



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 1081 OF 2016

DANIEL KAMUNYU KIMANI.....1ST PLAINTIFF

GEORGE WANYOIKE NGURI.....2ND PLAINTIFF

VERSUS

PAUL K. GICHUI.....1ST DEFENDANT

WEMBLEY VILLAS LIMITED.....2ND DEFENDANT

RULING

The Defendants filed the application dated 12/9/2020 seeking leave to appeal against the order this court made on 28/9/2020 and stay of the proceedings pending hearing and determination of their intended appeal. They made the application on the grounds that the court directed the Defendants on 28/9/2020 to obtain a valuation report of land reference number (L.R. No.) 7418/21 from which plot numbers 028 and 029 were to be excised and file the valuation report within 14 days of the date the order was made. Being aggrieved by the order, the Defendants wish to appeal. They contended that they lodged a Notice of Appeal and a letter requesting for proceedings in court. Further, that the intended appeal was arguable and that they stood to suffer prejudice if the orders sought were not granted.

The application was supported by the 1st Defendant's affidavit sworn on 12/10/2020. He deponed that he was the director of the 2nd Defendant and that vide the sale agreement dated 7/1/2008, the Plaintiffs and the 1st Defendant entered into an agreement for the sale of two plots, numbers 028 and 029 which were to be excised from L.R. No. 7418/21 belonging to the 2nd Plaintiff at Kshs. 420,000/= and 450,000/= respectively. He deponed that his application for approval for change of user and subdivision were rejected by the Ministry of Lands on the basis that the resultant plots from the subdivision had to be of a minimum area of 0.045 hectares and not 0.22 and 0.017 ha as he had proposed. The other reasons for the rejection of the application were given by the Ministry of Lands. The 1st Defendant contended that without the approvals, he could not avail the completion documents to effect the transfers. He averred that the Plaintiffs rejected his offer to reimburse them the amounts they had paid and instead filed this suit. He deponed that a consent was arrived at on 28/9/2020 which essentially provided for refund of the purchase price to the Plaintiffs and leave the issues of whether the refund should be based on the current market value of the property or interest and at what rate for the court's determination.

He averred that when the consent came up for adoption in court, the court ordered the Defendants to value the entire parcel of land and to file the valuation in court together with submissions. He contended that it was the Plaintiffs that prayed for a refund at the current market value and therefore the burden lay with them to prove why they should be refunded the current value of the plots and that that was not the Defendants' duty. Secondly, that the court ordered a valuation of the entire parcel of land comprising L.R. No. 7418/21 yet the dispute only related to the two plots that were to be excised from the land. He averred that the court was yet to hear the issue regarding the refund and whether it should be with interest or based on the current market value of the land. He averred that by ordering a valuation report to be filed before hearing the parties on their respective positions was tantamount to condemning the Defendants unheard which goes against the rules of natural justice. He added that if the entire parcel of land were valued the Defendants would suffer prejudice because most of the land is heavily developed and the super highway had not been constructed back then. Further, that the value of the suit land would have been much less before it was developed. He contended that basing the current market value of the suit plots on the valuation of the entire parcel of land for purposes of the refund would not be a fair estimate of the current market value of the plots and that that would be prejudicial to the Defendants. He contended that it was not possible to estimate the market value of the suit plots from a valuation of the entire parcel of land since the plots were never excised from the larger portion of the land because the Ministry of Lands rejected the proposed subdivision on the ground that the plot sizes would be too small. He attached copies of the letters dated 13/2/2012 and 25/10/2012 from the Ministry of Lands on the proposed subdivision.

The Plaintiffs filed grounds of opposition dated 9/12/2020. They contended that the Defendants had failed to demonstrate that they had good grounds of appeal meriting judicial consideration. They argued that the order sought to be appealed against was issued by the court in exercise of its unfettered discretion aimed at facilitating a speedy determination of the case and the order did not determine with finality the case before this court. Further that the Defendants had failed to establish issues involving public interest to entitle them to the leave sought. The Plaintiffs argued that if the orders sought were granted, it would definitely occasion delay in the determination of this suit thereby causing them to suffer injustice and prejudice as they had always been keen to have this dispute determined. They added that the delay would violate the overriding objectives under Sections 1A and 1B of the Civil Procedure Act. Lastly, that the application raised issues that fell

squarely within the jurisdiction of this court and that the issues can be addressed in submissions for the court to consider when rendering its final judgement.

Parties filed submissions which the court considered. The Defendants submitted Order 43 Rule 1 (2) of the Civil Procedure Rules required them to seek leave before lodging an appeal. The Defendants contended that since the Plaintiffs sought a refund at the current market value the burden lay on them to prove why they should be refunded the current market value and that it should have been the Plaintiffs to procure the valuation. Further, that the court ordered a valuation of the entire parcel of land yet the dispute related to a small portion of the Defendants' land. They submitted that the application for leave was made timeously. Further, that they sought stay of proceedings pending hearing and determination of the appeal because parties were to address the issue of valuation in their submissions and that since that is the order sought to be appealed against it was proper for the Court of Appeal to be allowed to determine it after which parties can submit on it. The Defendants added that it would be a total waste of the court's precious time and would cause great injustice to the Defendant if the matter were allowed to proceed while the appeal was pending. They contended that the appeal would be rendered nugatory if the matter were allowed to proceed before the appeal was determined. They added that the Plaintiffs would not suffer any prejudice if the orders sought were granted as they would have an opportunity to submit and have the matter decided on merit.

The Defendants relied on **Francis Mwanza Mulwa v. Kanji Vagjiani & 2 others [2018] eKLR** in which the court addressed the issue of when leave to appeal should be granted. According to the decisions cited, the general purpose of requiring leave to appeal from some orders was to restrict appeals from orders made in minor procedural or interlocutory matters which do not go to the root of litigation or determine finally the rights of the parties and which can still be brought into question in an appeal against the final decision. Secondly, that leave to appeal from an order in civil proceedings would normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration. Further, that the court would only refuse leave if it was satisfied that the applicant had no realistic prospects of succeeding on the appeal.

The Plaintiffs submitted that according to paragraph 2(b) of the consent order dated 14/8/2020, one of the issues to be determined was whether the Plaintiffs' refund was to be based on the current market value subject to valuation or it was to be subject to payment of interest and for what period. The plaintiffs urged that that was one of the issues the Defendants agreed to have considered by the court. They added that in order to determine the current market value of the suit land a valuation had to be undertaken and that the Defendants' opposition to the court's direction to conduct a valuation lacked merit. Further, that if any valuation were to be done it had to be done on the entire plot as the basis of calculation of the value of the subject plots. They submitted there would be no prejudice suffered by the Defendants if the entire plot were subjected to valuation. They added that conducting a valuation was just a way of assisting the court and not the Plaintiffs in arriving at a just determination of the suit and that conducting a valuation would not finally determine the suit. They submitted that the issue of valuation does not go to the root of the litigation nor will it determine the substantive rights of the parties with finality and that that issue could still be raised in an appeal against the final decision. The Plaintiffs submitted the orders sought to be appealed against were issued by this court in the exercise of its discretion which was done judiciously within the limits of the law.

The issue for consideration is whether the court should grant the Defendants leave to appeal and stay these proceedings pending determination of the Defendants' intended appeal.

It is helpful to give a background of the proceedings in this dispute. The Plaintiffs' claim arose from sale agreements which they entered into in 2008 for the purchase of plots from the Defendants. The payments for the plots were made in 2008 and the suit was filed in 6/9/2016. The hearing of this suit started on 26/2/2019 where the 1st Plaintiff testified. He stated that he was seeking the land he purchased or in the alternative if the refund could be given to him at the current market value. The Defendants' advocate informed the court that the Defendants were prepared to refund the purchase price with interest but the Plaintiffs were insisting on the current market value of the land. The court directed parties to obtain a valuation from the Chief Government Valuer for purposes of determining the market value and thereafter parties were to negotiate a possible settlement out of court. The court gave a mention date for 30/4/2019. On that date, the Defendants' advocate informed the court that the Defendants had had a change of mind and wished to proceed with the hearing of the case. The suit was set down for further hearing on 25/9/2019. None of the parties appeared in court on that day and the suit was dismissed for want of prosecution.

The issue that falls for determination is whether the Defendants should be granted leave to appeal against the decision of this court and whether these proceedings should be stayed pending determination of the appeal that the Defendants intend to lodge against this court's decision.

The matter came up in court on 27/9/2019, 30/9/2019 and 31/10/2019. When the Plaintiffs' application dated 26/9/2019 for reinstatement of the suit came up for hearing on 31/10/2019, the Defendants' advocate informed the court that they did not oppose the application and sought costs of Kshs. 5,000/=. The suit was reinstated for hearing and the Plaintiffs were ordered to pay the Defendants' costs of Kshs. 3,000/=. The court fixed the suit for hearing on 29/1/2020. The hearing could not proceed on 29/1/2020 because one of the Plaintiffs' witnesses was delayed on his way from Mombasa. The hearing came up again on 20/7/2020 when the Plaintiffs closed their case.

The case was fixed for further hearing on 29/7/2020. However, on that date the court could not hear cases in open court owing to the risk of contracting Covid 19. The case was fixed for further hearing on 28/9/2020 and on that date parties informed the court that they had entered into a consent on 15/8/2020 that partially settled the matter. The Defendants' advocate informed the court that the only outstanding issue after they refunded the purchase price to the Plaintiffs would be interest but the Plaintiffs were demanding the market value of the land. The Defendants argued that the plots that were to be sold to the Plaintiffs measured 0.017 ha and 0.029 ha and not the whole parcel of land measuring 1 hectare.

The court made an order in the following terms:

“The defendant is to file and serve a valuation report and submissions on the sum payable to the Plaintiffs over and above the refund within 14 days of today. The Plaintiffs will file and serve their submissions within 7 days of service by the Defendants. Highlighting of submissions on 28/8/2020.”

Looking at the consent filed by the parties, it was couched in the following terms:

“By consent,

1. The judgement be and is hereby entered against the defendants in favour of the Plaintiffs for Kshs. 870,000/= being refund of the purchase price paid by the Plaintiffs for purchase of plots nos. 029 & 028.
2. Parties to file written submissions on:-
 - a. Whether the Plaintiffs’ claim/relief should be subject to payment of interest and the period when such interest should accrue or
 - b. Whether the Plaintiffs’ refund should be as per the current market value subject to a valuation report.
3. Plaintiffs can file and serve their submissions on issues raised in (2) above within (21) days and Defendants can file theirs within twenty on (21) days after service.
4. Court to give a mention date after forty-two (42) days to confirm compliance and reserve a judgement date. “

From the wording of the consent recorded by the parties it is clear that parties were to file submissions on the issue whether the Plaintiffs were to be paid interest over and above the refund of the purchase price or whether the sum payable to the Plaintiffs was to be pegged on the current value of the land.

The court does not agree with the Defendants that the order made on 28/8/2020 was for purposes of getting the value of the whole portion of the Defendant’s land as the Plaintiffs’ entitlement. The valuation of the whole land was to be undertaken in order to determine the current value of the portions measuring 0.22 and 0.017 ha which the Plaintiffs intended to purchase from the Defendants. The Defendants have possession of the land and the Plaintiffs may not be in a position to access the Defendants’ land for purposes of valuing it. The valuer can ascertain the value of the two plots measuring 0.22 and 0.017 ha from a valuation of the whole parcel of land.

In order to give effect to the consent signed by the parties, it is imperative that a valuation is first undertaken and submissions filed so that the court can make a determination on how the sum payable to the Plaintiffs is to be computed. That is, whether it will be based on interest on the sum paid by the Plaintiffs or whether it will be pegged on the market value of the suit land.

The issue of valuation which the court directed the Defendants to undertake does not go to the root of the litigation and will not determine the substantive rights of the parties on the outstanding dispute with finality. In any event, the Defendants can still take up that issue on appeal against the final decision of this court. There are no grounds of appeal which merit serious judicial consideration.

The court declines to grant the orders sought in the application dated 12/10/2020. The Plaintiffs are awarded the costs of that application.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MAY 2021.

K. BOR

JUDGE

In the presence of: -

Ms. J. Gitau holding brief for Mr. G. Mwangi for the Plaintiffs

Ms. Bilha Kimani for the Defendants

Mr. V. Owuor- Court Assistant