



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 68 of 2004**

**FRED MWANGO AND ANOTHER.....PLAINTIFFS**

**VERSUS**

**MUNYAE MULINGE AND ANOTHER.....1<sup>ST</sup> DEFENDANTS**

**MARGARET MUNYAE.....2<sup>ND</sup> DEFENDANTS**

**MWAKA MUSAU.....3<sup>RD</sup> DEFENDANTS**

**R U L I N G**

By a Chamber Summons dated 16<sup>th</sup> March 2006, the 3<sup>rd</sup> defendant seeks the striking out or dismissal of the suit herein. The applicant also asks that the plaintiff be ordered to grant vacant possession of the suit property.

Furthermore, the applicants want the plaintiffs to deliver the certificate of title of the suit property, L.R. No. 209/10497/531R.52097, Jokim Estate Nairobi, to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. And it is also the wish of the applicant that the caveat lodged by the plaintiffs against the title to the suit property be removed forthwith.

It is the applicant’s contention that the plaintiffs are illegally in possession of the suit property, as they have no claim against the defendants, following the remittance of the purchase price, by May 2005.

As far as the applicant is concerned, the date of May 2005 was significant because it fell at a time before the 3<sup>rd</sup> defendant (who is the applicant herein) had been served with the Originating Summons.

If I understand the applicant correctly, its position is that it did perform its obligations before he had become a party to these proceedings. Therefore, the applicant holds the view that the proceedings had been overtaken by events, as the proceedings were seeking to compel him to make payment, yet payment had been made already.

The court records show that these proceedings were commenced by way of an Originating Summons dated 18<sup>th</sup> December 2003. The said Originating Summons was filed on 3<sup>rd</sup> February 2004.

As at that date, there were only two defendants. The 3<sup>rd</sup> defendant was not a party to the proceedings then.

In an affidavit sworn by the 2<sup>nd</sup> plaintiff, to support the Originating Summons, the deponent stated that the title to the suit property had already been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, as at 2<sup>nd</sup> October 2002. However, the plaintiffs had not yet received the balance of the purchase price, amounting to KShs.

2,025,000/=.

Due to that default on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiffs took possession of the title documents, as security.

On 8<sup>th</sup> October 2004, the plaintiffs filed an application for directions, pursuant to the provisions of Order 36 rules 8A and 9 of the Civil Procedure rules. As the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not oppose the application, the court directed that the said defendants should file their replying affidavits within 21 days, following which the case would be heard on the basis of affidavit evidence. However, all the parties were granted liberty to appear at the trial, and to take such part as the trial court would deem fit.

In compliance with the directions, the 1<sup>st</sup> defendant filed a Replying Affidavit on 11<sup>th</sup> November 2004. The said affidavit was said to have been filed on behalf of both the 1<sup>st</sup> defendant as well as the 2<sup>nd</sup> defendant.

Shortly thereafter, on 1<sup>st</sup> December 2004, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an application, seeking to have the 3<sup>rd</sup> defendant enjoined to the suit, as a co-defendant.

When the application came up for hearing, the plaintiffs did not oppose it. Therefore the court ordered that the 3<sup>rd</sup> defendant be enjoined to the suit as a co-defendant of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The court also granted directions that the Originating Summons be amended so as to accommodate the addition of the 3<sup>rd</sup> defendant as a party to the proceedings. Those orders were made on 24<sup>th</sup> February 2005.

It is now the 3<sup>rd</sup> defendant's position that he has never been served with an Amended Originating Summons. Therefore, he believes that the Originating Summons ought to be struck out not only because of non-service but also because it had been overtaken by events.

A perusal of the court records reveals that on 10<sup>th</sup> May 2005, the 3<sup>rd</sup> defendant filed a Replying Affidavit. In the said affidavit he deponed that he was competent to make the affidavit as he had been joined **“as a respondent/defendant in this proceedings.”**

The Replying affidavit was sworn on 8<sup>th</sup> April 2005, and in it, the 3<sup>rd</sup> defendant readily admits that whilst he had received a total of KShs. 3,353,000/=, he had only remitted to the plaintiffs a sum of KShs. 2,531,535/45. He explained that he was still withholding the sum of KShs. 821,465/55.

According to the 3<sup>rd</sup> defendant's replying affidavit, the plaintiffs were not entitled to the balance of the purchase price until and unless they handed over the suit property in vacant possession, and also provided an account for the rents collected as from the date of sale.

Notwithstanding that stated position, the 3<sup>rd</sup> defendant subsequently remitted to the plaintiffs the balance of the purchase price. The said remittance was made in or about May 2005.

Following the payment of the balance of the purchase price, has the suit been overtaken by events, as submitted by the 3<sup>rd</sup> defendant?

First, although the 3<sup>rd</sup> defendant blames the plaintiffs for the failure to amend the Originating Summons, I hold the view that the 3<sup>rd</sup> defendant found fault with the wrong party.

At no time did the plaintiffs indicate that they had any claim against the 3<sup>rd</sup> defendant. If anything, it was the 1<sup>st</sup> and 2<sup>nd</sup> defendants who expressed the view that there was need to enjoin the 3<sup>rd</sup> defendant;

**“as a co-defendant in this case to enable this court to determine effectively and completely adjudicate upon and settle all questions involved in this suit.”**

Therefore, if any amendments were to be effected to the Originating Summons, the parties who should have ensured that the needful was done, were the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiffs cannot be faulted for the omission on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The 3<sup>rd</sup> defendant has submitted that at all material times he was the agent of the plaintiffs in the contract for the sale of the suit property. He therefore holds the view that the plaintiffs do not have any sustainable claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who did pay the full purchase price timeously.

The other two defendants also state that the 3<sup>rd</sup> defendant was the agent of the plaintiffs.

However, the plaintiffs insist that the 3<sup>rd</sup> defendant was an agent of the 1<sup>st</sup> and 2<sup>nd</sup> defendant, for the purposes of receiving the purchase price and remitting it to the plaintiffs.

To my mind the question as to whose agent the 3<sup>rd</sup> defendant was, is critical in this matter. It is at the very core of determining, (as the 3<sup>rd</sup> defendant had asserted in his replying affidavit), if the plaintiffs should not only hand over the suit property but also provide accounts for the rents which they have received.

An interesting issue which the 3<sup>rd</sup> defendant is likely to have to grapple with is why, if he was not the agent of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, he was insisting that the plaintiffs should provide an account of the rents they had received. One wonders, on whose behalf the 3<sup>rd</sup> defendant was calling the plaintiffs to an account.

To my mind, the 3<sup>rd</sup> defendant is a very essential party to these proceedings. He has accepted the fact that the 1<sup>st</sup> and 2<sup>nd</sup> defendants remitted the purchase price timeously. According to the affidavit of John M. Mativo, which was sworn on 1<sup>st</sup> December 2004, the 3<sup>rd</sup> defendant was paid KShs. 3,033,000/= on 30<sup>th</sup> May 2002.

The 10% deposit had already been paid on 29<sup>th</sup> April 2002.

If those facts be accurate, I hold the considered view that the 3<sup>rd</sup> defendant will be accountable to either the plaintiffs or to the 1<sup>st</sup> and 2<sup>nd</sup> defendants for withholding part of the money until May 2005.

As I see it, the 3<sup>rd</sup> defendant's delay in remitting payment to the plaintiffs is the cause for the decision by the plaintiffs withholding the title documents, as well as possession to the suit property. Whether or not, the plaintiffs had a legal entitlement to do so, will need to be determined at the trial.

In the event that the trial court were to conclude that the 3<sup>rd</sup> defendant was the agent of the plaintiffs, for the purposes of receiving the balance of the purchased price, it is possible that the plaintiffs may be held accountable to the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the rents which the plaintiffs have continued to receive. But, at the same time, there was a possibility that the 3<sup>rd</sup> defendant may be held accountable to the plaintiffs for interest accruing on the balance of the purchase price, from the date the 3<sup>rd</sup> defendant received it, until the date he paid it over to the plaintiffs.

On the other hand, if the 3<sup>rd</sup> defendant was found to have been the agent for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, he could possibly be accountable, but only to the said 1<sup>st</sup> and 2<sup>nd</sup> defendants for the loss which they suffered due to the delay in forwarding payment to the plaintiffs.

In a nutshell, I find that the suit herein does not appear so hopeless that it plainly and obviously discloses no reasonable cause of action.

Indeed, the 1<sup>st</sup> and 2<sup>nd</sup> defendants had fully appreciated the serious issues emanating from the

proceedings herein, from as early as 6<sup>th</sup> December 2004, when they filed their version of the “**Agreed Issues.**” The said issues were as follows:

- “1. Whether Mr. E. Mwaka Musau T/a Mwaka Musau Consultants was an agent of the plaintiff.**
- 2. Whether the defendants fully performed their part of the contract by paying the purchase price to the said agent within the contract period.**
- 3. If the said agent misappropriated the said funds, whose fault is it?**
- 4. What is the legal relationship between the plaintiffs and the aforesaid agents?**
- 5. Whether or Not the said agent received the entire purchase price and if so, what is the legal implication?**
- 6. Can payment to an agent, be said to have been received by the principal?**
- 7. What was the scope of the agent’s powers?**
- 8. Was the said power (if any) revoked?**
- 9. What is the legal effect of actions of an agent who holds himself to be duly acting for his principal and in reliance of his express or implied conduct, a party performs his part of the agreement.**
- 10. Whether the reliefs sought in this suit can be justifiably granted without resultant injustice on the part of the defendant.**
- 11. What is the defendant’s remedy in the circumstances.**
- 12. Who should bear the costs of the suit?”**

To my mind, only a few of those issues have been addressed, after the 3<sup>rd</sup> defendant was enjoined to the suit. For instance, he has readily acknowledged receipt of the balance of the purchase price.

The next question that he will need to answer is when exactly he received the funds, and to whom he was answerable thereafter.

For all those reasons, I hold that the application dated 16<sup>th</sup> March 2006 is without merit, as the suit raises serious questions which ought to proceed to trial.

Accordingly, the application is hereby dismissed, with costs to the plaintiffs.

Finally, I direct that the suit be set down for hearing on a priority basis. However, I also grant liberty to the 3<sup>rd</sup> defendant to apply, in the event that he finds the directions which were given on 6<sup>th</sup> December 2004, inadequate.

Dated and Delivered at Nairobi, this 25th day of October 2006.

**FRED A. OCHIENG**

**JUDGE**