



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 791 OF 2009

STEPHEN KILONZO.....PLAINTIFF

VERSUS

HELLEN WANGARI

IMMACULATE NGINA (Sued as the Administratrix of the

Estate of the Late Obed Mwangangi).....DEFENDANTS

JUDGEMENT

1. The Plaintiff and the late Obed Mwangangi had entered into a sale agreement, whereby the deceased was to sell to the Plaintiff his property, hereinafter the suit property, registered as **L.R Number 12715/647 Athi River**. The terms of the sale were in the sale agreement dated 14th November 2000, and in which the Plaintiff claimed he had partly satisfied his obligations under the sale by making several payments to the deceased, and that he had unfortunately passed away on 17th January 2001 before the sale could be completed. The administrators of the estate, Hellen Wangari and Immaculate Ngina, have, as alleged by the Plaintiff, refused and or neglected to comply with the completion of the sale agreement, and that it was therefore the reason that necessitated the filing of the instant suit.

Plaintiff's Case

2. In seeking the Court's intervention, the Plaintiff reiterated that the parties, by the terms of the contract, had intended to be bound by such terms and execute the sale, and that therefore the Defendants' refusal and/or negligence to complete the sale were in breach of the terms of the contract. He instituted his claim against the Defendants through the Plaint filed on 26th October 2009. He sought for specific performance of the sale agreement and an order for permanent injunction restraining the Defendants, and or any other party from dealing in any manner whatsoever with the suit property.

3. In buttressing his claim, the Plaintiff in his witness statement stated that he had entered into an agreement for the purchase of the suit property from the deceased on 14th November 2000. Further, he stated that he had made several payments to the deceased with regards to the purchase of the property. He filed his list of documents and Supplementary List of Documents on 1st March 2012 and Further Supplementary List of Documents on 29th June 2012. He called upon Jacob Mutula, the advocate who had prepared the sale agreement, and who stated that at the time he had prepared the sale agreement, there

was a stay of the decision of the Law Society of Kenya suspending him from practicing, and that therefore at the time, he was the holder of a valid practicing certificate.

4. At the hearing of the matter on 2nd July 2012, the Plaintiff testified that he had entered into an agreement for the purchase of the suit property with the deceased, and that he had paid the deceased hospital bills amounting to Kshs 43, 929/-. He further reiterated that the claim for forgery of the deceased signature had not been prosecuted, and that the sale agreement therefore was valid. He was however, during cross-examination, unable to table evidence that he had paid the deceased the amount of Kshs 422,000/- as he has claimed, stating that the same was always in cash. He further claimed that the sum had been paid for a period of over two to three years prior to the sale agreement. With regards to the completion date, the Plaintiff contended that he had not paid the balance of the purchase price, and that further, he had taken over eight (8) years before instituting the present suit against the deceased and/or his estate.

5. Mr. Jacob Mutula as PW2 testified that he was the advocate that had prepared the sale agreement on the instructions by both the Plaintiff and the deceased. He further testified that he was not aware whether the transfer of the property had been executed, or that the sale had been completed as provided in the sale agreement, as he had only been limited to preparing the sale agreement. Further, he stated that he was neither aware nor able to elaborate whether the Kshs 422,000/- purportedly paid at the execution of the sale agreement had been paid, if at all nor why that the details of the parties to the agreement, namely the Plaintiff and the deceased, had not been included in the sale agreement. However, he further stated that he was witness to the signing of the sale agreement, and that the deceased had appended his signature on the document, and that the deceased had handed over the title to the suit property to the Plaintiff before the completion date, ostensibly for previous borrowings between them.

The Defendants' Case

6. The Defendants lodged their Defence dated 8th July 2010. An application was made on 14th September 2010 in which they sought leave to amend the Defence and to further include a counterclaim, which application was allowed. In the Amended Defence, the Defendants stated that the only claim that the Plaintiff has against them was for Kshs 39,000/- which had been paid by the Plaintiff, at the behest of the deceased, as hospital bills, and that the title was held as security for these monies. Further, it was stated that the purported sale agreement was perpetuated by forgery on the part of the Plaintiff, and that the same had been witnessed by an advocate who had been suspended from the roll of advocates. In the counterclaim, the Defendants sought for an order for the release and return of the title of the suit property held by the Plaintiff, and further, for an order to remove the caveat placed over the same, and a dismissal of the suit with costs.

7. In support of their contention, the Defendants filed witness statements and documents, which were dated 20th June 2012.

8. At the hearing of the Defendants' case, Peter Mwanza Mwangangi, the older brother to the deceased, adopted his statement dated 6th June 2012, and further testified that the title to the suit property was given to the Plaintiff as security for payment of the deceased hospital bills, and that at no one time was the deceased intending to sell off the suit property. He, however, contradicted his own statement by stating that he was not the one who gave the title to the deceased, who then gave it to the Plaintiff, and testified that he was unaware how the title passed to the Plaintiff and did not know whether the deceased was selling the suit property or not.

9. DW2 stated that the deceased was her husband and the Plaintiff a family friend. She testified that as one of the administratrix of the estate of the deceased, she had requested for the return of the title to the suit property, but had declined and instead stated that he had purchased the same from the deceased. She claimed that she only knew of the Kshs 39,000/- that was owed by the deceased to the Plaintiff for hospital bills, and that the deceased had never intended to sell the suit property to the Plaintiff as alleged. She further stated that the issues concerning her and the deceased were personal matters which did not concern this instant suit, and that the same did not therefore go to the core issues at hand.

Determination

10. The Court has considered the pleadings and proceedings of this matter by both the Plaintiff and the Defendants. The issues arising for determination are; (1) whether there was a valid agreement of sale between the Plaintiff and the deceased and (2) whether the Plaintiff is entitled to the prayers sought. Before proceeding with these two (2) issues, it is imperative to deal with the issue of the Defendants capacity as the administratrix of the estate of the deceased. Although the issue has not been specifically pleaded, it has nonetheless been raised by the Plaintiff. He attested that the Defendants, moreso Hellen Wangari, was not a wife for any purpose and that therefore, she was a mere opportunist whose sole purpose was to scuttle the sale agreement that had been entered between the Plaintiff and the deceased.

11. They submitted several cases in this regard. The Plaintiff's claim was that the Defendant was not a witness to the agreement, and could therefore not be privy to the contract. Further, he claimed that the Defendant was not at all the wife of the deceased, and therefore had no *locus standi* in the matter. Surprisingly though, the Plaintiff sought to have the performance of the contract effected by the same parties whom he claimed had no *locus standi*. The Defendants were sued as the administratrix of the estate of the deceased, and the matter proceeded as such until this point where a determination pends. If the Plaintiff had all along been of the consideration that the Defendants were neither the legal assigns of the deceased, nor the proper parties to this suit, an amendment at the earliest juncture would have sufficed, and not at this last minute. Further, the reliefs that the Plaintiff seeks, moreso the completion of the agreement by specific performance, are claimed as against the Defendants, who in any event, and in such event as them having no *locus standi* to Defend the suit, the entire case would stand to be dismissed. The Court therefore, holds that the Defendants, having been appointed as the administratrix of the estate of the deceased Obed Mwangangi, have the required *locus standi* to defend the suit, and that therefore the allegations by the Plaintiff are unfounded.

12. Further, it was contended that the advocate who was witnessed the signing of the sale agreement was not practicing at the time, although they presented to the Court an order by Mulwa, J in **Misc. Civil Cause No 1057 of 2000**, in which the learned Judge granted a stay of the decision of the Law Society of Kenya Disciplinary Committee delivered on 22nd September 2000. It is therefore not in dispute that at the time of the execution of the sale agreement, there was a pendency of the application and suit by the advocate. The challenge on the sale agreement's validity to the extent of witness by a competent advocate is therefore invalid.

13. Turning to the sale agreement dated 14th November 2000, it was contended that the same was willfully entered into by the parties. It was the Plaintiff's contention that the sale was on track at the time of the demise of the deceased, and that the Defendants were compelled to complete the sale. He stated that he had paid some substantial amount to the deceased, and that at the time of the execution of the sale agreement, Kshs 422,000/- had been paid to the deceased. He was however, unable to provide evidence before the Court that the sum of Kshs 422,000/- or Kshs 465,000/- as claimed had been paid to the Plaintiff, and that documents presented to the Court, did not substantiate the claim. The alleged payment of Kshs 422,000/- as purported by the Plaintiff is unverified, with the advocate who witnessed the sale agreement, further stating that he had not been privy to or aware of the payment of the sum as claimed by the Plaintiff. It is an unfortunate coincidence that the only other individual who may corroborate the payment of this sum is the deceased.

14. By his own admission, the Plaintiff stated that he had not paid the balance of the purchase price of Kshs 578,000/- which was to be paid by 4th December, nor Kshs 100,000/- which was to be paid by 14th December 2000. To claim for specific performance whereby the Plaintiff had not yet fulfilled his obligations under the sale agreement would be against the principles of equity. The Plaintiff cannot claim for an equitable relief if he himself is not seen to have done equity by settling the balance of the purchase price within the stipulated completion date. As such his only remedy, if any, would lie in damages. However equity would demand that if the plaintiff was not to get the suit land due to failure to meet the threshold for specific performance, he gets back the consideration paid though it may not be pleaded or prayed for. In the case of **MOSES MARANGU AND ANOTHER VS ESTHER NTHIRA AND OTHERS, CA AT NYERI** held that though consideration refund was not pleaded or prayed in the

pleading , the court can invoke the overriding objective vide s 1A and 1B CPA and order the refund. We rely on the same case and also the national values and principles of governance vide **Article 10 sub articles 2b** of the constitution and do equity by ordering refund of the consideration paid.

15. The Defendants state that it was only the sum of Kshs 43,000/- that the Plaintiff had paid to the deceased as assistance for the settlement of a hospital bill, whereas the plaintiff says he paid ksh 43 929/ as hospital bill for the deceased. The defendant state that, the amount was to be refunded to the Plaintiff, and the title of the suit property that was in his possession as security would be returned to the deceased, and or in this instance, his assigned and representatives of the estate. The Defendants have been willing to refund this amount, as was evidenced by the 1st Defendant visiting the Plaintiff, ostensibly to settle this amount.

16. In light of the foregoing circumstances, and in consideration of the facts and evidence before the Court, the Plaintiff's claim is hereby disallowed on specific performance but allowed as below, with costs to the plaintiff. The Defendants' counterclaim is allowed as here below, and for the avoidance of doubt, it is ordered that;

a. Defendants are to pay the sum of Kshs 43,000/, costs and interest at court rates from date of filing suit- to the Plaintiff within 30 days of the date of this judgment.

b. The Plaintiff to release, deliver and surrender the title in his possession over **LR No 12715/647 Athi River** to the Defendants after payment above; (a)

c. The caveat placed and registered by the Plaintiff over **LR No 12715/647 Athi River** be removed after payment above.(a)

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of December, 2015.

.....

C. KARIUKI

JUDGE