



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 490 OF 2017

JOHN NGANGA KIBE.....PLAINTIFF

=VERSUS=

REBECCA MUTHONI KIAMA.....1ST DEFENDANT

MESHACK MBUTHIA GITAU *alias* MICHECK MBUTHIA GITAU.....2ND DEFENDANT

RULING

1. The plaintiff brought this suit on 25/7/2017 through a plaint of even date. He contended that in May 2017, he purchased Land Title Number Nairobi/Block 126/466, measuring approximately 2.5 acres, from the 2nd defendant who was an attorney of the 1st defendant. He further contended that the defendants were intent on rescinding the sale agreement and evicting him from the suit property for unknown reasons. He sought the following orders against the defendants:

i. A declaration that the plaintiff is the bona fide purchaser and owner of all that parcel of land being title number Nairobi Block 126/466.

ii. An order of specific performance of the sale agreement dated 23rd May, 2017.

iii. An order of permanent injunction restraining the defendants by themselves, their servants, agents and/or whomsoever in any means howsoever from encroaching, trespassing, invading, selling alienating, charging and/or in any other way interfering with the parcel of land being title number Nairobi Block 126/466 and further from evicting the plaintiff/applicant therefrom.

iv. Costs and interest of this suit.

2. The 1st defendant filed a statement of defence and counterclaim dated 26/2/2018 in which she denied selling the suit property to the plaintiff. She denied executing any power of attorney in favour of the 2nd defendant. Her case was that the power of attorney was a forgery and the plaintiff had no right to be on the suit property. She sought the following fifteen orders in the counter-claim:

1) The plaintiff's suit be dismissed with costs to the 1st defendant

2) A declaration that the 2nd defendant did not possess a valid power of attorney in respect of the suit property known as Parcel Number Nairobi/Block/126/466 capable of passing good title to the plaintiff.

3) A declaration that the sale agreement dated 23rd May 2017 entered into between the 2nd defendant (Meshack Mbuthia Gitau) as vendor, falsely representing himself as the holder of a valid power of attorney donated by the 1st defendant on the one hand and the plaintiff (John Nganga Kibe) as purchaser on the other hand, in respect of the suit property known as Parcel Number Nairobi/Block/126/466 is null and void ab initio and therefore could not and did not pass title to the plaintiff

4) A declaration that the suit property known as Parcel Number Nairobi/Block/126/466 is the property of the Estate of the Late Dr Liitho Wangondu Ndegwa also known as Dr Riitho Wangondu Ndegwa.

5) A declaration that any sub-division or other dealings or transactions with respect to the whole or any portion of the suit property known as Parcel Number Nairobi/Block/126/466, emanating from the purported sale agreement dated 23rd may 2017 is null and void ab initio.

6) An injunction do issue directed to the plaintiff restraining him by himself, his servants and or agents or any other parties claiming under or through him including Ebenezar Lands View Company Limited, from the continued trespassing on the suit property known as Parcel Number Nairobi/Block/126/466.

7) An injunction do issue directed to the plaintiff restraining him by himself, his servants and or agents or any other parties claiming under or through him including Ebenezar Land View Company Ltd, from selling or offering for sale or receiving any monies from any party whatsoever in respect of the whole or any portion of the suit property known as Parcel Number Nairobi/Block/126/466.

8) An injunction do issue against the plaintiff restraining him by himself, his servants and or agents or any other parties claiming under or through him including Ebenezar Lands View Company Limited, from passing themselves off as the owners of or as having any proprietary or other rights in the suit property known as Parcel Number Nairobi/Block/126/466.

9) An injunction do issue against the plaintiff restraining him by himself, his servants and or agents or any other parties claiming under or through him including Ebenezar Lands View Company Limited, from interfering in any manner whatsoever with the proprietary rights of the Estate of the said late Dr Liitho Wangondu Ndegwa also known as Dr Riitho Wangondu Ndegwa, the legal representatives and the ultimate beneficiaries of the suit property known as Parcel Number Nairobi/Block/126/466.

10) A mandatory injunction do issue against the plaintiff requiring the plaintiff and any third parties claiming ownership or any rights or who have moved onto the suit property known as Parcel Number Nairobi/Block/126/466 at their own cost, to vacate the suit property with immediate effect.

11) An order requiring the plaintiff and or the said Ebenezar Lands View Company Limited to file an affidavit in this court giving the full names, ID card numbers, postal address and telephone numbers of all purported third party purchasers to enable the plaintiff to serve upon such third parties such orders as may be granted by this honourable court affecting such third parties.

12) In the event of the plaintiff by himself, his servants and or agents or any other parties claiming under or through him including Ebenezar Lands View Company Limited, failing to obey the express orders of this court or relation to the suit property known as Parcel Number Nairobi/Block/126/466, the Officer Commanding Station (OCS) Kamulu Police Station do supervise the enforcement of the same.

13) Damages for trespass against the plaintiff.

14) Costs of the counter-claim be awarded to the 1st Defendant

15) Such other or further orders as the court may deem fit and just to grant.

3. Subsequent to that, on 23/3/2018 the plaintiff and the 1st defendant filed a lengthy consent dated 15/3/2018 providing as follows:

“BY CONSENT

1. The plaintiff's suit filed vide the plaint dated and filed in court on 25th July 2017 be dismissed with costs, which costs if not agreed to be taxed.

2. The defendant's counterclaim contained in the statement of defence and counterclaim dated 26th February 2016 and filed in court on 27th February 2018 be settled and compromised in the following terms:

i. In consideration of the 1s defendant having agreed at the request of the plaintiff made to the 1st defendant to settle and compromise the claim in the counterclaim on behalf of the estate of the late Dr Liitho Wang'onde Ndegwa also known as Dr Riitho Wang'onde Ndegwa represented herein by the 1st defendant, the plaintiff hereby:

a) Concedes that the suit property known as Parcel Number Nairobi/Block/126/466 belongs to the Estate of the late Dr Liitho Wang'onde Ndegwa also known as Dr Riitho Wang'onde Ndegwa represented in these proceedings by the 1st defendant who is one of the administrators of the said Estate.

b) The plaintiff shall pay to Kimamo Kuria Advocates' designated Bank Account on behalf of and to the account of the Estate of the late Dr Liitho Wang'onde Ndegwa also known as Dr Riitho Wang'onde Ndegwa, the sum of Kenya Shillings Twenty Two Million (22,000) of which Kenya Shillings Five Million (Kshs. 5,000,000) shall be paid within seven(7) days from the date of filing this consent and a further sum of Kenya Shillings Five Million (Kshs 5,000,000/-) within Thirty (30) days from the date of filing this consent and the balance of the sum of Kenya Shillings Twelve Million (Kshs 12,000,000/-) within Ninety (90) days from the date of filing this consent or as otherwise provided in any sale agreements signed between the parties.

c) In default of the plaintiff failing to pay the said amounts as stipulated in (b) above, any late payment shall attract interest at the rate of Twenty percent (20) per annum from the due date until payment in full but without prejudice to the 1st defendant to take such other lawful steps to address such breach.

d) *The plaintiff shall pay to the 1st defendant on behalf of the said Estate costs on the counter-claim based on the subject matter value of Kenya Shilling Twenty Two Million (Kshs 22,000,000/-) which costs if not agreed shall be taxed.*

e) *Upon the plaintiff paying in full the said sum of Kenya Shilling Twenty Two Million (Kshs 22,000,000/-) plus all accrued interest (if any), the 1st defendant shall procure herself and her fellow administrators and beneficiaries to execute a transfer of the suit property known as parcel number Nairobi/Block/126/466 in favour of the plaintiff and/or the plaintiff's Nominees(s) and hand over to the plaintiffs' advocates Completion documents to enable the plaintiff to register the transfer.*

f) *For so long as the plaintiff shall faithfully adhere to the payment mode in (b) above, the 1st defendant and the other administrators of the said estate shall not interfere with the plaintiff's current possession of the suit property.*

g) *The ownership and Title of the suit property shall not pass or be deemed to pass prior to payment of the full amount of Kenya Shillings Twenty Two Million (Kshs 22,000,000/-) as provided in (b) above and for the avoidance of doubt, it is hereby expressly provided that neither the 1st defendant nor the said estate has sanctioned the selling of or other dealings with the said land or any part thereof prior to the payment in full of the said amount and if the plaintiff shall purport to sell or deal with the said land in breach of this order, neither the plaintiff nor such third party purchaser or dealer shall plead that they are "innocent purchasers for value without notice".*

h) *Upon handling over the said completion documents, the parties shall file a consent marking the entire counter-claim as fully settled.*

i) *The designated Bank Account of the Advocates of the 1st Defendant and the said Estate of the late Dr Liitho Wang'ondy Ndegwa also known as Dr Riitho Wang'ondy Ndegwa is*

NAME: KIMAMO KURIA ADVOCATES

BANK: I & M BANK

BRANCH: KENYATTA AVENUE

ACCOUNT NO: 00100198471201

ii. There be liberty apply"

4. Subsequently, on 7/2/2019, the plaintiff and the 1st defendant filed another consent dated 22/1/2019 containing the following terms:

"BY CONSENT

The Plaintiff and the 1st defendant request that the following consent be recorded and adopted as an order of this honourable court.

1. The consent letter dated 15th March 2018 and filed in court on 23rd March 2018 be and is hereby withdrawn and replaced by the consent set out here below.

2. The counterclaim dated 26th February 2018 and filed in court on 27th February 2018 be allowed to the effect that:

a) The plaintiff hereby concedes that the suit property know as Parcel Number Nairobi/Block/126/466 belongs to the Estate of the late Dr Liitho Wang'ondy Ndegwa also known as Dr Riitho Wang'ondy Ndegwa represented in these proceedings by the 1st defendant who is one of the administrators of the said Estate

3. Pursuant to the plaintiff's concession in 2(a) above, the parties have agreed to enter into sale agreement wherein the plaintiff shall purchase the suit property known as Parcel Number Nairobi/Block/126/466 for the sum of Kshs 22 million out of which the sum of Kshs 10.5 million has already been paid to Kimano Kuria Advocates with liberty to release the same to the legal representatives of the Estate of the said Dr Liitho Wang'ondy Ndegwa also known as Dr Riitho Wang'ondy Ndegwa.

4. Once the sale is completed, payment in full made and transfer of property registered in favour of the plaintiff the parties shall file a joint consent letter making the matter as fully settled and the terms of such settlement.

5. There be liberty to apply.

5. It is noted from the court record that some of the recorded proceedings of the period between 24/6/and 30/10/2019 were plucked from the court file and are missing from the court record. It is not clear if those proceedings were deliberately plucked from the court file.

Application

6. Against the above background, the 1st defendant brought a notice of motion dated 17/6/2019 seeking the following orders:

- 1) *The application be certified as urgent and be heard ex-parte in the first instance.*
- 2) *Pending the hearing of this application, the plaintiff/respondent be restrained from selling or otherwise dealing with the suit property known as Nairobi Block 126/466 or any portion thereof.*
- 3) *A declaration that the sale agreement dated 15th March 2018 has been rescinded by reason of the plaintiff/respondent's failure to pay the balance of the purchase price.*
- 4) *The plaintiff/respondent do forthwith, at his own cost remove all and any third party's on the suit property together with any structures erected thereon and do hand-over vacant possession of the suit property Parcel Number Nairobi/Block/126/466 to the 1st defendant and or her duly appointed representative prior to the payment by the 1st defendant/applicant of the refund in the sum of Kenya Shillings Eight Million Three Hundred Thousand (Kshs 8,300,000/-) being the deposit paid less the 10% forfeiture under the Law Society Conditions of sale 1989 Edition.*
- 5) *The 1st defendant be at liberty to sell the suit property Parcel Number Nairobi/Block/126/46 to any interested party or to deal with the same in any other manner.*
- 6) *The plaintiff/respondent and or his advocates Gacau Kariuki & Company Advocates be ordered to return to the Vendor's Advocates the transfer documents collected by his advocates.*
- 7) *Such further orders as this honourable court may deem fit and just to grant.*
- 8) *Costs of this application be paid by the plaintiff/respondents.*

7. The said application is the subject of this ruling. It was supported by the 1st defendant's affidavit sworn on 17/6/2019 and further affidavit sworn on 2/12/2019. The case of the applicant is that the consent dated 15/3/2018 was consensually withdrawn and replaced with the consent dated 22/1/2019. Secondly, the consent dated 22/1/2019 granted the 1st defendant's counter-claim. The applicant further contends that the plaintiff breached the sale agreement dated 15/3/2018, leading to a rescission of the contract by the 1st defendant, hence the plaintiff together with his agents, should be ordered to vacate and hand over vacant possession of the suit property.

8. The plaintiff opposed the application through a replying affidavit sworn on 29/10/2019. The case of the plaintiff is that he has not breached the sale agreement dated 15/3/2018. He contends that the 1st defendant has failed to procure the necessary completion documents. His position is that by purporting to rescind the agreement for sale, the 1st defendant seeks to unlawfully enrich herself.

9. The plaintiff further contends that, for the consent dated 22/1/2019 to be enforceable, it must first be adopted by the court. The plaintiff adds that were the said application to be granted, the suit herein shall have been marked as settled without being heard on merit. He urges the court to reject the application.

10. The application was canvassed through written submissions. The applicant (1st defendant) filed written submissions dated 2/12/2019 through his advocates, M/s Kimamo Kuria & Co Advocates. Counsel for the applicant itemized the following as the issues falling for determination in the application: (i) whether the plaintiff was in breach of the contract for sale contained in the sale agreement dated 15/3/2018; (ii) in the event the answer to the above question was in the affirmative, whether the 1st defendant was entitled to rescind the contract, and if so, whether the same had been validly rescinded; (iii) whether the 1st defendant was entitled to the prayers in the application dated 17/6/2019; (iv) whether the 1st defendant was entitled to any other or further orders under the application dated 17/6/2019; (v) what are the final orders of this honourable court? and (vi) who should pay costs of the application?

11. Counsel for the 1st defendant submitted that plaintiff's failure to pay the balance of the purchase price in the sum of Kshs 11.5 Million constituted a breach of clause 2 (c) of the agreement dated 15/3/2018 and entitled the 1st defendant to rescind the contract. It was further submitted that in view of the breach, the contract was validly rescinded by the 1st defendant's notice dated 26/2/2019. Counsel added that the plaintiff's reply to the 1st defendant's defence and defence to the 1st defendant's counter-claim filed on 30/10/2019 were of no consequence because they were filed after the plaintiff and the 1st defendant had compromised the suit through the consent dated 22/1/2019. Lastly, it was argued that the applicant had demonstrated the extensive steps she took to procure completion documents. Counsel urged the court to grant the prayers in the motion.

12. The plaintiff filed written submissions dated 10/12/2019 through his advocates, M/s Gacau Kariuki & Co Advocates. Counsel for the plaintiff itemized the following as the issues falling for determination in the application: (i) whether the plaintiff was a *bona fide* purchaser for value without notice or fraud (ii) whether the plaintiff had breached the terms of the agreement for sale dated 15/3/2018; (iii) whether the plaintiff had continued to sub-divide and sell the suit property as alleged by the 1st defendant; (iv) whether the consent letter dated 22/1/2019 and filed in court on 7/2/2019 was binding on the parties; (v) whether the 1st defendant was entitled to grant of any of the orders sought in the application dated 17/6/2019.

13. Counsel for the plaintiff submitted that the plaintiff was not a party to the fraud perpetrated by the 2nd defendant but merely a purchaser in good faith without knowledge of any fraud. Invoking the maxim *Nemo dat quod non habet*, counsel argued that the plaintiff and the 1st defendant having entered into a formal agreement on 15/3/2018, the 1st defendant cannot re-ignite issues that subsisted prior to the execution of the agreement in March 2018.

14. Counsel for the plaintiff added that contrary to the 1st defendant's contention that the plaintiff had breached the agreement for sale, it was the 1st defendant who was in breach because she had failed to procure completion documents despite the fact that the completion period had lapsed. Counsel for the plaintiff argued that the plaintiff was required to remit balance of the purchase price only upon proof by the 1st defendant that the completion documents had been procured. Further, counsel argued that sub-division and sale of the suit property to third parties was done prior to the emergence of the 1st defendant and therefore the orders sought by the 1st defendant had been overtaken by events.

15. On whether the consent dated 22/1/2019 was binding on the parties, counsel for the plaintiff argued that the consent had not been adopted by the court and was therefore not yet binding on the parties. Lastly, counsel submitted that the 1st defendant was not entitled to the prayers sought in the application. Counsel urged the court to dismiss the application.

16. I have considered the application together with the response thereto and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key questions falling for determination in the application. Parties did not agree on a common set of issues or questions to be determined in this application. Having considered the application, the response to the application, the parties' submissions, and the totality of the court record, including the executed, filed, uncontested and subsisting consent filed by the parties on 7/2/2019, the following three issues fall for determination in the present application: (i) whether the consent dated 22/1/2019 and filed on 7/2/2019 compromised the plaintiff's suit against the 1st defendant and the 1st defendant's counter-claim against the plaintiff; (ii) whether at this point, the orders sought by the 1st defendant in the application dated 17/6/2019, are available to the 1st defendant on the platform of this suit; and (iii) who should bear costs of the present application? I will make brief pronouncements on the three questions sequentially in the above order.

17. Both the plaintiff and the 1st defendant agree that on 22/1/2019, they consensually executed a consent and caused the said consent to be filed in court. There is common ground that the consent subsists. Neither of the two parties has contested the consent or sought to have it expunged or withdrawn from the court record. The said consent, in my view, therefore constitutes a valid instrument which a court properly directing itself would not ignore and proceed to deal with this suit as if the consent did not exist. Indeed, the terms of the consent are reflected in the preceding agreement dated 15/3/2018. The plaintiff, however, contends that because there is no formal order of the court adopting the consent, the same is not binding on the parties until it is formally adopted. There is, however, no application before court seeking to withdraw the consent or contesting the consent.

18. The legal framework under which parties consensually compromise civil suits is Order 25 rule 5 of the Civil Procedure Rules, which provides as follows:

25, rule (5) (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

19. My understanding of the above framework is that, whenever it is demonstrated to the satisfaction of the court that parties have consensually entered into a compromise in relation to the whole or a portion of a suit, and the court is satisfied that the consensual compromise is not against the law or against public policy, the court is obliged to accept the compromise and grant the consensual orders appropriately. Indeed, the Court of Appeal in ***East African Portland Cement Company Limited v Superior Homes Limited*** rendered itself on the tenor and import of a compromise in a civil suit under Order 25 rule 5 of the Civil Procedure Rules in the following words:

“As correctly held by the trial court, once parties compromise their suit under Order 25 rule 5 of the Civil Procedures Rules, a judgment ensues upon which a decree issues out which is subject to the law governing the discharge of court orders and decrees”

20. In my view, given that neither of the two consenting parties has challenged the formal consent which they filed; and there is nothing to suggest that the consent contravenes any law or public policy, the court is obliged to accept the consent as presented by the parties, as a compromise fully binding the plaintiff and the 1st defendant under Order 25 rules of the Civil Procedure Rules. The suggestion by counsel for the plaintiff that the court should deal with this matter as if the consent does not exist, in my view, would also serve to cause confusion and expose the court process to disrepute. If either of the consenting parties has a change of mind, nothing has prevented them from applying to have the consent marked as withdrawn or expunged from the court. The court cannot at this point proceed to deal with this suit as if the consent does not exist. Secondly, the absence of any challenge through an application seeking to expunge the said consent from the court record, the court is obliged to accept the subsisting consent and thereafter deal with the matter from that premise.

21. The net effect of the foregoing is that, the uncontested consent dated 22/1/2019 and filed by the parties on 7/2/2019, is accepted by the court as a binding compromise between the plaintiff and the 1st defendant. My finding on the first issue, therefore, is that the consent dated 22/1/2019, and filed by the plaintiff and the 1st defendant on 7/2/2019 compromised both the plaintiff's suit against the 1st defendant and the 1st defendant's counterclaim against the plaintiff. The only remaining issue between the two parties in the suit relates to costs of the suit and counter-claim, respectively.

22. The second issue is whether, at this point, the orders sought by the 1st defendant in the application dated 17/6/2019 are available to the 1st defendant on the platform of this suit. The cause of action upon which the present application is founded is an alleged breach of the contract dated 15/3/2018. At the time the plaintiff's suit and the 1st defendant's counter-claim were brought, the contract did not exist. The original pleadings were never amended to reflect any other cause of action. I have already made a finding to the effect that the consent dated 22/1/2019 compromised both the plaintiff's suit against the 1st defendant and the 1st defendant's counter-claim against the plaintiff.

23. It is clear from the prayers sought in the present application, and from the supporting affidavit, that the grievance which the 1st defendant is seeking to ventilate through the present application relates to a fresh cause of action, namely, breach of contract by the plaintiff and the 1st defendant's right to rescind the contract. In my view, the present suit is not the platform through which to ventilate that cause of action. That is a fresh cause of action which requires ventilation on the platform of a fresh suit. I say so for a number of reasons. Firstly, this suit

was compromised through the consent dated 22/1/2019 and filed on 7/2/2019. The suit is therefore not available as a platform for ventilation of the subsequent cause of action. Secondly, the pleadings on record relate to a completely different cause of action. The pleadings were never amended. Were the court to admit and adjudicate upon this new cause of action through the present application, it would be doing so on the basis of a plaint, a defence, and a counter-claim which do not relate to the alleged breach of the contract dated 15/3/2019. Our Civil Procedure Rules do not countenance a scenario such as what the applicant is inviting the court to do. Thirdly, from the evidential materials presented to the court in relation to the application, it is clear the consent dated 22/1/2019 allowed the 1st defendant's counter-claim, and by legal implication, disallowed the plaintiff's suit against the 1st defendant. It also emerges that what gave the plaintiff the legitimacy to be on the suit property, notwithstanding the consent dated 22/1/2019, was the contract dated 15/3/2018. If there has been breach of the said contract, necessitating eviction of the plaintiff together with his agents, in the absence amended pleadings, the proper forum for redress is a fresh suit founded on the fresh cause of action. It is therefore my finding that the orders sought by the 1st defendant in the present application are not available in this suit at this point. They may only be available in a fresh suit founded on the new cause of action.

24. Lastly, I have considered the history of this application. Taking that history into account, there shall be no award of costs in relation to the application.

25. In light of the above findings, I make the following disposal orders in relation to the 1st defendant's notice of motion dated 17/6/2019

a) The court is satisfied that the plaintiff's suit against the 1st defendant and the 1st defendant's counterclaim against the plaintiff were compromised under Order 25 rule 5 of the Civil Procedure Rules in terms of the duly executed, filed and subsisting consent dated 22/1/2019.

b) The 1st defendant's notice of motion dated 17/6/2019 is declined on the ground that it is premised on a new cause of action which cannot be ventilated in this suit at this point or on the pleadings presently before court.

c) Each party shall bear their respective costs of the application

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of: -

Mr Gacau Kariuki for the Plaintiff

Mr Mageto for the 1st defendant

June Nafula - Court Clerk