



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 21 OF 2018**

**ANDREW KARANJA NDABA.....1<sup>ST</sup> APPLICANT**

**LISA KATHAMBI MIRITI.....2<sup>ND</sup> APPLICANT**

**=VERSUS=**

**PASADENA SYSTEMS LIMITED.....1<sup>ST</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Plaintiffs/Applicants herein filed and/or lodged the instant suit vide Plaintiff dated the **7<sup>th</sup> February 2019**, and in respect of which the Plaintiffs/Applicants sought the following Reliefs;

I. *The said Defendants be compelled to forthwith release to the Plaintiffs/Applicants the original title documents for a property known as **Massionate Number 9 L.R No. 209/1705/3**, Woodlands Road, situate in Nairobi.*

II. *There be a computation of any losses incurred by the Plaintiffs due to the willful negligent acts by the Defendants and the same be determined by the court.*

III. *Costs and interest of the suit.*

IV. *any other or further relief that the honourable court may deem fit to grant*

2. Contemporaneously with the filing of the Plaintiff, the Plaintiffs/Applicants also took out a Notice of Motion Application dated **the 7<sup>th</sup> February 2019**, whereby the Plaintiffs/Applicants sought the following Reliefs;

a. *this application be certified as urgent, service be dispensed with and the same be heard ex-parte in the first instance.*

b. *The said Defendants be compelled to forthwith release to the Plaintiffs/Applicants the original title documents for a property known as **Massionate Number 9 L.R No. 209/1705/3**, Woodlands Road, situate in Nairobi.*

c. *There be a computation of any losses incurred by the Plaintiffs due to the willful negligent acts by the Defendants and the same be determined by the court.*

d. *Costs and interest of the suit.*

e. *any other or further relief that the honourable court may deem fit to grant*

2. It is imperative to observe that the Notice of Motion Application herein is supported by the Affidavit of one, **Andrew Karanja Ndaba**, who is the 1<sup>st</sup> Plaintiff/Applicant herein and to which the 1<sup>st</sup> Plaintiff/Applicant has deposed to the circumstances touching on and/or concerning the subject matter. For clarity, the 1<sup>st</sup> Plaintiff/Applicant avers that same entered into a sale agreement with the 1<sup>st</sup> Defendant/Respondent, whereby the latter agreed to sell and/or transfer to the Plaintiffs/Applicants, all that property otherwise known as **Masonite number 9, L.R NO. 209/1705/3**, situate along Woodlands road, within the City of Nairobi.

3. Upon the filing of the subject Application, the 1<sup>st</sup> Defendant/Respondent, who is now the only Defendant in the matter filed a Replying affidavit in opposition thereto.

4. It is worthy to note that the 1<sup>st</sup> Defendant/Respondent averred *inter-alia* that the subject transaction, was being undertaken on behalf of the parties herein, namely the Plaintiffs/Applicants, on one hand and the Defendant/Respondent on the other hand by the 2<sup>nd</sup> Defendant, who is an Advocate of the High Court of Kenya.

5. It was the 1<sup>st</sup> Defendant's /Respondent's further averment that the certificate of title in respect of the suit property, namely **Massionnate Number 9, LR. No. 209/1705/3**, situate in Woodlands Road, were held by the 2<sup>nd</sup> Defendant, who has however since been released from the subject proceedings by way of a consent duly executed between the Plaintiffs/Applicant and the said 2<sup>nd</sup> Respondent.

### **SUBMISSIONS BY THE PARTIES**

6. On the 25<sup>th</sup> May 2021, the subject Application came up for hearing, when the parties namely the Plaintiffs/Applicant and the 1<sup>st</sup> defendant/Respondent, respectively, agreed that the Notice of Motion application dated the 7<sup>th</sup> February 2019, be canvassed and/ or be disposed of by way of written submissions.

7. Pursuant to the foregoing, the Plaintiffs/Applicants herein, proceeded to and filed their written submission on **the 21<sup>st</sup> May 2021**, whereas the 1<sup>st</sup> defendant/Respondent filed his submissions on **the 21<sup>st</sup> September 2021**, highlighting the issues in dispute.

8. I have examined the submissions filed by the respective parties and it is common ground that the certificate of title/original title documents pertaining to and/or concerning the suit property, have since been released to and are now in the custody of the Plaintiff/Applicant. *See the last paragraph of page 1 of the Plaintiffs/Applicants written submissions.*

### **ISSUES FOR DETERMINATION**

9. Having reviewed the Complaint, whose details have been, reproduced in paragraph one hereof, the Notice of Motion Application dated **7<sup>th</sup> February 2019**, and the supporting affidavit thereof, filed by the Plaintiffs/Applicants, as well as the Replying affidavit by the 1<sup>st</sup> Defendant/Respondent, the following issues arise for determination;

- I. *Whether the honourable court has jurisdiction to grant final and/or substantive orders vide an interlocutory application.*
- II. *Whether the honourable court can pronounce itself on a relief a kin to specific performance sought in an interlocutory application.*
- III. *Whether Special damages can be claimed and/or sought for in the Application*
- IV. *Whether the subject application amounts to an abuse of the court process of the court.*

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

10. At the commencement of the subject ruling, I endeavored to and/or reproduced the Reliefs and/or orders sought for by the Plaintiffs/Applicants in terms of the Complaint, and similarly I have reproduced the Reliefs sought at the foot of the Notice of Motion Application, the latter which is the subject of the current ruling.

11. Without going into the details and just at cursory glance, what becomes evident and/or apparent, is that the plaintiffs/Applicants herein have sought the same Reliefs in respect of the Notice of Motion Application, as well as the main suit.

12. It is therefore evident that what the Plaintiff's/Applicant's want to achieve from the court is to attract and/or obtain final and/or substantive orders, albeit disguised, as Interlocutory Reliefs.

13. It is my humble opinion and I so hold that the nature of the Reliefs sought on the face of the Notice of Motion Application, speak to finality and in any event, correspond word for word, with the reliefs sought in the complaint and in this regard, the grant of the Notice of Motion Application, shall obviously defeat the main suit. Simply put, the determination of the subject Application will conclude or otherwise, determine the entire suit ,albeit at an Interlocutory stage.

14. It is common ground that vide the subject application the Plaintiffs/Applicant, are seeking to dupe and/or mislead the honourable court to finalize the subject dispute, prior to and/or before the plenary hearing. Such kind of a scenario, is unorthodox and unknown to law and, is otherwise, inimical to the Rule of law.

15. At any rate, an Interlocutory application can only give rise to interlocutory reliefs and not final orders. Consequently, I find and hold that the subject application herein, is intended to achieve a travesty of justice and therefore same is legally untenable and should not have been filed in the first place.

16. To fortify the foregoing position I rely in the decision in the case of **HEADMASTER KIEMBENI BAPTIST PRIMARY SCHOOL & another v PASTOR OF KIEMBENI BAPTIST CHURCH [2005] eKLR**, where the honourable court observed as hereunder;

*In my view these are issues that can only be resolved after a full hearing of the case. The Respondents application sought a permanent injunction and that is what the learned Senior Resident Magistrate granted. That in effect conclusively decided the suit. That is wrong. When dealing with applications for injunction courts should not decide issues of fact – Mbutia – Vs – Jimba Credit Finance Corporation & Another (1988) KLR 1. Issues of fact should be decided after hearing evidence.*

16. Taking into account the foregoing Decision, what becomes apparent is that court must guard against being invited to grant final and/or substantive orders and/ or Reliefs, which have the effect of the disposing of the entire suit even before the scheduled hearing. For clarity, that is what the Plaintiffs/Applicants herein are seeking to achieve by sidewind.

### **ISSUE NUMBER 2**

17. Other than the fact that the Plaintiffs/Applicant's Application, have sought final and/or substantive reliefs, it is also apparent that prayer two [2] of the Application as coached relates to Specific performance, which in itself, is also an order that can only issue upon the full hearing of the case. However, in the instant situation, the Plaintiffs/Applicants are seeking to procure such an order vide an Interlocutory application.

18. On the other hand, the Plaintiffs/Applicants have vide submissions expressly ventured to address the court on the issue of Specific performance and the circumstances when same can be granted and/or issued.

19. For the avoidance of doubt, the Plaintiffs/Applicants herein have referred the court to the Decision in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR**, where the honourable court held as hereunder;

*Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.*

*The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.*

20. Taking into account the submissions filed by the Plaintiffs/Applicants and the case law relied upon, I can now say here and now, that the Plaintiffs/Applicants, are indeed, not seeking any Interim and/or temporary reliefs. Same are keen, to side step procedure as well as the Doctrine of Natural justice and attract an order of specific performance, which cannot ordinarily issue on the basis of an Interlocutory Applications of this Nature.

### **ISSUE NUMBER 3**

21. Other than the disguised request for the Specific Performance Relief, the other evident Relief that the Plaintiffs/Applicants herein are also seeking is for computation and payment of any losses incurred by the Plaintiffs/Applicants, due to the willful and negligent acts of the Defendant.

22. My humble understanding of the said prayer, is that the Plaintiffs/Applicants are saying that same have suffered losses, arising from the willful and negligent acts of the Defendant/Respondent. Consequently, the Plaintiffs/Applicants are asking the honourable court to compute the amount at the foot of such loss and thereafter pronounce itself on the Quantum of same, that is, the loss that is alleged to have been suffered by the Plaintiffs/ Applicants..

23. Other than the foregoing, the Plaintiffs/Applicants herein are also keen to ask the honourable court, to pronounce itself on the issue, that the Defendant/Respondent was also willfully negligent, in the manner in which same handled the transaction, which is said to found the subject claim.

24. Before venturing to address whether the honourable court can make pronouncements on the Issue of willful Negligence, it is important to take cognizance of the provisions of **Order 2 rule 10 (1), of the civil procedure rules**, which provides as hereunder;

#### ***Particulars of pleading [Order 2, rule 10.]***

***(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—***  
***(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading and***  
***(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.***

25. From the foregoing provisions, what becomes apparent, is that where a party's case is premised on willful default, or willful negligence, (the latter being the case herein) the claimant must supply particulars of such willful negligence.

26. Nevertheless, it is also important to underscore the fact that, even if the Plaintiffs/Applicants herein, had supplied such particulars, (*which is not the case*) such a claim can only be addressed and/or be resolved, after plenary hearing, comprised of Evidence in chief and thereafter cross examination of the Parties, thereof.

27. On the other hand, the computation of losses, whether such losses be special and/or general in nature, can also only be undertaken by the court upon full hearing of the case and not otherwise. For clarity, the Honourable Court can not indulge and/ or engage itself in the assessment of Damages, whether Special or otherwise, during the Interlocutory Proceedings.

28. Suffice it to say, that even in the event of ascertainment of such losses, which in the instant case relate to a contract, the Plaintiffs/Applicants would first and foremost be required to particularly plead and there after specifically prove such losses. In this regard, I must say that the case law pertaining to this position are now legion, including, the case of **PROVINCIAL INSURANCE OF EAST AFRICA LTD VERSUS MORDEKAI MWANGA NANDWA, [1996] eKLR**, where the Honourable Court of Appeal dealt with a similar issue.

29. I am afraid that in the instant matter, that is the subject application, no such pleadings have been availed. In any event, none could be availed because the nature of proof required, cannot be attended to and/or achieved in an interlocutory application of this nature. Clearly, the Plaintiffs/Applicants, are trying to dupe the Honourable Court.

30. In the premises, I must similarly observe that the Plaintiffs/applicants herein, threw caution to the wind and did not care whether the reliefs sought, can ordinarily be issued, in the manner prayed or otherwise.

31. I should hasten to add, that it is high time that litigants and more particularly, advocates, should pay heed to the procedural issues, which have a bearing on the jurisdiction of the court in determining matters in dispute. In such a situation, the honourable court, would not have to burn the precious judicial resources, to craft Rulings, like the one herein, which relates to an issue that ought to go down for trial.

#### **ISSUE NUMBER 4**

32. From the submissions filed by and/or behalf of the Plaintiffs/Applicants, it is conceded as hereunder;

***“During the pendency of the hearing of this application, the 2<sup>nd</sup> Defendant released the original title documents in her custody and consequently the Plaintiffs/Applicants withdraw their claim against her.*”**

33. The import and tenor of the foregoing submissions is that the Plaintiffs/Applicants now have custody of the original title documents for and in respect of the suit property. In this regard, how then can the plaintiffs/applicants continue to maintain a suit, seeking for the very documents, which are under their own custody and care. Certainly, the Honourable Court is being taken for a Horse ride.

34. On the other hand, if the documents are already under the custody and care of the Plaintiffs/Applicants, and given that the same were not in possession of the 1<sup>st</sup> defendant/Respondent, then how will a court order, if any, be enforced against the 1<sup>st</sup> Defendant/Respondent.

35. It is common ground that a court of law cannot act in vain and/or in futility. To vindicate the foregoing position, I take guidance in the decision in the case of **Kalya Soi Farmers Cooperative Society v Paul Kirui & another [2013] eKLR**, where the honourable court had this to say;

***Once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.***

36. In any event, where a Party is seeking an order in respect of an issue, property and/or documents, which are under her custody and care and still wants the court to issue an order against a third party, for the same Documents, such a pursuit constitutes an act in vanity and hence amounts to abuse of the court process.

37. In this regard, I take cognisance of this decision in the case of **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR**.

**In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-**

***“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”***

**The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-**

**(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**

**(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

**We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.**

38. Without belabouring the point, the conduct of the Plaintiffs /Applicants, that is, of pursuing the subject matter, yet the titles that are being sought for were surrendered to same by 2<sup>nd</sup> Defendant, a fact which has been conceded elsewhere, amounts to an unfathomable recklessness that cannot be entertained by a court of law. Simply put, the conduct of the Plaintiffs/Applicants herein, amounts to an abuse of the Due process of the court.

### **COSTS**

39. Costs ordinarily follow the event, unless the judge for a good cause finds otherwise. However, in respect of the subject matter and taking into account the Plaintiffs/ Applicants own acknowledgment that the Documents sought were indeed released to them by the 2<sup>nd</sup> Defendant, leading to the withdrawal of the suit against the said 2<sup>nd</sup> Defendant, the conduct herein is one that ought and should be condemned with costs.

### **FINAL DISPOSITION**

40. In conclusion, the Notice of Motion Application herein is Devoid of Merits and same, is hereby Dismissed with costs to the Defendant/ Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT, MILIMANI.**

In the Presence of;

**June Nafula    Court Assistant**

**Mr Kegode For Plaintiff/Applicant**

**Omulama For Defendant/Respondent**