



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 284 OF 2015

MICHAEL MWAURA NJOROGE.....PLAINTIFF

-VERSUS -

PETER KAMAU MUNENE.....DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....THIRD PARTY

BEATRICE KORI.....PROPOSED

AGGRIVED/INTERESTED PARTY

RULING

1. The suit herein was brought by the plaintiff, **MICHAEL MWAURA NJOROGE**, against 2 parties, namely;

1) PETER KAMAU MUNENE – DEFENDANT

2) and KENYA COMMERCIAL BANK LIMITED – THIRD PARTY.

2. According to the plaintiff, he had entered into a Sale Agreement with the defendant, enabling him to purchase the suit property for Kshs. 11,500,000/-.

3. The plaintiff was well aware that the suit property was charged to the Third Party. Therefore, the plaintiff was to pay Kshs. 6,400,000/- to the Third Party to help offset the defendant's loan which had been secured by the charge over the suit property.

4. According to the plaintiff, he had performed his obligations under the Sale Agreement. However, the defendant was alleged to have failed to provide the plaintiff with the necessary completion documents.

5. The plaintiff came to court seeking specific performance against the defendant. The plaintiff was also seeking orders to compel the Third Party to discharge the charge, and to release the security documents to the plaintiff.

6. In the alternative, the plaintiff sought the refund of the money he had paid.

7. Simultaneously with the plaint, the plaintiff filed an application for interim reliefs. In particular, the plaintiff sought injunctions to:

- a) restrain the bank from releasing the title deed to the plaintiff;*
- b) restrain the bank from releasing a discharge of charge, to the suit property;*
- c) restraining the defendant from selling or otherwise alienating the suit property.*

8. The plaintiff also asked for orders that would allow him to collect rents from the tenants occupying the suit property.

9. When the application came up for hearing, the parties recorded a consent dated 14th August 2015. The following were the terms of the consent order;

“1. The Notice of Motion dated 11th June 2015 be marked as withdrawn with orders that costs be in the cause.

2. That judgement be entered in favour of the plaintiff as against the defendant and the same to bind the Third Party in the following terms:-

a) The Defendant to specifically perform the contract dated 24th March 2015.

b) Costs of the suit assessed at Kshs. 200,000/-, all inclusive, be paid to the Plaintiff by the Defendant.

c) Within three days upon this consent being filed in court, both the Plaintiff and the Defendant to pay Kshs. 1,181,385.05 owing as liabilities to the 3rd party which is inclusive of the 3rd party's costs in this suit.

d)The Plaintiff will contribute Kshs. 590,692.5 only towards settlement of the liabilities owed to the 3rd party, by the Defendant.

e) Upon being paid Kshs. 1,181,385.05 the 3rd Party shall discharge and release to the plaintiff all security documents held by them on account of tile number Dagoretti/Riruta 5810.

f) The Plaintiff to deduct Kshs. 790,692.5 being Kshs. 590,692.5 contribution of the Defendant to the liabilities owed to the 3rd Party and Kshs. 200,000/- as costs of the suit from Kshs. 2,950,000/- that is outstanding as balance of the purchase price.

g) Within seven days upon this consent being filed in court, the Defendant to sign all documents to perfect transfer of his interest in title number Dagoretti/Riruta/5810.

h) Within seven days upon this consent being filed in court Kshs. 2,159,307.5 held by the plaintiff as balance of the purchase price be paid through his advocates M/s Kirwa Koskei & Company Advocates who shall apply the same as follows:

i) Kshs. 1,000,000/- to be paid to the Defendant after he executes all completion documents and puts the plaintiff in possession of the suit property.

ii)Kshs. 1,159,307.5 be held by M/s Kirwa Koskei & Company Advocates as stake holders until successful transfer of title number Dagoretti/Riruta/5810 in favour of the plaintiff”.

10. The consent was signed by P.W. Macharia Associates, the advocates for the plaintiff; Kirwa Koskei & Company the advocates for the defendant; and Mohamed Muigai the advocates for the Third Party.

11. On 10th September 2015 the Law firm of Majanja Luseno & Company Advocates filed an application dated 9th September 2015.
12. Through that application, the plaintiff asked the court to set aside or discharge the consent orders dated 14th August 2015.
13. By September 2015, the plaintiff had become aware of the fact that the Defendant had also signed an Agreement for the Sale of the suit property, to **BEATRICE KORI**.
14. The Agreement for Sale dated 19th June 2015 shows that the defendant was selling the suit property to Beatrice Kori, for Kshs. 10,000,000/-.
15. Beatrice Kori provided copies of pleadings the case of **BEATRICE KORI Vs PETER KAMAU MUNENE & KENYA COMMERCIAL BANK LIMITED ELC 827 of 2015**. Through that suit, Beatrice Kori applied for, *inter alia*, an order for specific performance, to compel P.K. Munene to complete the contract of sale.
16. From the contentions of the plaintiff and Beatrice Kori, it appeared that the defendant had executed 2 separate and distinct Agreements for the sale of one suit property.
17. The 2 persons who alleged that they had signed Sale Agreements with the Defendant, both filed their respective suits, seeking, *inter alia*, orders for specific performance.
18. In the case before the Environment and Land Court, Beatrice Kori sought and obtained an order barring dealings with the property.
19. In the light of that order, it became impossible to give effect to the consent order dated 14th August 2015.
20. Mr. Luseno, the learned advocate for the Interested party, submitted that a plaintiff cannot originate a suit against a Third Party. Therefore, in his considered view, the suit was fatally defective.
21. Secondly, he submitted that the consent order dated 14th August 2015 could not be implemented because they would affect Beatrice Kori, yet she was not a party to it.
22. Mr. Macharia, the learned advocate for the plaintiff conceded that it was an error for the plaintiff to originate the suit against the Third Party. However, he expressed the view that that error was not fatal. He believed that it was still possible to amend the plaint, as pleadings had not yet been closed.
23. Mr. Macharia also told the court that he and his client were only made aware of the case which was before the Environment & Land Court, through the application herein.
24. Mr. Macharia pointed out that Beatrice Kori had not taken steps to investigate the fraudulent defendant. Therefore, the plaintiff believes that the application by the Interested Party (*Beatrice Kori*) should be dismissed.
25. Mr. Mwangi, the learned advocate for the Third Party (**KENYA COMMERCIAL BANK LIMITED**) said that he was relying on the Replying Affidavit.
26. The bank made it clear that the defendant's liabilities at the bank, had been cleared.
27. The bank also pointed out that the Interested Party had never involved the bank in its dealings with the defendant. Therefore, the bank sought to dispel any notion that it may have been a party to the circumstances in which the Interested Party could have become a victim of fraud which was allegedly being perpetrated by the defendant.

28. Mr. Kirwa, the learned advocate for the defendant terms the application by the Interested Party as an abuse of the process of the court. He said that the Interested Party should not have brought this application as she had already filed another application in the Environment & Land Court.
29. If the Interested Party were to be allowed to proceed with this application, the defendant deemed that to constitute double prosecution of one claim.
30. Finally, it was submitted that the Interested Party was not a party to the consent order which she was seeking to have discharged; therefore she could only hope to succeed if she demonstrated that there had been fraud, which could warrant the setting aside of the consent order.
31. At that stage in the proceedings, the court came to the conclusion that there was need for the Criminal Investigations Department (**CID**) to investigate the defendant. The court expressed the view that it was necessary to establish whether or not the defendant did execute the 2 separate Sale Agreements.
32. Accordingly, the court directed that appropriate investigations be conducted.
34. Mr. Daudi Mutui, a qualified Forensic Document Examiner, who was also a certified Handwriting Analyst, filed his report in court on 24th March 2016. None of the parties raised any issues concerning the said report. It was the conclusion of the Forensic Document Examiner that it is the defendant who had executed the 2 Sale Agreements, through which he sought to sell one piece of land to the Plaintiff and also to the Interested Party.
35. In the light of the expert report, I find that the defendant appears to have taken steps calculated to defraud either the plaintiff or the Interested Party. I so find because the defendant did not justify his actions, of signing 2 Sale Agreements with 2 different people, in respect to the same parcel of land.
36. On a *prima facie* basis, I find that the defendant was engaged in a fraudulent transaction. I so find because if the consent order was given effect, the parcel of land would have been transferred to the plaintiff, and would thus have been put beyond the reach of the Interested Party, who had also signed a Sale Agreement for the same piece of land.
37. Currently, there is no indication that either the plaintiff or the bank were aware of the defendant's intentions, to sell the suit property to 2 different people.
38. But the consent was, on a *prima facie* basis, tainted with fraud, which the defendant was playing out.
39. Secondly, as correctly conceded by the plaintiff, there was an error in the manner in which the plaintiff originated the suit as against the Third Party.
40. Pursuant to Order 1 Rule 15 of the Civil Procedure Rules, the person cited as a Third Party is he against whom a defendant lodges a claim when that person was not already a party to the suit.
41. There is no suggestion that the bank had any ulterior motives for not challenging its being cited as a Third Party, when that step had not been taken by the defendant.
42. However, there is no doubt that the plaintiff had no *locus* to enjoin the bank to the suit, as a Third Party.
43. In effect, the bank was in the suit irregularly. That therefore gives rise to doubts about the legitimacy of the consent order which the bank was a party to.
44. Accordingly, the consent order dated 14th August 2015 is hereby set aside.
45. Secondly, the proceedings, to the extent that the said Third Party participated in them prior to the

application dated 9th September 2015, are also set aside.

46. Mr. Macharia, the learned advocate for the plaintiff, did disclose that the original documents of title, together with the discharge executed by the bank, were being held by the plaintiff.

47. In the light of the pending dispute, pitting the plaintiff against the Interested Party, justice demands that the subject matter of the suit be preserved.

48. There is also a request by **LINDA NJOKI MWANGI**, to be enjoined to the suit. She is the wife of the defendant, and she claims to have an overriding interest in the suit land.

49. In order to enable the court determine whether or not to order that Linda Njoki Mwangi be enjoined to the suit, the court directs her to provide a draft pleading, through which it could be ascertained, who she was claiming against, and the nature and scope of the said claim. I so direct because I hold the considered view that prior to determining the suitability or otherwise of an order for joinder, the court ought to be satisfied that the claim being introduced into an existing suit, could be properly determined within that suit, and without distracting from the already existing issues.

50. The plaintiff and the defendant are ordered to pay to the Interested Party the costs of the application dated 9th September 2015.

51. Finally, and for the avoidance of any doubt, I order that the *status quo* prevailing be maintained until further orders. That means that there should be no further dealings with the suit property. In particular, the title to the suit property should not be encumbered or alienated or in any other way dealt with by the plaintiff, the defendant or the interested party, in such manner as may alter its character in any manner.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

P. Machaia for the Plaintiff

Kiriu for the Defendant

Mwangi for the Third Party

Luseno for the 1st Interested Party.

Macharia for Ms. Alusiola for proposed 2nd Interested Party.

Collins Odhiambo – Court clerk.