



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 462 OF 2016

SAMUEL KAMANDE MUGO.....APPLICANT

VERSUS

ROBERT A. ASEMBO T/A ASEMBO & CO. ADVOCATES.....RESPONDENT

RULING

1. The application dated 8th July 2016 principally seeks orders that pending the hearing and determination of the appeal herein or until further orders the Respondent be restrained by way of injunction from making withdrawals or bank transfers from Equity Bank account No. [particulars withheld] as to bring the balance therein to less than Ksh.9,000,000.
2. The application is predicated on the grounds set out in the body of the application and is supported by the affidavit and supplementary affidavit of the Applicant, Samuel Kamande Mugo. Lawrence Maina Irungu, the Applicant's Advocate in the transaction that gave rise to this case also swore a supplementary affidavit.
3. The Applicant's case is that he was aggrieved by the decision of the trial magistrate in upholding a Preliminary Objection raised by the Respondent regarding the court's jurisdiction vis-a- vis a reference arbitration and the making of a complaint to the Advocates Disciplinary Tribunal. In the application at hand the Applicants position is that he paid the sum of Ksh.9,000,000/= to the Respondent as stakeholder in a land sale transaction wherein the Respondent was the Advocate for the vendor. According to the Applicant, the transaction failed to go through due to fraud as the title document was a forgery and was not availed for verification. It is further stated that the Respondent did not have a practicing certificate. The Applicant's position is that he therefore cancelled the transaction and requested for a refund of his money but the Respondents failed to refund the same, hence this suit.
4. The application is opposed. The Respondent has stated in the replying affidavit that he is qualified to practice law. He averred that the title document is not a forgery and stated that the Applicant has raised the issue of the validity of the title document as a guise to evade his obligations under the sale agreement. That he was instructed by one Doreen Wangare Muthemba to act for her in the land sale transaction. That the said Doreen Wangare Muthemba the vendor instructed him not to release the money held on stakeholder basis until the dispute between the parties has been referred to arbitration and resolved as per the sale agreement. The Respondent blames the Applicant for unilaterally purporting to terminate the sale agreement and requesting for a refund of the money without adhering to the terms of the sale agreement. The Respondent further stated that due to the conflicting instructions from the parties to the transaction he obliged the instructions of his principal who is the seller who is not a party to this suit. The Respondent further averred that he is ready and willing to release the money as ordered by the arbitrator after the

resolution of the dispute. He further stated that his client was unwilling to release the title document without any professional undertaking. The Respondent alleged that the Applicant had come to court with unclean hands in that he unprocedurally accessed the Respondent's details of the bank account herein and also failed to serve the orders freezing the Respondent's account. It is further deponed that the Applicant can be compensated in monetary terms and therefore does not merit the orders sought.

5. When the application come up for hearing, the counsels for the parties herein made oral submissions. I have considered the said submissions.

6. It is not in dispute that there was a land sale transaction between the Applicant and one Doreen Wangare Muthemba. It is also not in dispute that the Applicant made the payment of Ksh.9 million to the Respondent who is the advocate for the vendor, Doreen Wangare Muthemba. On why the sale transaction failed, there are allegations and counter allegations which are yet to be resolved. However, the concern of the court at this stage is whether to issue the orders of injunction sought.

7. Under Order 42 rule 6(6), the High court in its appellate jurisdiction can grant a temporary injunction on such terms as it thinks just provided that the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. A memorandum of appeal was filed herein on 11th July, 2016.

8. In granting injunctions, the court is required to observe the general principles laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. On the question of grant of a freezing injunction, in **Goode in Commercial Law 4th Edition** at Pg 1287, the authors state:

“the grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction the court will usually require to be satisfied that:

- a. The claimant has a good arguable case based on a pre-existing cause or action.**
- b. The claim is one over which the court has jurisdiction.**
- c. The defendant appears to have assets within the jurisdiction.**
- d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.**
- e. There is a balance of convenience in favour of granting the injunction.**
- f. The court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets.**

Where there is a relationship of trust, tracing of the assets as an equitable remedy can issue.”

9. In the case under consideration, the Applicant has an arguable case. He has paid Ksh.9,000,000/=. No copy of the title document said to be valid has been exhibited herein. There is no information from the Respondent regarding his means to give any reassurance that the money in question will not be dissipated.

10. On whether the Advocate had a valid practicing certificate, and the import of lack of the same, I am guided by dicta in the Supreme Court to the case of **National Bank of Kenya Ltd v Anaj Warehousing Limited [2015]eKLR** where it was held as follows:

“It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: “justice shall be administered without undue regard to procedural technicalities.”

11. With the foregoing, the courts view is that the interests of justice will be served by preserving the money subject matter of the dispute herein. Consequently, I allow the application with costs in cause.

Dated, signed and delivered at Nairobi this 19th day of Jan., 2017

B. THURANIRA JADEN

JUDGE