



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 187 OF 2017

IN THE MATTER OF LAND REFERENCE NUMBER 519/533

IN THE MATTR OF A PROFESSIONAL UNDERTAKING BETWEEN ADVOCATES

JOHN MWAURA THUO.....PLAINITFF

VERSUS

DICKSON NGUGIDEFENDANT

AND

CRESWELL, MANN& DOD ADVOCATES.....1ST INTERESTED PARTY

MOHAMMED & KINYANJUI ADVOCATES.....2ND INTERESTED PARTY

J U D G M E N T

1.The plaintiff commenced the present suit by way of an originating summons dated 17th February 2017. The plaintiff sought the determination of the following questions by the court.

1. Whether the plaintiffs is entitled to a declaration that he is the legal and equitable owner of property land Reference No.519/353 situated in Njoro within the Nakuru District being premises registered in the Registry of Titles at Nairobi as Number IR 40423/1 which said piece of land and boundaries thereof is delineated and described on land survey plan number 124991 deposited in the Survey Records at Nairobi;

2. Whether the plaintiff is entitled to the delivery of all completion documents held in the firm of Mohammed & Kinyanjui Advocates regarding property Land Reference No.519/353.

3. Whether the firm of Mohamed & Kinyanjui advocates is entitled to be released from their professional undertaking contained in the letter from the firm of Cresswell, Mann & Dod Advocates dated 8th October 2012.

2.The originating summons was supported on the annexed affidavit sworn by the plaintiff, John Mwaura Thuo, on 1st February 2017. The plaintiff averred that on 31st August 2007 he entered into a sale agreement for purchase of portion of 20 acres out of L.R 519/353 for the consideration of Kshs,7,000,000/= and further on 29th October 2008 he entered into another agreement with the defendant to purchase the remainder of 30 acres of LR 519/353 at the consideration of Ksh.12,000,000/= as the subdivision for the initial 20 areas had not been effected.

3. That on the 16th March 2012 the plaintiff, and the defendant agreed to modify the terms of the previous two agreements and entered into a fresh agreement for the sale of the entire 50 acres of LR No.519/353 for the agreed consideration of Kshs.35,000,000/= which sum was to be paid as follows :-

(a) Twenty Million Kenyan shillings (Ksh.20,000,000/=) on or before the execution of the Agreement which amount was duly paid.

(b) 10 million Kenyan shillings (Ksh.10,000,000/=) to be financed by Barclays Bank of Kenya Ltd with Land Reference No.519/353 as security.

(c) Balance of Five Million Kenyan Shillings (Kshs5,000,000/=) to be paid in Ten (10) equal monthly installments of five hundred thousand shillings (Ksh.500,000/=). Annexed hereto and marked "JMT3" is the agreement of sale).

4. Under clause 4 of the sale agreement the completion date for the transaction was expressed to be 30th June 2012 while under clause 6 of the agreement it was acknowledged that the purchaser (plaintiff) was already in possession of the property. As per the agreement of sale both the plaintiff and the defendant were represented in the sale transaction by the firm of Cresswell, Mann and Dod Advocates while the firm of Mohammed and Kinyanjui acted for Barclays Bank in the financing transaction.

5. The plaintiff averred that Barclays Bank agreed to advance him the sum of Ksh.10,000,000/= towards the purchase and in that regard instructed its advocates M/s Mohammed & Kinyanjui to take a charge in its favour over L.R No.519/353 to enable the bank to disburse the loan proceeds. The bank's lawyer vide the letter dated 29th June, 2012 (JMT4") requested for the necessary documents against their professional undertaking to pay Kshs10,000,000/= by RTGS within 14 days of the registration of the Transfer in favour of the purchaser and charge in favour of the bank. On 8th October 2012 the firm of Creswell, Mann & Dod Advocates released the following documents to facilitate the creation of the security and set out the terms of the professional undertaking upon which the documents were released : ("JMT3a"):-

1. Original provisional certificate of Title of LR No. 519/353 dated 10th March 2003 INO Dickson Ngugi Ngugi.

2. Transfer duly executed by the vendor and the purchaser.

3. Original land Control Board consent to the transfer.

4. Original rates clearance certificate valid upto 31st December 2012.

6. On 10th October 2012 the firm of Mohammed & Kinyanjui Advocates acknowledged receipt of the documents. However the advocate vide a letter dated 14th January 2013 addressed to M/s Cresswell Mann & Dod Advocates ("JMF-6") indicated they had experienced difficulties in obtaining the consent to charge since the vendor (defendant) had lodged an objection to the sale. M/s Cresswell Mann & Dod Advocates vide their letter of 17th January 2013 (JMT7) responded stating they were unaware of the vendors objection to the sale and stated that they learnt of the complaint from the letter written to the purchaser by the firm of Ndeda & Associates Advocates dated 17th October 2012 which had been copied to them. (" JMT-9") .

7. The plaintiff asserted that as it became not possible to complete the financing arrangement without the consent to charge he sourced the balance of the purchase price from other sources and paid to the vendor. On that account his advocates M/s Wandabwa Advocates wrote the letter dated 18th January,2016 to Mohammed & Kinyanjui advocates (JMT10) requesting that they release to them the completion documents that had been released to them on their professional undertaking for purposes of creating and registering a charge on behalf of Barclays Bank.

8. The firm of M/s Mohammed & Kinyanjui Advocates responded to M/s Wandabwa Advocates letter vide their letter of 12th February, 2016 (" JMT-11") stating that the documents had been released to them on a professional undertaking they had issued to M/s Cresswell, Mann & Dod and hence they could only release the documents to the said firm unless the firm released and discharged them from the professional undertaking and authorized them to release the documents. The said advocates intimated that the firm of Cresswell, Mann & Dod had declined return of the documents to them stating that they no longer acted for the vendor in the matter.

9. The two law firms were enjoined in the suit as interested parties on account of the roles they played in the sale transaction. The 1st and 2nd interested parties entered appearance and filed their responses. The 1st interested party in the replying affidavit sworn by N.K Githua dated 19th June 2017 admitted they acted for both the plaintiff and the defendant in the sale and purchase of LR No.519 /353, He affirmed that his firm forwarded the completion documents relating to the sale to the 2nd interested party who were the advocates for Barclays Bank who were financing the purchase price to the extent of Kshs.10,000,000/=. He stated that the documents were acknowledged receipt of by the 2nd interested party vide the letter dated 10th August 2012. He however stated the defendant caused the firm of M/s Ndenda & Associates Advocates to write the letter dated 18th October 2012 which among other things stated the defendant had been made to sign some documents in the 1st interested party's office. The 1st interested party thus stated that since the defendant had appointed another firms to represent him they could not deal with the matter any further by accepting the documents back and/or by discharging the firm of M/s Mohammed Kinyanjui from their professional undertaking.

10. The 2nd interested party in the replying affidavit sworn by Nicholas Karanja advocate dated 12th July 2017 reiterated that they received and accepted the documents on the terms of the professional undertaking they had given to the firm of Cresswell, Mann & Dod advocates. The 2nd interested party stated they could only release the documents to the said firm against the said firm releasing them from their professional undertaking unless a court order directed otherwise.

10.The defendant did not appear and did not file any response. The record does not show whether he had been served with the originating summons until 17th February 2021 when one Onyango Henry Obonyo served him with Notice of Motion dated 20th January 2021 that sought directions to be given on the originating summons. The affidavit of service filed on 18th February 2021 indicated that apart from the application for directions he was served with the other documents including the originating summons . The same process stated he on 12th June 2021 served the defendant with a Notice for delivery of judgment scheduled on 15th July 2021.

12. It is against the foregoing background that the instant originating summons was instituted by the plaintiff. On 23rd February 2021 the court gave directions that the originating summons be disposed off on the basis of affidavit evidence and the documents filed and

submissions. The plaintiff was directed to file and serve his submissions on the defendant and the interested parties. The record does not show the plaintiff's submissions were served on the other parties. I have reviewed the pleadings including the supporting documents and the submissions filed on behalf of the plaintiff and the following are the issues that arise for determination:-

(i) Whether the plaintiff paid the full purchase price for the suit property?

(ii) Whether the plaintiff has demonstrated that he is the equitable owner of LR No.519 /353 to warrant the court to declare that he is legal owner of the property?

(iii) Whether the 2nd interested party should be released from their professional undertaking contained in the letter dated 8th October 2012 and the documents released to the plaintiff and/or to his order to facilitate completion of the transaction.

13. There is no dispute that the plaintiff and the defendant entered into a series of agreements for sale relating to LR No.519/353 owned by the defendant, culminating in the agreement for sale dated 6th March 2012. The issue however that arises is whether the terms of that agreement were honoured by the plaintiff. Under clause 3 of the agreement for sale Kshs.20 million was paid and acknowledged upon execution; Kshs.10 million was to be financed to the plaintiff by Barclays Bank; and the balance of Kshs.5 million was to be paid in instalment of Kshs.500,000/= for 10 months. The plaintiff to acquire an equitable right to be entitled to be declared as the legal owner of the suit property has to show and demonstrate that he fulfilled the terms of the agreement including the payment of the full purchase price. Although the plaintiff has averred he paid the full purchase price, he has not demonstrated when and how he paid the balance of the purchase price of Kshs.15 million. It is clear the financing of Kshs.10 million by Barclays Bank did not come through. Under paragraph 18 of the supporting affidavit the plaintiff deposes thus:-

18. When it became manifestly clear that it was impossible to register the charge owing to lack of consent from the defendant, I sourced for funds and paid the full shillings Ten million only (Ksh10,000,000/=) to the defendant thereby paying the full purchase price and discharging all my obligations under the agreement.

14. How was this amount paid and was there an acknowledgment by the defendant? And still while at the payment of the balance of the purchase price, when and how was the balance of Kshs.5,000,000/= paid and was there an acknowledgment? Without satisfactory answers to these queries, I find myself unable to hold and find that the defendant was paid the full purchase price for the suit property. If the plaintiff paid the full purchase price considering that consent to transfer had been obtained and the plaintiff had been granted possession, there would be no doubt that an equitable trust would have arisen in his favour and the court would have had no hesitation in finding that he would have become entitled to be declared as the equitable owner of the property and therefore entitled to a declaration that he was the legal owner and entitled to be registered and issued title. The maxim that he who seeks equity must come to court with clean hands must apply in the circumstances of this matter. The plaintiff must demonstrate and show he paid the full purchase price.

15. The plaintiff in the present matter is basically seeking specific performance of the sale agreement dated 16th March 2012. A party who seeks specific performance of a contract must be able to prove and demonstrate that they on their part performed all the obligations placed upon them under the contract and are therefore entitled to have the contract specifically performed.

16. Having considered the circumstances of this matter in its totality, I am of the view that owing to the issues that required to be proved, an originating summons was not necessarily the best route to approach the court. The matter was not simply one for enforcement of a professional undertaking and/or discharge thereof.

17. The matter entailed consideration whether or not the terms of the sale agreement of 16th March 2012 were fully complied with by the plaintiff. There was no admission by the defendant that the terms of the agreement were satisfied. In fact there was correspondence that indicated he was blaming the plaintiff for breach. These are issues that I think could only be ventilated in a formal suit commenced by way of plaint. To preserve the parties position I will order the present originating summons struck out and grant leave to the parties to commence a fresh action within the next six months from the date of this judgment. In such subsequent suit any plea of resjudicata on account of the present action and/or limitation of action is waived to enable and to facilitate the pursuit of substantive justice by the parties.

18. As I have not made any determination respecting the question of release of the documents held by the 2nd interested party on a professional undertaking, and or the discharge of the professional undertaking, the position will remain as it was before the present suit was filed pending further action by the plaintiff and/or the defendant.

19. Each party will bear their own cost of the suit.

JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE