



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 142 OF 2015**

**NANCY WANJA GATABAKI.....PLAINTIFF**

**-VERSUS-**

**JACARANDA HOLDING PROPERTY LIMITED....1<sup>ST</sup> DEFENDANT**

**SURAYA PROPERTY GROUP LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **NANCY WANJA GATABAKI**, the Plaintiff herein filed this present case against two Defendants. The 1st Defendant, **JACARANDA HOLDING PROPERTY LIMITED** is sued as the buyer of 40 acres of land on LR No. 5980 (hereinafter the suit property) owned by the Plaintiff and her husband, Dr. Samuel Munda Gatabaki. The Plaintiff by her pleading pleaded that the 1st Defendant agreed, by an Agreement dated 11th September 1992, to buy and she and her husband agreed to sell the portion of 40 acres to the 1st Defendant, at the price of Ksh. 18 million. The Plaintiff further pleaded that the property in the title was to pass to the 1st Defendant on their 1st Defendant paying the full purchase price. The Plaintiff further stated that the 1st Defendant paid, pursuant to the terms of their agreement, Ksh. 6,345,000 leaving a balance of the purchase price of Ksh. 11,655,000.

2. The Plaintiff pleaded that the 1st Defendant breached the agreement by, amongst others, selling to the 2nd Defendant, Suraya Property Group Limited, 20 acres of the suit land. The Plaintiff stated that was done without her consent or of that of her husband. The Plaintiff also pleaded that the 1st Defendant failed to pay the full purchase price of the 40 acres he was buying. It is also the Plaintiff's case that the Plaintiff sold 14 acres of the suit property to individuals without. Her consent or of that of her husband.

3. The Plaintiff's prayer in this action is for judgment against both the Defendants, jointly and severally, for the balance of the purchase price for the suit property, Ksh. 11,655,000; Ksh. 12,360,000 being the current value of the suit property; and mesne profit from 19th March 2014 to February 2015 at Ksh. 46,800,000.

4. The 1st Defendant by its defence admitted that the Plaintiff and her husband agreed to sell him 40 acres, the suit property, but denied the Plaintiff's claim for damages and also denied that it wrongfully and without authority of the Plaintiff and her husband alienated the suit property. The 1st Defendant pleaded that the agreement for sale was not completed for a period of 10 years due to the existence of several caveats over the property. The 1st Defendant pleaded that it entered into an agreement of sale with the 2nd Defendant for the sale of the suit property and that in that agreement it was acknowledged that the property was registered in the name of the Plaintiff and her husband. Further that the Plaintiff and her husband executed an indemnity and guarantee acknowledging and authorizing the development of the suit land by the 2nd Defendant. That the developer, who constructed houses on the suit property obtained from the Plaintiff and her husband an indemnity and guarantee to enable the developer to complete any transaction on the suit property. The pleadings do not make it clear what those transaction, the developer was to complete, but it does seem to be the construction of houses.

5. The 1st Defendant finally prayed for the Plaintiff's suit to be dismissed and for a permanent injunction be issued restraining the Plaintiff from trespassing or in other way interfering. That prayer is incomplete, as it will be noted, since it does not set out what the Plaintiff is to be restrained from interfering with.

6. The 2nd Defendant by its defence pleaded that the Plaintiff is one of the Directors of Muga Developers Limited, but that she subsequently resigned pursuant to a consent entered into in case **High Court Commercial Suit No. 352 Of 2011**, following which the Plaintiff was paid some amount of money in settlement of that suit. The 2nd Defendant further denied the Plaintiff's pleading that she did not give consent to the purchase by the 2nd Defendant of the suit property. That any claim that the Plaintiff may have against the 2nd Defendant was settled by the consent in the aforementioned case. The 2nd Defendant enumerated in its defence ten other cases pending before Court which it stated all related to the subject matter before Court in this case.

7. In its final prayer the 2nd Defendant prayed for the dismissal of the Plaintiff's case.

8. What is before Court for consideration in this Ruling is the application, by way of Notice of Motion, dated 11th May 2017. That Application is filed by the 1st Defendant. By that application the 1st Defendant seeks the following prayer:

*a. That the Honorable Court be pleased to grant an order compelling the Plaintiff to deposit the duly executed transfer of the sale of the suit property to the individual purchasers of the 1st Defendant, currently described as LR NO. 28223/33 (formerly known as LR NO. 5980/3 and originally as LR NO. 5980), in Court for onward transmission to the Ministry of Lands & Physical planning for their further action to facilitate the conveyance;*

*b. That this application be heard and determined prior to the further hearing and consideration of any aspect of this. Case, to prevent irreparable prejudice to the parties herein.*

9. Those prayers, in that application are supported by the depositions of the director of the 1st Defendant. He deposed that the 1st Defendant sold 20 acres of the suit property to the 2nd Defendant. It was a term of the sale agreement that the 2nd Defendant would pay the Plaintiff Ksh. 11,655,000, which was the balance of the purchase price of the 40 acres, the suit property.

10. The despondent further deposed, and I believe in error, that the 1st Defendant paid the balance of the purchase price to the 1st Defendant's advocate, Harit Sheth Advocates in 2009. What perhaps the despondent meant was that the 1st Defendant paid the balance of the purchase price to the Plaintiff.

11. The deponent further stated that the 1st Defendant sold 14 acres to a group of individual buyers, whom he referred. To as 'Jacaranda Buyers' and that 6 acres were 'given' to a director of the 1st Defendant. The deponent deposed that the Plaintiff had not transferred or provided the completion documents to the various buyers despite a consent in the case referred to above and deponed the Plaintiff and her husband executed an indemnity against liability by which the 2nd Defendant's developer was authorized to finalize the transaction between the parties.

### **ANALYSIS AND DETERMINATION**

12. I have considered the parties several affidavits, their submissions and authorities. At the very initial stage I wish to agree with the submissions of the Plaintiff. The Plaintiff submitted that the 1st Defendant's claim was not supported by the pleadings before Court. Pleadings presented before Court set out the perimeters within which the parties conduct themselves in a suit and within which the Court should determine the matter before it. The 1st Defendant as will be observed in this Ruling above did not plead, to seek the Plaintiff to execute or deposit transfers of the suit property. The 1st Defendant, therefore, in seeking to have the Plaintiff ordered to execute such transfers is seeking for orders that are beyond the pleadings before Court. It is trite that parties are bound by their pleadings. This has been reiterated severally in many jurisdiction. The Court of Appeal of Kenya in the case **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER V STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** considered a decision of the Supreme Court of Nigeria and stated:

***ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002**, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;*

***"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

*Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;*

***"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

13. The prayers sought by the 1st Defendant by its present application, they are not anchored on the pleadings before Court. The 1st Defendant payers as stated in the above case goes to no issued in this case and it is indeed to be disregarded. The 1st Defendant's application is not assisted by the fact that that it is brought under Order 40 Rule 11 of the. Civil Procedure Rules, which provides:

*"Deposit of money and other deliverables [Order 40, rule 11.]*

***"Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court."***

14. As One considers the pleadings above it becomes very clear that the subject matter, or the issue, which this Court will eventually have to determine, when this case is fully heard, is whether the Plaintiff is entitled to the prayers for damages. There are no prayers for a counter-claim by the Defendants. The above Rule 11 of Order 40 cannot apply to the facts of this case because the transfer to those who allegedly purchased the suit property is not an issue for determination, in this suit and further the Plaintiff has not admitted to hold the suit property in trust for any party. The said rule therefore does not apply to the facts before Court. It follows that the payers in the 1st Defendant's application are misconceived.

15. As it will become clear to the parties, I have steered clear from discussing many of the issues raised by the parties in either support or in opposition of the application because those issues may possibly be for determination at the trial and I do not wish to interfere with the trial judge's discretion in that regard. Suffice it to state that my finding is that the 1st Defendant's application is not supported by the pleadings before Court and on that ground it fails.

**16. In the end the orders of the Court are that the application dated 11 May 2017 is dismissed with costs to the Plaintiff.**

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>TH</sup> day of JUNE, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1<sup>ST</sup> DEFENDANT

..... FOR THE 2<sup>ND</sup> DEFENDANT