



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 271 OF 2015

KWALUKO FARM ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS -

MARGARET WANGARI NGUGI.....1ST DEFENDANT

RONALD MORARA NGISA T/A

MORARA NGISA & CO. ADVOCATES.....2ND DEFENDANT

RULING

1. The application dated 20th November 2015 was brought by the 2nd defendant, **RONALD MORARA NGISA T/A MORARA NGISA & Co. ADVOCATES.**
2. It is a two-pronged application. First, it seeks the variation, review or setting aside of the Order dated 13th July 2015.
3. Secondly, it seeks the stay of proceedings in this suit until the Directorate of Criminal Investigations in Nairobi conclude their investigations on the alleged forgery of the Original Title No. **7785/1028, RUNDA, NAIROBI.**
4. As far as the applicant was concerned, it would not be possible to execute the orders in question, when the investigations by the Directorate of Criminal Investigations were still pending.
5. The applicant also asserted that the advocates who were acting for him at the material time did not have his instructions to record the consent order.
6. Thirdly, the 1st defendant, who was allegedly affected adversely by the consent order, had not been represented when the order was being recorded.
7. In any event, at the time the order was being recorded, the applicant had filed a Preliminary Objection, but the same was never determined on merit or withdrawn.
8. Pursuant to the consent order in issue, the applicant was required to hand over the sum of Kshs. 13,000,000/-, (*which he had been holding as a stakeholder*), so that the said cash could be deposited in a joint interest – earning account, in the names of the plaintiff’s advocates and the applicant.

9. The applicant was to hand over the said cash within 30 days.
10. Secondly, the original title of the suit property was to be made available, for the purposes of transfer and registration in the name of the plaintiff, within 21 days.
11. It is the applicant's case that he is unable to hand over Kshs. 13,000,000/- as he does not have the money. The reason why he does not have the money is that, he had already handed over to the 1st defendant, a total of Kshs. 10,300,000/-.
12. The applicant also says that he is unable to hand over the title document because it is the subject matter of criminal investigations.
13. The plaintiff submits that the applicant had an obligation, in his capacity as the stakeholder, to only pay out the balance of the purchase price after the transfer had been registered.
14. Clause 3.2 of the Agreement for Sale dated 20th January 2015 expressly provided that;
- “The Balance in the sum of Kenya Shillings Thirteen Million only (Kshs. 13,000,000/-) shall be paid by as set out in clause 8 below. The vendor's advocates shall hold the balance as stakeholders pending the registration of the transfer in favour of the purchaser and final handing over of vacant possession of the property by the vendor to the purchaser?.**
15. On 4th June 2015 the plaintiff instituted these proceedings, in which it was seeking an order to compel the applicant to give an account of the money which he was holding as a stakeholder.
16. Secondly, the plaintiff sought an order to compel the applicant to have the sum of Kshs. 13,000,000/- placed in a joint interest – earning account.
17. One of the reasons which prompted these proceedings was, as stated by the plaintiff;
- “2. That on paying the entire purchase price the then appointed advocates Anthony M. Mulekyo & Company Advocates gave to the 2nd defendant all the completion documents, which documents were presented to the Lands Office for purposes of transfer of title to the applicant herein.**
- 3. That on presentation, the “ORIGINAL TITLE? given and which was presented for purposes of transfer was suspected to be a forgery.**
- 4. That in view of the developments, it could be prudent that the money paid and in the custody of the 2nd defendant be confirmed that it is secure and be moved to a safe account pending investigation on the authenticity of the title documents surrendered to the plaintiffs/applicants and to block any further action/transaction on the said land for the interest of justice?.**
18. In response to the application by the plaintiff, the 2nd defendant filed a Replying Affidavit sworn on 20th November 2015. The 2nd defendant deponed that he had already paid out to the 1st defendant, the sum of Kshs. 10,300,000/-. The money had been paid out in 2 tranches of Kshs. 6,500,000/-, and Kshs. 3,800,000/- respectively.
19. In his replying affidavit, the 2nd defendant stated that the only amount which he was still holding was Kshs. 2,700,000/-.
20. Notwithstanding the contents of the 2nd defendant's replying affidavit, a consent order was recorded in court on 13th July 2015, requiring the 2nd defendant to have the sum of Kshs. 13,000,000/- deposited in

a joint account which was to be in the name of both the 2nd defendant and the advocates for the plaintiff.

21. On a *prima facie* basis, I find that the 2nd defendant's explanation about the alleged consent, is plausible. His explanation was that he was unwell at the time when the consent was recorded. Secondly, and in any event, his advocate neither sought nor obtained his instructions before entering into the consent.

22. Considering that the 2nd defendant had already deponed in his replying affidavit, that he was only holding Kshs. 2,700,000/-, it is more probable than not that the 2nd defendant's advocates had acted without instructions when he entered into the consent.

23. It is also clear, from the information provided by the plaintiff, that the Original Title documents had been presented at the Lands Office, for the purposes of having the transfer registered.

24. However, when the said document was suspected to have been a forgery, it was handed over to the Directorate of Criminal Investigations.

25. In those circumstances, I am unable to comprehend how the 2nd defendant could have been required to make available a document which was the subject matter of criminal investigations, and which was being held by the Directorate of Criminal Investigations.

26. On a *prima facie* basis, I find that when the advocates for the 2nd defendant entered into the consent, they did so without his authority or instructions because it would defy all logic for the 2nd defendant to agree that he would do something which he was aware that he would be unable to do.

27. In so far as the consent order appears to have been entered into without the authority or instructions of the 2nd defendant, it cannot be deemed as willful.

28. The plaintiff has quoted the following words of Law **J.A in BROOKE BOND LIE BIG (T) LIMITED Vs MALLYA [1975] E.A 266, at page 269;**

“Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, or those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or generally for a reason which could enable the court to set aside an agreement?.

29. In my considered opinion, when the advocate for the 2nd defendant entered into a consent which imposed upon his client, obligations which the client was unable to discharge, the said advocate was either ignorant of material facts or he lacked sufficient material facts.

30. Secondly, it is noted that the Original Title document may be a forgery. If the ongoing criminal investigations were to establish that there was a forgery, it would follow that there existed a fraudulent scheme, to obtain money from the purchaser in exchange for a property whose ownership could not be legitimately transferred to the said purchaser.

31. The interests of justice require that appropriate investigations be finalized, to enable the parties and the court know whether or not the transaction was tainted with illegality.

32. Accordingly, I now direct as follows;

a) The Director of Criminal Investigations shall, by this order, be summoned to personally attend court on a date to be fixed by this court immediately after I conclude reading this Ruling.

b) The court will, after conducting appropriate consultations with the parties and the Director of Criminal Investigations, set a time-frame for the court to receive the Director's Report.

c) Meanwhile, the sum of Kshs. 2,700,000/- which the 2nd defendant has, is to be deposited in a joint interest – earning bank account, in the names of the advocates representing the plaintiff and the 2nd defendant, respectively.

d) Until further orders, there shall be a stay of execution of the orders dated 13th July 2015.

e) On the date when the Report of the Director of Criminal Investigations is to be tendered in court, all the parties to this suit are required to personally attend court.

f) The 2nd defendant is to serve this Order and Ruling upon the 1st defendant.

g) Costs of the application dated 20th November 2015 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ndungu for S.B. Mbeche for the Plaintiff

No appearance for the 1st Defendant

Miss Marienga for Kiluva for the 2nd Defendant

Collins Odhiambo – Court clerk.