considered.

The only issue to be determined is whether the plaintiff has proved prima facie case with probability of success the issue that the agreement stood rescinded as at 16th December, 2005.

Her recognized agent/advocate sends the clearance certificate on 16th December, 2006 with a request to **“proceed with dispatch to have the said transfer registered.”**

Not only that, on 23rd December, 2005, a request to pay Shs.20,000 towards commission to one Mr. Gichere is placed in a note from the said advocate. This fact is not disputed by the plaintiff. It is only after the purchase price is tendered after the registration of the transfer, the Plaintiff's Advocate by his letter of 26th January, 2006 returned the cheque and indicated that the transaction was terminated by the plaintiff as per her letter of 13th January, 2006.

The plaintiff at this stage has, in my humble view, not demonstrated to me that she has a prima facie case with probability of success. The facts on record do not support her contention that the notice of rescission was acted upon and came into effect without any further intervening events. The acts of the plaintiff's advocate prima facie showed the waiver of the notice.

In the premises, I cannot uphold the contention of the Plaintiff/Applicant and dismiss the application dated 10th August, 2006 with costs to the 1st to 3rd Defendants.

Dated and signed at Nairobi, this 6th day of June, 2007.

K.H. RAWAL

JUDGE

6.6.07