



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

Civil Case 83 of 2006

KENNEDY KEANGO NYAENCHA.....1ST APPLICANT

LUCY KABURA WAICHARI..... 2ND APPLICANT

VERSUS

DOROTHY SEYANOI MOSCHION 1ST DEFENDANT

THE CO-OPERATIVE BANK OF KENYA LIMITED..... 2ND DEFENDANT

RULING

The application under consideration is the one dated 13th March, 2007 and has been brought by the Plaintiffs against the two Defendants. In this suit it is expressed to be brought under Order VI rule 13 (1) (c) of the Civil Procedure Rules and Section 3A of Civil Procedure Act.

The application seeks orders as follows:

- a) That the Defences filed herein by the Defendants and dated 7th April 2006 and 28th April 2006 respectively be struck out.**
- b) That judgment be entered in favour of the Plaintiff in terms of prayer (b) of the plaint i.e an order directing the defendants to effect transfer of one acre out of the property known as LR. NO. 5892/12 Karen to the Plaintiff's.**
- c) That in the alternative Judgment be entered in favour of the Plaintiff in terms of prayer (c) of the plaint.**
- d) That the court do give such further or other orders as it may deem fit in the interest of justice.**
- e) That the Plaintiff's be awarded the costs of this application and the case.**

The grounds for the application have been given on the face of the application as follows:

1. The defences filed by the Defendants may prejudice, embarrass or delay the fair trial of the case because:

- i) Contrary to the 1st Defendant's contention at paragraph 5 of the defence dated 18th April,**

2006 that the sub-division process of LR Number 5892/12 had become complicated and impossible, the subdivision process is still going on and indeed the Director of Surveys has issued two new LR. Numbers for LR. No. 5892/12 namely LR No. 5892/23 and LR No. 5892/24.

ii) The terms of the same agreement between the Plaintiffs and the 1st Defendant are clear and completion thereof shall be sixty days from the date on which the Vendors advocates shall confirm to the purchasers Advocates that the Deed Plan for LR Number 5892/12/B has been duly registered with the Director of Surveys and is available for purposes of completion of the sale agreement. The Plaintiff's/Applicants have not received the said notice.

iii) The defences filed herein have pleaded terms which are not contained in the sale agreement the subject matter of this suit.

iv) The defence that LR No. 5892/12/B is non-existent is untenable as the parties to the agreement contracted for a sub-division of LR. NO. 5892/12 in order to have a new sub-division namely 5892/12/B which would then be transferred to the Plaintiff's Applicants.

2. In the premises the Defendants defences are a sham meant only to delay the fair trial of this matter.

3. It is in the interest of Justice that this application be allowed.

There are two affidavits shown in support of the application. One sworn by Lucy Kabura Waichari dated 13th March, 2007 and the further affidavit by the same party dated 16th July, 2007.

The application is opposed. There is a replying affidavit dated 13th June, 2007 sworn by **MERCY BUKU** the Senior Legal Officer of the 2nd Defendant Bank and a supplementary affidavit dated 31st October, 2007 sworn by **ELIUD OGUTU** the Legal Officer of the 2nd Defendant Bank.

This was a heavily contested application with Mr. Nyaencha appearing for the Applicants, while Mr. Mungai appeared for the 2nd Defendant/Respondent. The 1st Defendant was served with the application but filed no response to same. This suit arises out of a sale agreement entered into between the Plaintiff's who were the purchasers of half portion of a piece of land registered in the name of the 1st Defendant and charged to the 2nd Defendant. The sale agreement is dated 6th December, 2004. The facts are that the Plaintiff's were to purchase one acre piece of land from the 1st Defendant out of the two acre piece of land known as LR. NO. 5892/12. The one acre was to be excised from LR.5892/12. The two acre piece of land was charged to the 2nd Defendant Bank, which was informed of the proposed sale and that, in order to facilitate the sub-division of the said property, released the title deed to Hayanga & Co. Advocates, the Vendors Advocate. For some reason the sub-division took time to be completed and the process appears to have been completed after the instant application had been filed. The letters giving appraisal for the sub-division by the Commissioner of Lands and the City Council of Nairobi are dated May, 2007. This application was precipitated by a letter written by the 2nd Defendant to Hayanga & Co. Advocates, Advocates for the Vendor, dated 25th January, 2006 in which the 2nd Defendant states that the 1st Defendant does not wish the transaction to proceed due to the fact the process had taken too long.

The plaint is dated 1st March, 2006. The Plaintiff's seeks three substantive prayers:

a) An injunction restraining the Defendants by themselves their servants or agent howsoever and however from selling, offering for sale or in any way dealing with property known as LR Number 5892/12 Karen unless the same is subject to the Plaintiff's right to the sub-division designated LR Number 5892/12/B.

b) An order directing the Defendants to effect the transfer of the piece of land LR Number 5892/12/B to the Plaintiff's.

c) Or in the alternative and without prejudice to the foregoing a full refund of the moneys paid to the 1st Defendant and to the stakeholders thereof plus a sum equal to the current value of an acre in Karen to enable the Plaintiff's purchase similar land.

The plaint sets out the terms of the sale in paragraph 5 as follows:

5) The terms of the said sale were inter alia:

a) Purchase price Kshs.1,500,000.00.

b) Deposit 150,000.00 being 10% of the purchase price and paid to the Defendant's advocates to hold as stakeholders pending completion.

c) Completion date sixty days from the date on which the Vendors Advocates shall confirm to the Purchasers Advocates that the Deed plan for LR Number 5892/12/B has been duly registered with the Director of Surveys and is available for purposes of completion of the Agreement herein.

The 2nd Defendant Bank, filed its defence on 10th April, 2006 in which it denies being a party to the sale agreement between the Plaintiff and the 1st Defendant. In the alternative the 2nd Defendant avers in paragraph 4 as follows:

4) In the alternative and without prejudice to the foregoing the 2nd Defendant states that the agreement between the parties was that the sale proceeds would be used to offset the loan account of the 1st Defendant held with the 2nd Defendant within a period of thirty (30) days from the date of execution of the sale agreement.

The 2nd Defendant also makes the following averment in paragraph 2, 6 and 8.

2) The 2nd Defendant is a stranger to the contents of paragraphs 4 & 5 of the plaint as it was not a party to the sale agreement between the Plaintiff's and the 1st Defendant.

6) In reply to paragraph 10 of the plaint the 2nd Defendant states that as a Mortgagee it is within its rights to demand return of the title for LR. Number 5892/12 since its rights are superior and paramount to those of the Plaintiffs who are purchasers for value with notice.

8) In reply to paragraph 12 of the plaint the 2nd Defendant states that an order for specific performance cannot issue herein as the property in respect of the sale agreement being LR Number 5892/12/B does not exist on the ground or at the offices of the Director of Survey.

The 1st Defendant also filed a statement of defence on 20th April, 2006. The key paragraphs in this statement of defence are No. 3, 4, 5, 8 and 10 which stipulates as follows:

3) The 2nd Defendant denies the contents of paragraph 6 of the Plaint and specifically the allegation that it agreed to the terms of any sale agreement between the Plaintiff's and the 1st Defendant and the Plaintiff's are put to strict proof thereof.

4) In the alternative and without prejudice to the foregoing the 2nd Defendant states that the agreement between the parties was that the sale proceeds would be used to offset the loan account of the 1st Defendant held with the 2nd Defendant within a period of thirty (30) days from the date of execution of the sale agreement.

5) The 2nd Defendant is a stranger to the contents of paragraphs 7, 8 and 9 of the Plaint as it was not a party to the sale agreement between the Plaintiff's and the 1st Defendant.

8) In reply to paragraph 12 of the plaint the 2nd Defendant states that an order for specific performance cannot issue herein as the property in respect of the sale agreement being LR Number 5892/12/B does not exist on the ground or at the offices of the Director of Survey.

10) Jurisdiction of this Honourable court is admitted but liability is denied.

The Applicant chose to bring this application under Order

VI rule 13 (1) (c) of Civil Procedure Rules which stipulates as follows:

“13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

a).....

b).....

c) it may prejudice, embarrass or delay the fair trial of the action”

The Applicant seeks to have the Defendant Defences struck out and Judgment in terms of prayer (b) and (c) entered for the Plaintiffs.

The Plaintiffs have to show how the Defendants defences may prejudice, embarrass or delay the fair trial of the case. It must be noted that certain facts pleaded on the face of the application, and the supporting affidavit of the 2nd Plaintiff, have changed since the instant application was filed. These include the fact that the two institutions needed to grant approval for the sub-divisions have since the filing of the application and the suit, granted the same. The sub-division has also been effected and the resultant Deed plans issued in respect of the two plots created out of the original parcel of land. The other important change that has occurred is that new land reference numbers have been issued to the two plots excised out of the original parcel of land and that the said land reference numbers are not cited anywhere in the plaint.

Given these facts, the Defendants averments in their respective defences, in paragraph 5 and 10 for the 1st Defendant and paragraph 8 for the 2nd Defendant, are indisputable. It is a fact, both before the sub-division was completed, and after the exercise has been completed, that LR NO. 5892/12/B does not exist. The Plaintiff's averment that the parties contracted, for the purposes of the sale agreement, to refer to the plot offered for sale to the Plaintiff, as LR.5892/12/B, is untenable for the purposes of the Plaintiff's prayer for specific performance, as no such land exists, and the Plaintiff, through various annexures in the two affidavits sworn in support of this application, has clearly proved it to be so.

In that regard, ground 1(i) and (iv) cited as a basis for the instant application is untenable. That leaves only two grounds 1(ii) and (iii). Ground 1(ii) and (iii) raises the issue of the terms of the sale agreement upon which this suit is premised. The issue is whether both the Defendants defences, touching on the issue of the terms of the agreement, is a sham. Paragraph 5 of the Plaint sets out these terms as interalia.

a) Purchase price Kshs.1.5 million.

b) Deposit of 150,000/= being 10% thereof paid to Hayanga & Co. Advocates as stakeholders.

c) Completion date sixty days from the date on which the Vendors Advocate shall confirm to the Purchasers Advocates that the Deed plan for LR. No. 5892/12 has been registered with the Director of Surveys and its available for purposes of completion of the Agreement herein.

The 1st Defendant has, in paragraph 3 of her defence, pleaded that she was a stranger to the contents of paragraph 5 of the plaint. In effect the 1st Defendant has denied the alleged terms of the sale agreement

between her and the Plaintiffs. More importantly, in the alternative the 1st Defendant has in paragraph 5 of her defence averred that the sale was conditional on the property being surveyed and sub-divided and a deed plan being registered. In further alternative, in paragraph 8 of her defence, the 1st Defendant avers that it was a term of the sale agreement that the completion date was 30 days from the date of execution of the agreement.

The issue is, are these averments a sham? Whether they are a sham or not is a matter that will require an interpretation of both the sale agreement and the provisions of the Law Society Conditions of Sale [1989 Edition] on which it was premised, which can only be done by the trial court.

A technical point was raised by Mr. Mungai for the 2nd Defendant that since no stamp duty had been paid, the sale agreement could not be admitted in evidence. Mr. Mungai relied on Section 19 of the Stamp Duty Act which provides:

“19(1) Subject to the provisions of the subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly signed.”

Mr. Nyaencha in response said that if found necessary, the court could still order for the Stamp Duty to be paid. The point is, if no Stamp Duty has been paid on the sale agreement, the court will have to determine the effect of that omission at the trial, and not in an interlocutory application such as this one.

In addition to the aforementioned issues, the two Defendants have each pleaded in paragraph 3 and 2 of their defences, respectively that they are total strangers to the sale agreement. The 1st Defendant has not filed any papers in the instant application and she is yet to substantiate that averment. As for the 2nd Defendant, it avers that it never signed the sale agreement and was therefore a stranger to its terms and conditions. Whether these averments are substantiated or not, I do not find them a sham. The terms of the agreement are themselves in issue as demonstrated, and in that light, the Defendants are perfectly in order to aver that they are strangers to the terms of the agreement as set out in the Plaintiff.

There is a second angle to the Plaintiff's application. They seek **“Specific Performance”** against both Defendants. Specific performance is rarely granted at an interlocutory stage of the proceedings. Mr. Nyaencha has relied on the case of **KINYANJUI & ANOTHER VS THANDE & ANOTHER [1995-1998]2 EA 159** where Akiwumi, Tunoi and Shah JJA held:

“The Respondent's defence was a sham which tended to prejudice, embarrass or delay the trial of the action because it was upon the vendors to obtain the deed plan and subdivision. Even if the purchasers helped in obtaining the same, the contractual obligation to obtain the same remained upon the vendors. They could not rescind the contract unless they could show a breach on the part of the purchasers and even then, they had to serve the requisite condition 26 notice of rescission which they never did.”

The cited case is easily distinguishable from the instant case. The parties to the instant case are the Purchasers of the suit property who are the Plaintiff, the Vendor, who is the 1st Defendant and the Mortgagee of the suit property, who is the 2nd Defendant. The 2nd Defendant is the undisputed Mortgagee of the suit property and the Plaintiff's were aware of the same at the time the sale agreements were drawn. The rights of the 2nd Defendant over the suit property overrides those of the Plaintiff's. The fact the 2nd Defendant released the title documents over the suit property cannot be interpreted to mean its rights over the property were waived, extinguished or reduced. The title is still mortgaged to the 2nd Defendant in whole, and the debt is still outstanding. For that reason alone, no orders divesting the property from

the Defendant's herein and vesting any part of it to the Plaintiff's can be made before the suit is heard, and viva voce evidence called, to help resolve the issues that arise in this case.

On the issue of refund of the sums paid by the Plaintiff's to the 1st Defendants Advocate, the 1st Defendant has denied instructing Hayanga & Co. Advocates, to whom the Plaintiff's paid the sum now claimed, by virtue of the latter being the Vendor's Advcoates. That raises triable issues including inter alia, whether indeed Hayanga & Co. Advocates were instructed by the 1st Defendant to act for her. For that reason also, interlocutory judgment in terms prayed for in the instant Chamber Summons application cannot be granted.

The upshot of this ruling is that for reasons given in the body of the ruling, the orders sought cannot be issued at an interloucutory stage. The application is therefore dismissed with costs to the 2nd Defendant only.

Dated at Nairobi this 16th November, 2007

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

N/A for Applicants and Respondents

LESIIT, J.

JUDGE