



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

Civil Case 77 of 2005

OL'BOLOSSAT CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LTD.....PLAINTIFF

V E R S U S

JOHN NJAGI RURIMADEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in the year 2006 and the long attendant recuperation. The delay is regretted.

I have before me an application by chamber summons dated 21st April, 2005. It is brought by the Defendant under Order 6, rule 13(1) (b) and (d) of the Civil Procedure Rules (the Rules). It seeks the main order that the suit be struck out with costs to the Defendant. The grounds for the application, as the rules it is brought under indicate, are that the plaint is scandalous, frivolous or vexatious and that it is otherwise an abuse of the process of the court. These legal grounds are amplified by other grounds set out on the face of the application. These are:-

1. That the Plaintiff was unable to satisfy the terms of the agreement for sale upon which the suit is founded, following which a compromise was entered into between the parties.
2. That the Defendant is not liable to the Plaintiff as alleged or at all on account of the compromise, which was reached before the suit was filed and the Plaintiff's suit satisfied.
3. That no suit can be brought upon a contract for the disposition of an interest in land unless there is a written contract signed by the parties duly attested as provided by section 3(3) of the Law of Contract Act, and there is no such contract in this case.

There is a supporting affidavit annexed to the application. It is sworn by the Defendant. To it are annexed a number of documents.

The Plaintiff has, naturally, opposed the application. There is a replying affidavit sworn by one **DAVID NJAU GITU**. He describes himself as the secretary of the Plaintiff. A number of documents are annexed to the same. The following grounds of objection to the application emerge from the replying affidavit:-

1. That the supporting affidavit offends the mandatory provisions of the Oaths and Statutory Declarations

Act, Cap. 15.

2. That in view of the admission by the Defendant that the Plaintiff paid him KShs. 6,500,000/00 towards purchase price and took possession of the suit property, the application ought to fail.

3. That there was no compromise between the parties as alleged.

4. That the application is an abuse of the process of the court.

There is a further affidavit sworn and filed by the Defendant with leave of the court in response to the replying affidavit. It was filed on 19th May, 2005. In it the Defendant denies the allegations made in the replying affidavit. There is a further (replying) affidavit filed on behalf of the Plaintiff on 27th May 2007 with leave of the court. It is sworn by the same David Njau Gitu.

In the course of argument, learned counsel for the Defendant, **MR. KIRAGU**, conceded that the objection taken to the suit based on section 3(3) of the Law of Contract Act was misconceived in that section 3(3) aforesaid came into force on 1st June 2003 vide Legal Notices Nos. 188 and 189 of 2002, and did not have retrospective effect upon the contract between the parties herein which was entered into before 1st June 2003. That left only one issue to be decided by the court, to wit, whether, as alleged by the Defendant, there was a compromise prior to filing of the suit that settled all the issues in controversy between the parties.

I have considered the submissions of the learned counsels, including the cases cited. The issue at hand is essentially one of fact. It is to be noted that the compromise alleged here is not as anticipated by Order 24, rule 6 of the Rules (compromise of suit). The compromise alleged is one before the suit was filed; if proved it would render the filing of the suit unnecessary and therefore scandalous, frivolous or vexatious, or otherwise an abuse of the process of the court.

The alleged compromise is said to be constituted by the agreement dated 19th January 2005 annexed at paragraph 16 of the supporting affidavit. Some seven (7) persons are shown to have signed it on behalf of the Plaintiff. These are:-

- (i) **ALFONCE KAMAU**
- (ii) **ISACK KANYORO**
- (iii) **SAMUEL KIRENGE**
- (iv) **PETER G. NGUGI**
- (v) **MOSES KIMARUA**
- (vi) **NJAGI RIRIMA**
- (vii) **NJAGI MURUANA**

However, there are only five (5) signatures; two of the seven persons appear not to have signed the agreement. More importantly, the officials of the Plaintiff appear to be the following in accordance with a search carried out by the Defendant which is at page 13 of the application:-

- (i) **SIMON NJAU GITU** – Chairman
- (ii) **ISAAC M. KANYORO** – Treasurer
- (iii) **NJAU D. GITU** - Secretary

- (iv) **ARTHUR G. CHEGE** - Member
- (v) **BENSON N. MACHARI** - Member
- (vi) **ALPHONCE K. KIMANI** - Vice – Chairman
- (vii) **FREDERICK M. GICHUHI** - Member
- (viii) **KENNETH K. KINYUA** - Member
- (ix) **CHARLES M. MACHARI** - Member
- (x) **NEWTON J. N. MURUANA** - Member

At least five of the seven persons who signed the agreement are not in the above–quoted list of officials. Did they have the necessary authority to sign the agreement on behalf of the Plaintiff? That is an issue that can only be properly ventilated at the trial of the action. Isaac Kanyoro and Njagi Muruana appear not to have signed the agreement. There are no signatures against their names. Isaac Kanyoro has denied that he signed the agreement. That leaves only Alphonse Kamau. He is in the list of officials at page 13 of the application. He has also signed the agreement. But could he alone bind the Plaintiff by this agreement? That is another issue that will be best tackled at the hearing of the action.

There is also another issue. Njagi Rurima, one of the seven persons who allegedly signed the compromise on behalf of the Plaintiff, appears to be the same person as the Defendant in the suit. Could he bind the Plaintiff by the alleged compromise? It is to be noted that by the alleged compromise the Plaintiff stood to lose KShs. 2.5 million as compensation to the Defendant for what is termed as spiritual and moral loss! Then there are issues as to whether or not the terms of the alleged compromise were fully met.

There are simply too many issues surrounding the alleged compromise that cannot be properly tried in the present application. They require oral evidence and are best left to be tackled at the trial.

In the result, I am not satisfied at this stage that there was a clear and lawful compromise between the parties prior to the filing of the suit that fully and effectually settled all the issues between them now raised in the present suit, as to render the suit scandalous, frivolous or vexatious, or otherwise an abuse of the process of the court. I must therefore refuse the application. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

DATED AT NAIROBI THIS 16TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007