



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 317 of 2006**

**ESTHER NJERI NJUGUNA .....PLAINTIFF**

**VERSUS**

**KENYA AKIBA MICRO FINANCE LTD. ....1<sup>ST</sup> DEFENDANT**

**GIDEON MWITI IREA.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR (KAJIADO).....3<sup>RD</sup> DEFENDANT**

**RULING**

On 15<sup>th</sup> June 2006, the plaintiff filed the Plaint in this suit. Simultaneously which the Plaint, was filed a Chamber Summons, through which the plaintiff sought injunctive relief.

Basically, the plaintiff's contention is that although she had consented, in 1994, to sell the suit property to the 1<sup>st</sup> defendant, that transaction was never completed. At this point in time, it is necessary to properly identify the said suit property, as being L. R. No. KAJIADO/KAPUTIEI NORTH/1668.

On record, in relation to the application, are two affidavits of the Plaintiff, and one replying affidavit which was filed by the 2<sup>nd</sup> defendant. In other words, the 1<sup>st</sup> defendant did not file any replying affidavit. The significance of these facts will soon become apparent. But first, I believe that it is important to set out some basic facts which tell the story, as perceived by the plaintiff.

On 20<sup>th</sup> December 2004, the plaintiff entered into an Agreement with the 1<sup>st</sup> defendant, pursuant to which the 1<sup>st</sup> defendant was to buy the suit property. The purchase price was agreed, in the sum of Kshs.4,200,000/-.

The purchaser was supposed to pay Kshs.1,200,000/- as a down payment, on or before the execution of the Agreement. Thereafter, the purchaser was to pay the balance in equal instalments of Kshs.300,000/-, until payment in full.

Notwithstanding the terms of the Agreement, the 1<sup>st</sup> defendant paid only Kshs.620,000/-, as down payment. The plaintiff then handed over to the 1<sup>st</sup> defendant, the original documents of title, for purposes of preparing the requisite transfer documentation.

Later, the plaintiff learnt, with dismay, that the suit property had been transferred to the 1<sup>st</sup> defendant, who in turn, had the said property transferred to the 2<sup>nd</sup> defendant.

Both transactions were said to have taken place even though the plaintiff had never signed any transfer document, nor obtained the consent of the Land Control Board, for the transfer to the 1<sup>st</sup> defendant.

When the plaintiff learnt, in May 2006, that some valuers had visited the suit property, for purposes of carrying out a valuation thereof, the plaintiff decided to carry out investigations. It is then that she learnt that the valuers had been sent to the suit property by the 2<sup>nd</sup> defendant. She therefore decided to lodge a caution against the title. However, notwithstanding the payment she made at the Lands Registry, for the said caution, the same was not registered against the title.

The plaintiff says that she then approached the 1<sup>st</sup> defendant, to ascertain the circumstances which had led to the transfer of the suit property. According to the plaintiff, the said 1<sup>st</sup> defendant declined to discuss the matter.

That prompted the plaintiff to cause a demand notice to be dispatched to the 1<sup>st</sup> defendant. The said notice was sent by Messrs Ichah Mutahi & Company Advocates, by way of a letter dated 12<sup>th</sup> June 2006.

It is noteworthy that in the notice, the plaintiff's advocates reiterated the contention that the 1<sup>st</sup> defendant had only paid Kshs.620,000/-. That contention has not been challenged by any affidavit evidence, on the part of the 1<sup>st</sup> defendant.

As I indicated earlier, the only replying affidavit on record, was sworn by the 2<sup>nd</sup> defendant. The said defendant has deponed that the plaintiff had voluntarily signed the sale Agreement and transfer form. However, the 2<sup>nd</sup> defendant does not indicate his source of information.

When it is borne in mind that the 2<sup>nd</sup> defendant only came onto the scene more a year after the plaintiff had allegedly sold and transferred the suit property to the 1<sup>st</sup> defendant, I hold the view that the 2<sup>nd</sup> defendant was unlikely to have been privy to what had transpired in December 2004. At any rate, he has not expressly stated that he was privy to the said happenings. Therefore, at this stage, I am not prepared to accept the 2<sup>nd</sup> defendant's assertions, in that regard.

The plaintiff has sworn an affidavit in which she states that the only reason why the original title document was handed over to the 1<sup>st</sup> defendant was for the purposes of preparing the transfer. That deposition has not been controverted by the 1<sup>st</sup> defendant.

The plaintiff has also deponed that she never applied to the Land Control Board for consent to sell the suit property to the 1<sup>st</sup> defendant. Also, she has deponed that she never signed any transfer instrument in favour of the 1<sup>st</sup> defendant.

Those depositions have not been controverted by the 1<sup>st</sup> defendant.

In the circumstances, I hold that the plaintiff has, on a prima facie basis, demonstrated that the sale and transfer to the 1<sup>st</sup> defendant was more probably than not, a nullity. That would imply that the 1<sup>st</sup> defendant would have had no legal title which it could pass on to the 2<sup>nd</sup> defendant. If that were ultimately to be the verdict of the trial court, it would matter little that the title was currently registered to the 2<sup>nd</sup> defendant.

Meanwhile, the 2<sup>nd</sup> defendant correctly stated that delay defeats equity, or to put it differently, equity does not aid the indolent.

Bearing that in mind, the 2<sup>nd</sup> defendant faults the plaintiff for giving possession to the 1<sup>st</sup> defendant for 18 months, only to later allege that the 1<sup>st</sup> defendant had not paid the balance of the purchase price. As the sale Agreement provided that the sale would be completed within ninety (90) days, the 2<sup>nd</sup> defendant says that the plaintiff was wrong to have waited for 18 months before taking action. The said delay is said to have occasioned prejudice to the 2<sup>nd</sup> defendant.

Without purporting to make any definitive findings on the matter, I note that the sale Agreement appears to be somewhat inconsistent. I say so because on the one hand the completion date was said to be ninety (90) days from 20<sup>th</sup> December 2004; whilst on the other hand, the balance of the purchase price (which was stated as being Kshs.3,000,000/-), was to be paid over a period of ten (10) months.

As the balance of the purchase price was payable at the rate of Kshs.300,000/-, it would have taken ten months to clear it. And until the said balance was paid in full, there was no way that the sale would have been completed.

To my mind, the registration of the transfer to the 1<sup>st</sup> defendant appears suspect. I say so because it was effected on 21<sup>st</sup> December 2004, which was the day after the sale Agreement was executed. When it is recalled that the balance of the purchase price was to be paid over a period of time, after 20<sup>th</sup> December 2004, I hold the view that until and unless the 1<sup>st</sup> defendant was able to demonstrate that it paid the said balance, this court would be right to accept the plaintiff's uncontroverted deposition, to the effect that the 1<sup>st</sup> defendant has, to date, failed to pay the plaintiff the sum of Kshs.3,580,000/-.

As regards the contention that the plaintiff was guilty of delay, I find myself unable to agree with the defendants. I say so because the plaintiff only became aware of the factual position prevailing on the ground in May 2006. That is when the plaintiff was alerted that a valuer had visited the suit property. She then carried out investigations, which revealed that the 2<sup>nd</sup> defendant intended to dispose of the property.

Upon becoming aware of those facts, the plaintiff moved to court on 15<sup>th</sup> June 2006. In other words, the plaintiff acted promptly.

To my mind, in determining the issue of the alleged delay, the period that should be taken into account is that from the moment when the plaintiff became aware of what had transpired.

In that regard, it is acknowledged that the plaintiff first became aware that the suit property had been transferred to the 2<sup>nd</sup> defendant in July 2005. At that stage, the plaintiff could have taken legal action, but she did not. It was not until some eight months later, when the 2<sup>nd</sup> defendant sent valuers to the land, that the plaintiff was stirred into action. In my view, the period of eight months is not so long as to give rise to it becoming a bar to equity.

In any event, although the 2<sup>nd</sup> defendant has asserted that the delay has prejudiced him, he failed to elaborate on the said assertion. The least that the 2<sup>nd</sup> defendant could have done, to demonstrate the prejudice occasioned to him, would be to show that he had, during the period in issue, carried out substantive developments on the land.

If the 2<sup>nd</sup> defendant were to be allowed to sell and transfer the suit property to another person, that would imply that if the plaintiff's claim was to be pursued to its logical conclusion, the buyers would also have to be enjoined to the suit. Therefore, I hold the view that it is in the best interest of justice to preserve the prevailing state of affairs.

As at the moment, the 1<sup>st</sup> defendant's operations have been closed down by the Central Bank of Kenya. Therefore, if the plaintiff lost the suit property, through a sale by the 2<sup>nd</sup> defendant, the loss may be incapable of being compensated by the 1<sup>st</sup> defendant.

For those reasons, I order that the defendants, their agents or servants, be restrained by an injunction, from selling, alienating, disposing of, wasting or in any way other manner dealing with the suit property, L.R. No. KAJIADO/KAPUTIEI NORTH/1168, until this suit is heard and determined. The costs of the application dated 15<sup>th</sup> June 2006 are awarded to the plaintiff.

However, the plaintiff is required to execute and file in court, within the next SEVEN (7) DAYS, an undertaking to pay to the defendants, or either of them, such damages as may be occasioned to them, by the injunction issued herein, in the event that it later transpired that the same was without foundation.

**FRED A. OCHIENG**

**JUDGE**

Dated and delivered at NAIROBI by Azangalala J, this 6<sup>th</sup> day of November, 2006 in the absence of the parties.

**F. AZANGALALA**

**JUDGE**