



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 89 of 2003

NABIL FAKRU MOHAMED TAHER PLAINTIFF

- Versus -

- 1. ZEINAB MOHAMED ALI 1ST DEFENDANT**
- 2. HUSSEIN MOHAMED ALI 2ND DEFENDANT**
- 3. BURHAN MOHAMED ALI 3RD DEFENDANT**
- 4. M. JEVANJEE 4TH DEFENDANT**

Coram: Before Hon. Justice Mwera

Abeid for Balala for Applicant/Plaintiff

Kadima for Aziz for Respondent – 1st,

2nd and 3rd Defendant

court clerk – Kazungu

RULING

The plaintiff filed a notice of motion dated 14/6/2005 under Order 24 rule 6 (1) (2), Order 50 rule 1 Civil Procedure Rules and section 3A Civil Procedure Act. His prayer was that judgment be entered in his favour in terms of the agreement of 30/7/2004, in satisfaction of prayer (b) of the plaint as against 1st, 2nd and 3rd defendants. The 4th defendant was said to be a lawyer against whom some negligence was attributed in some transaction involving the suit property herein known as MOMBASA/BLOCK XXXI/65. The plaintiff swore an affidavit in support thereof which Mr. Balala relied on to argue the application. Some annexures were appended, in particular the said agreement of 30/7/2004 which was

central here.

The court was told that the plaintiff and the first 3 defendants were relatives disputing about entitlements in the subject property. That on 30/7/2004 several family members including the litigants appeared before the Charge de Affairs of the Republic of Yemen and he brokered the agreement which gave each of the litigants 20% share while another 20% went to one Asgar Ali Taher (another relative), not a party here. Then all those present – the defendants, the family members, save the plaintiff, signed the agreement.

The plaint filed here on 30/4/2003 alleged fraud and so the plaintiff prayed that the title to the property held by the first 3 defendants be declared null, void and of no effect. The plaintiff then prayed this court to give:

“(b) An order that the defendants do jointly and severally deliver up to the plaintiffs (sic) the title documents.”

The court heard that several sessions to discuss settling the dispute resulted into the agreement of 30/7/2004 – hence the prayers herein. That by sharing the property in the proportions alluded to above, this suit was settled.

Mr. Kadima had a different view. To the defendants, the plaintiff having failed to append his signature to the agreement of 30/7/2004 meant that he could not seek to enforce it on the basis of lack of privity contract. And that of more importance, that agreement set out conditions which were still unfulfilled as at the time of filing this application and that that made it premature. It appeared that even if the said agreement did not specifically allude to this suit – MBA HCCC 89/2003 as being the centre thereof, both sides argued and the court thus accepted that the agreement of 30/9/2004 indeed concerned this suit. Then Mr. Kadima referred to other people mentioned or who signed that agreement but are not parties to this suit, some of whom gave/got terms that cannot be effected by this suit or parties to it.

In matters of this nature when the agreement said to compromise a suit is put in question as to its validity etc. it is only proper that the dispute be resolved by way of evidence at a trial. Here the plaintiff claims that in the totality of this suit vis a vis the agreement of 30/7/2004 he is right inside it even if he did not sign it. For a contract to bind parties they must bind themselves to it by signature, stamp, seal or other accepted mark. That is the law of contract. The defendants invoke it here in that the plaintiff did not sign the agreement of 30/7/2004. He admits it. It is a matter for trial.

The agreement contained conditions including one which said:

“5. The above-mentioned block (i.e. Mombasa/Block XXXI/65) should be sold within a year space (sic) according to its market value and the shareholders interested to buy should be given the first priority.”

The agreement was made on 30/7/2004. A year expired on 30/7/2005. The plaintiff said and the defendants agreed that the property has not been valued or sold to whoever of the shareholders is interested. That outstanding condition only means that the agreement has not gotten to the stage to compromise this suit.

It did not say who would conduct the valuation and eventual sale of the property. But be that as it may.

On the basis of lack of privity of contract by the plaintiff and that one or several of the conditions set out in the subject agreement remain unfulfilled, this court is inclined to dismiss this application.

It is however added that the parties should have filed the agreement in court as soon as it was made even though, it appears, putting it into effect would still require the parties to do more first e.g. value the property and give the first option to buy, to the interested shareholders (who include non-partes to this suit).

In sum this application is dismissed. Each side to bear its own costs. They are family members haggling over an estate of a deceased relative.

Delivered on 26th October 2005.

J.W. MWERA

JUDGE