



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 633 OF 2017

STEPHEN MACHARIA NGUGI PLAINTIFF

VERSUS

PETER KAMAU MUNENE 1ST DEFENDANT

FRANCIS MUNGAI MUIRURI 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

BEN MOMANYI 4TH DEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 5/10/2017. He sought the following reliefs against the defendants:-

a) An order directed at the 3rd defendant to cancel the title deed to all that parcel of land known as Dagoreti/Kinoo/2467 issue to the 2nd defendant; or

b) Alternatively the 1st, 2nd and 4th defendants jointly and severally do pay the plaintiff the sum of Kenya Shillings Twenty Million (Kshs 20,000,000/-) being the current value of the property;

c) Judgment against the 1st, 2nd, and 4th defendants jointly and severally for mesne profits calculated at the rate of Kenya Shillings Fifty Four Thousand (Kshs 54,000) per month from October 2014 till payment in full;

d) General damages;

e) Costs of the suit;

f) Interest on (b), (c) and (d) above; and

g) Any other remedy that this Honourable Court may deem fit to grant.

2. The Plaintiff's case was that on 22/10/2014, he entered into a land sale agreement with the 1st defendant, pursuant to which he agreed to sell to the 1st defendant his property, **Dagoreti/Kinoo/2467 (the suit property)** at Kshs 13,000,000. Under the agreement, the 1st defendant was to pay 10% of the purchase price on execution of the agreement, and the balance was to be paid after successful transfer of the suit property into the name of the 1st defendant or his nominee. Completion period was 90 days. The plaintiff contended that prior to the payment of the 10% deposit by the 1st defendant, the 1st defendant fraudulently and illegally procured the transfer of the suit property into his name, and subsequently conveyed it into the name of the 2nd defendant.

3. The plaintiff itemized the following verbatim particulars of fraud against the defendants;

“(a) The 4th defendant facilitated the transfer of the property from the plaintiff to the 1st defendant without the 1st defendant having paid the purchase price of the property in the sum of Kenya Shillings Thirteen Million (Kshs 13,000,000/=) as per the terms of the sale agreement.

b) The 1st defendant purporting to be the owner of the property sold the same to the 2nd defendant knowing very well that he had

fraudulently and illegally procured the transfer of the same from the plaintiff.”

4. The plaintiff contended that he had developed rental units on the suit property, which were earning him rental income of Kshs 54,000 per month. He had lost the monthly rental income as a result of the fraudulent transfer.
5. The court record does not bear a defence by the 1st defendant. The 2nd defendant filed a defence and counterclaim dated 1/12/2017. He denied liability. He averred that at all material times, the suit property belonged to the 1st defendant and he properly purchased it from the 1st defendant at an agreed purchase price of Kshs 5,000,000 which he paid to the 1st defendant in full. Upon payment of the full purchase price, the 1st defendant conveyed the suit property to him. He averred that he was a bonafide purchaser for value. By way of counter claim, he pleaded that should the court order a “a refund” the same should be based on the current market value of the suit property.
6. The 3rd defendant filed a statement of defence dated 18/10/2017. He averred that he was a stranger to the allegations made in the plaint, including the allegations of fraud. He urged the court to dismiss the suit against him.
7. The 4th defendant filed a statement of defence dated 17/10/2008. He denied preparing the sale agreement dated 22/10/2014 or any other agreement between the plaintiff and the 1st defendant. He further denied being privy to the said agreement. He urged the court to dismiss the suit against him.
8. Subsequently, the 4th defendant brought a notice of motion dated 12/10/2020, seeking an order striking out the suit against him on the ground, *inter alia*, that it was scandalous, frivolous and vexatious, and that it did not disclose any reasonable cause of action against him. The said application is the subject of this ruling.
9. The application was supported by his affidavit sworn on 12/10/2020. It was canvassed through written submissions filed by the firm of **Momanyi & Associates**, dated 19/3/2021. The 4th defendant contended that he was a partner in the law firm of **Momanyi & Associates Advocates** and that the sale agreement dated 22/10/2014 was never drawn by the said firm. He added that although the sale agreement was expressed as drawn by the said law firm, that expression together with the signature thereon, were forgeries. He added that there was no advocate/client relationship between him and the plaintiff, and that the plaintiff had never engaged him nor his law firm to act for him in the said transaction. He further deposed that the Advocates Disciplinary Tribunal had exonerated him.
10. In his written submissions, the 4th defendant contended that the key issue for determination in the application was whether there was an advocate/client relationship between him and the plaintiff. He added that no such relationship existed. He cited the Court of Appeal decision in **Nairobi Civil Appeal No. 9 of 2007; Dr Vijay Kumar Saidha & Dr Uma Saidha v Tribuhuran Gordhan Barkrania & another** and urged the court to grant the application.
11. The 1st, 2nd and 3rd defendants did not file responses to the application. The plaintiff filed written submissions dated 11/3/2021 in which he alluded to a replying affidavit sworn by his advocate, James Nyiha, on 14/12/2020. The said replying affidavit was not in the e-portal relating to this case. No physical copy of the said replying affidavit was in the physical file.
12. Counsel for the plaintiff submitted that the key issue falling for determination in the application was whether the 4th defendant was liable for the actions and/or omissions of his firm, employees and/or associates. Counsel added that the 4th defendant was personally liable for actions and/or omissions of his law firm. Citing the decision in the case of **Kimaiyo Kiptangula & Peter G Munya t/a Kimaiyo & Munya Advocates v Kenya Pipeline Limited, Civil Appeal No. 637 of 2011**, counsel urged the court to reject the application.
13. I have considered the application together with the parties’ respective pleadings and submissions thereon. The key question falling for determination in this application is whether the 4th defendant is a necessary party for the effectual and complete adjudication and settlement of all questions involved in this suit. My answer to that question is in the affirmative.
14. The plaintiff alleges that the transfer of the suit property from him to the 1st defendant was fraudulently procured. He contends that he deposited all the completion documents with the 4th defendant’s law firm at the request of an employee of the law firm. The 4th defendant on his part contends that the signature on the sale agreement indicating that he witnessed the sale agreement is a forgery. Similarly, he contends that the expression on the sale agreement indicating that his law firm drew the sale agreement is similarly a forgery. He denies retainer of his law firm by the plaintiff. The ruling by the Advocates Disciplinary Tribunal, though acquitting the 4th defendant against allegations of professional misconduct under the Advocates Act, is not categorical on whether the 4th defendant’s co-accused acted as a servant/agent of the 4th defendant. Further, at this point, there is no conclusive evidence on the question of ownership of the law firm of **Momanyi & Associates** and the advocates engaged by the law firm as at the time when the alleged fraud was committed. Given the above circumstances, the 4th defendant is the right person to assist the court in the adjudication of questions relating to the claims of fraud and forgery made by the plaintiff and the 4th defendant respectively. Removing him from this suit at this point while the allegations of fraud revolve around his law firm would not be in the interest of justice.
15. In light of the foregoing, it is my finding that the 4th defendant is a necessary party for the effectual and complete adjudication of all questions in this suit. Consequently, the application dated 12/10/2020 is rejected. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Banji for the Plaintiff

Ms Nyakundi for the 1st defendant

Ms Wachanga for the 2nd defendant

Mr Nyakoe for the 4th defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE