



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 153 OF 1992

GEORGE WANJIKU GETHI.....PLAINTIFF

VERSUS

PETER MUTAMBACHO.....DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....3RD PARTY

JUDGMENT

The plaintiff was at the material time the registered owner of all that piece of land known as Title No. **LANET/DUNDORI BLOCK 464/26**. On or about the 17th October, 1989, he entered into a written sale agreement with the defendant in which he was to sell to the defendant 24 acres out of the aforesaid property (hereinafter referred to as "***the suit premises***") at a consideration of Kshs.1,200,000/-. Upon execution of the agreement, the defendant was to deposit with M/S Kagondu & Mukunya Advocates Kshs.480,000/- while the balance of Kshs.720,000/- was to be deposited with the said Advocates on or before 31st January, 1990; the plaintiff stated. The agreement further provided that the defendant was to take possession and use of the property upon payment of the full purchase price. The plaintiff alleged that as at 31st January, 1990 the defendant had only paid to the plaintiff the sum of Kshs.431,241.25 leaving a balance of Kshs.768,758.75. The plaintiff stated that the defendant further breached the sale agreement by entering into the suit property before payment of the full purchase price and without consent of the plaintiff. The plaintiff also alleged that time was the essence of the said agreement but that was not expressly stated in the agreement. The plaintiff stated that the defendant was in breach of the said agreement and urged the court to declare as such and make a further declaration that the defendant was a trespasser on the suit property and issue an order of vacant possession. The plaintiff also prayed for an order that the defendant was entitled to a refund of the deposit of the purchase price less 10% liquidated damages for breach of the sale agreement.

In his defence, the defendant admitted having entered into the said agreement with the plaintiff at a consideration of Kshs.1,200,000/- and said that the transaction was duly completed and that he had been registered as the proprietor of the said property. He further stated that the original agreement had been substantially altered and/or modified by mutual agreement of both parties by exchange of several correspondences. The defendant further stated that one of the alterations to the said agreement allowed him to move into the land and develop the same prior to paying the purchase price in full. He stated that he had paid the full purchase price and denied that time was the essence of the said transaction.

On 23rd September, 1993 the defendant applied for leave to serve a third party notice upon Agricultural Finance Corporation because the Corporation had stated in a letter dated 14th March, 1991 that a sum of Kshs.650,000/- had been paid to the plaintiff on behalf of the defendant on account of the sale agreement between the plaintiff and the defendant but the plaintiff had denied receipt of the said sum. The defendant therefore sought to join the third party so that it could be indemnified in the event that the said sum was found to be due and payable to the plaintiff by the defendant.

The said application was granted and the third party entered appearance and filed a statement of defence. It denied that it was liable to pay either the plaintiff or the defendant the said sum of Kshs.650,000/-. It stated that at or about the time of the said sale agreement, the plaintiff had taken loans from itself (the third party) and had defaulted in repaying the same and fallen into huge arrears.

The third party further stated that it financed the purchase of the suit land by the defendant and after registration of a discharge of charge which had been created over the suit premises in favour of Kenya Commercial Bank Limited, it lawfully credited the balance of the purchase price to the plaintiff's account which was in arrears. It said that it did so with full knowledge of the plaintiff.

When the suit came up for hearing, the plaintiff told the court that although the sale agreement between him and the defendant provided that a deposit of Kshs.480,000/- was to be paid to Kagonda & Mukunya Advocates, the same was not paid but the plaintiff received from the defendant Kshs.190,000/- in cash. The defendant said that he could not raise sufficient funds in time and was looking for a financier. He further stated that the defendant paid on his behalf a sum of Kshs.241,241.25 to Kenya Commercial Bank. At the time, the plaintiff was indebted to the said bank in the sum of Kshs.768,758.75.

The plaintiff further stated that in 1996, the defendant left the country and settled in London and the plaintiff was now in physical possession of the two parcels of land which he had sold to the defendant.

The plaintiff said that he was informed by a Mr. Githua Advocate of Cresswell, Mann & Dod Advocates that there was a letter dated 8/5/90 written to him by the third party which indicated that the third party had agreed to grant a loan of Kshs.650,000/- to the defendant and was requesting for the title documents to the suit property on its undertaking to pay to the said advocates the aforesaid sum of Kshs.650,000/-. The plaintiff executed transfer documents for the suit property and obtained Land Control Board consent and handed the documents to Kagonda & Mukunya Advocates who forwarded them to the third party. However, the third party paid to Cresswell, Mann & Dod Kshs.241,241.25 only.

The plaintiff admitted that he owed some money to the third party but that money was secured by a charge on another property known as **Plot No. 7156/8** which was near Kitale, measuring 501 acres or thereabout. He had been servicing that loan and he eventually cleared it. The plaintiff said that he had not requested the third party to deduct any money out of the sale proceeds which the third party was to pay on behalf of the defendant and neither did the third party communicate with him at all regarding that transaction.

In cross examination by the third party's advocate, the plaintiff said that the third party did not inform him that it had credited his loan account with it in the sum of Kshs.408,758.75. He also stated that the third party was advancing the defendant Kshs.650,000/- towards purchase of the said property and the defendant was to raise the balance of the purchase but the defendant either by himself or through the third party failed to pay the full purchase price for the suit property as agreed.

The defendant did not attend court for the hearing neither was any evidence tendered on his

behalf. However, he had filed several affidavits in respect of various interlocutory applications that had come up earlier.

On behalf of the third party, Mr. Willis Okumu, the third party's Branch Manager at Nakuru testified and said that he did not know the plaintiff, although he knew that he had borrowed some money from their Kitale branch. He said that the defendant was their customer at their Nakuru branch and the third party had advanced some money to the defendant to enable him purchase the plaintiff's properties which the defendant charged to the third party to secure a loan of Kshs.900,000/-. He said that the conditions attached to the said loan were that a first charge over the suit property was to be registered and the proceeds of the sale were to be applied to redeem the plaintiff's loan account at Kitale. However, the plaintiff was not a party to the loan agreement between the defendant and the third party. The third party was to advance the defendant Kshs.900,000/- out of which Kshs.650,000/- was earmarked to go towards purchase of the suit premises and the balance towards development thereof. The witness said that of that Kshs.650,000/-, Kshs.408,758.75 was credited directly to the plaintiff's loan account at their Kitale branch and Kshs.241,241.25 was paid to the plaintiff's loan account at Kenya Commercial Bank, Nakuru Branch.

In cross examination by the plaintiff's advocate, Mr. Okumu conceded that there was no evidence that the third party ever wrote to the plaintiff to inform him of what was being done and neither did the plaintiff request that any money be remitted to his loan account at Kitale branch of the third party corporation. He also conceded that the third party did not honour its undertaking dated 8th May, 1990 (P. Exh. 2) given to Cresswell, Mann & Dod Advocates to remit to the said firm a sum not exceeding Kshs.650,000/- upon registration of a charge in respect of the suit premises.

Mr. Erastus Ahura, an accountant working for the third party told the court that in January 1991, the plaintiff's loan account with the third party stood at Kshs.1,208,117.60 and the third party transferred Kshs.408,758.75 to the plaintiff's aforesaid loan account and paid Kshs.241,241.25 to Kenya commercial Bank Ltd, Nakuru branch on behalf of the plaintiff. He produced a statement of the plaintiff's loan account with the third party which showed that on 29/1/91 a sum of Kshs.408,758.75 was credited to the plaintiff's account.

He said that the defendant was not servicing his loan account with the third party and as at 30/5/2005 the debit balance stood at Kshs.5,025,990.35. In cross examination, Mr. Ahura said that the plaintiff had given oral instructions to the third party's Corporation secretary to recover Kshs.408,758.75 as aforesaid and credit the sum to his loan account. However, the Corporation secretary never testified and the plaintiff denied having ever given such instructions to the third party.

Subsequent to the entry of appearance by the third party, the defendant did not apply for directions as required under Order I Rule 18 of the Civil Procedure Rules and the third party proceeded to file its defence. Order I Rule 18 states that the defendant:-

“may apply to the court by summons in chambers for directions, and the court, upon the hearing of such application may, if it is satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

Does failure by the defendant to apply for third party directions invalidate the third defendant's defence (if any) against the defendant? I don't think so. A third party notice is often treated as a plaint and before a court grants leave to the defendant to issue a third party notice, it has to be satisfied that the defendant has a ***prima facie*** case as against the proposed third party that

may entitle the defendant to contribution or indemnity or any other relief relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff. Alternatively, the court has to be satisfied that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but also as between the plaintiff and the defendant and the third party or between any or either of them.

The directions that the court may give after the third party has entered appearance usually state how the issues raised in the third party notice will be resolved and the procedure thereof.

In the affidavit sworn by the defendant's advocate in support of the application for leave to serve third party notice, he stated *inter alia*, that:-

“4. THAT in answer to a request for particulars from the plaintiff the defendant duly filed the particulars and specifically paragraph 3 of the particulars refers to an annexed letter from Agricultural Finance Corporation dated 14th March, 1991 confirming payment of a sum of Kshs.650,000/- to the plaintiff on behalf of the defendant for a land purchase agreement between the plaintiff and defendant.

5. THAT the plaintiff has denied receipt of the said sum of Kshs.650,000/- and it is necessary for the ends of justice that Agricultural Finance Corporation be joined as a party to this suit to indemnify the defendant should the said sum be found to be due to the plaintiff from the defendant.”

In my view therefore, the court has to determine not only the plaintiff's case against that of the defendant but also the defendant's claim for indemnity as against the third party. The court also has to consider and determine any other relevant issue raised by any of the parties in this matter, notwithstanding that the defendant did not apply for directions as earlier stated.

I will first consider the plaintiff's case against the defendant. It was not in dispute that the plaintiff entered into a sale agreement with the defendant for sale of the suit premises at an agreed purchase price of Kshs.1,200,000/-. Although the agreement provided that a deposit of Kshs.480,000/- was to be paid to Mr. Kagonda & Mukunya Advocates immediately upon the signing of the agreement and the balance of Kshs.720,000/- was to be deposited with the said advocates on or before 31st January, 1990, as at 18th March, 1992 when the plaintiff filed the suit, he stated that he had been paid only Kshs.431,241.25, Kshs.190,000/- having been paid to him personally and Kshs.241,241.25 having been paid by the third party to the plaintiff's bank, Kenya Commercial Bank.

The defendant denied the plaintiff's claim in his defence and stated that he had paid the full purchase price.

On 18th March, 1992, the plaintiff filed an application against the defendant seeking an interlocutory injunction against him to restrain him from entering, cultivating or in any way interfering with the suit premises and in an affidavit which the plaintiff swore in support thereof stated that the defendant had unlawfully entered into the suit premises before he had paid the full purchase price. In his replying affidavit, the defendant annexed a copy of the plaintiff's letter dated 11th June, 1990 that showed that prior thereto, the plaintiff had allowed him to occupy the suit land pending finalisation of the transaction. The defendant also annexed a copy of the plaintiff's letter dated 16th June, 1990 wherein he was demanding a sum of Kshs.650,000/- being the balance of the purchase price. There was also a letter dated 15th June, 1990 addressed to the defendant by M/S Kagonda & Mukunya Advocates demanding the aforesaid sum of Kshs.650,000/-. The defendant therefore stated that the plaintiff's letter of 16th June, 1990 showed that by that date he had received Kshs.550,000/-. The defendant said that the

balance of Kshs.650,000/- had been paid on his behalf by the third party.

On 8th May, 1990, the third party wrote a letter to M/S Cresswell Mann and Dod and stated that it had granted the defendant a loan of Kshs.650,000/- towards purchase of the suit premises which at the time was charged to the Kenya Commercial Bank. The third party further stated as follows:-

“In order to enable me finalise the loan transaction please let us have the title deeds together with the duly executed Discharge on our undertaking that upon successful registration of our charge the corporation will remit direct to you a sum not exceeding Kshs.650,000/-.

Your co-operation will be appreciated.

Yours faithfully

(signed)

G. N. TARAYIA (MRS)

FOR: MANAGING DIRECTOR

The said letter was copied to M/S Kagondu & Mukunya Advocates and to the Manager, Kenya Commercial Bank Ltd, Nakuru branch, among others.

Earlier on 2nd January, 1990, M/S Kagondu & Mukunya Advocates had written to the General Manager of the third party stating that he was acting for both the plaintiff and the defendant (the vendor and the purchaser) and forwarded the application for consent of the Land Control Board and the letter of consent dated 28th September, 1989. The said advocates had requested for the balance of the purchase price amounting to Kshs.720,000/-.

On 14th January, 1991 the third party paid to the Kenya Commercial Bank a sum of Kshs.241,241.25 and on 29th January, 1991, without the plaintiff's consent, it credited his loan account with itself (the third party) in the sum of Kshs.408,758.75. The third party produced a statement of the plaintiff's loan account to prove that the said sum was indeed credited thereto.

From the evidence on record, it is evident that prior to 8th May, 1990, the balance of the purchase that was payable to the plaintiff by the defendant was Kshs.650,000/- and this sum was paid to the plaintiff through the third party in January, 1991 as shown herein above.

However, two issues arise regarding payment of the sum of Kshs.408,758.75. The first one is that the third party breached its undertaking to Cresswell, Mann & Dod Advocates who were acting for the Kenya Commercial Bank Ltd in failing to pay the full sum of Kshs.650,000/-. During the hearing, the court was informed by the plaintiff's counsel that the bank sued the third party for breach of the said undertaking in SRMCC No. 1398 of 1992 at Nakuru but counsel for the plaintiff and the third party did not know what the outcome of the said case was. I need not dwell on the issue of breach of the undertaking because that is not of much relevance in this matter.

The second issue is that the third party did not formally inform the plaintiff that it was going to credit his loan account with itself at its Kitale Branch. The third party contended that the plaintiff had given such instructions to its corporation secretary but that was not proved. That notwithstanding, it was sufficiently proved that the plaintiff was paid the sum of Kshs.408,758.75. There was no suggestion from him that he was not given due credit for the said sum.

From the foregoing, I do not agree with the plaintiff that the only amount that was paid to him was Kshs.431,241.25 and that there is an outstanding balance of Kshs.768,758.75. The plaintiff's case against the defendant must therefore fail.

As between the defendant and the third party, the latter demonstrated that it had paid for and on behalf of the defendant a sum of Kshs.650,000/- as shown herein above. The third party also demonstrated that the defendant had lawfully charged the suit property to it since September, 1990, the suit property having been lawfully transferred to the defendant by the plaintiff. I therefore hold that the defendant has no valid claim as against the third party. The defendant defaulted in repayment of the loan that was advanced to him by the third party and in the circumstances, the third party is perfectly entitled to exercise its statutory right of sale of the defendant's property to recover the amounts that are lawfully due and owing to it.

All in all, I dismiss the plaintiff's case but make no orders as to costs. I also dismiss the defendant's claim as against the third party and the defendant shall bear the third party's costs.

DATED, SIGNED AND DELIVERED at Nakuru this 21st day of October, 2005.

D. MUSINGA

JUDGE

21/10/2005

Judgment delivered in the presence of Mr. Waiganjo for the plaintiff, N/A for the defendant and Mr. Kisila holding brief for Robson Harris for the third party.

D. MUSINGA

JUDGE

21/10/2005