



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 481 OF 2011

KIOTO DEVELOPMENT LIMITED.....PLAINTIFF

VERSUS

MIKE OYOO WAGUNDA (T/A WAGUNDA & CO. ADVOCATES)....DEFENDANT

R U L I N G

1. The Plaintiff's case against the Defendant, as pleaded in the plaint dated 21st October 2011, is for a refund of KShs 2.5 million paid to him by the Plaintiff in his capacity as stake-holder in a land-sale transaction that failed. In the alternative the same amount is claimed as money had and received by the Defendant from the Plaintiff. The Defendant is an advocate of this court and apparently acted for the vendor in the land sale transaction in which the Plaintiff was the purchaser.
2. The Defendant entered appearance and filed defence. He has in effect pleaded that he has been wrongly sued as he was not a party to the transaction and merely acted as advocate and stake-holder, and that the Plaintiff ought to sue the Vendor. He has also pleaded that it was the Plaintiff who rescinded the sale agreement, and in effect, was to blame for failure of the transaction. The Defendant has also denied the particulars of fraud pleaded against him.
3. Finally the Defendant admits receiving the sum of KShs 2.5 million from the Plaintiff, but on behalf of the vendor with the full knowledge of the Plaintiff. He also gave notice of intention to raise a preliminary objection to the suit on various legal grounds.
4. Apparently the Plaintiff did not file any reply to the defence. But it filed **notice of motion dated 11th June 2012** which is the subject of this ruling. The application, stated to be brought under **Order 36, rules 1 and 2 of the Civil Procedure Rules, 2010 (the Rules)** (which cater for summary judgment) seeks the main order that the Defendant's statement of defence be struck out with costs and summary judgment be entered for the Plaintiff as prayed. The main ground for the application is that the Plaintiff's claim is a liquidated one and that the Defendant has admitted receiving the claimed sum. There is a supporting affidavit to the sale agreement and other documents are annexed.
5. The Defendant does not appear to have filed any papers in response to the application. There was no appearance for him at the hearing though he had been duly served with notice.
6. I have considered the submissions of the Plaintiff's learned counsel. I have also perused the pleadings.

7. It is true that the Defendant has admitted receiving from the Plaintiff the sum of KShs 2,500,000/00 as stake-holder. He has also pleaded that he received the sum for and on behalf of the vendor and that he paid the same over to the vendor.

8. I have perused the sale agreement. **Clause 3.1** of the agreement stipulates that the deposit (KShs 2.5 million) paid to the vendor's advocate shall be held by him by him as stake-holder "**pending successful registration of the transfer of the purchaser**".

9. It appears to be common ground that there was no successful registration of any transfer in favour of the purchaser. So, in what circumstances did the advocate/stakeholder pay the deposit over to the vendor, if he did that? He has not bothered to address this important issue in a replying affidavit or at all. I also note that though the Defendant gave notice that he would apply to serve the vendor with a third party notice, so far he has not done so.

10. In all these circumstances I am satisfied that the Defendant's defence raises no triable issue and is a sham. In any case the application is unopposed. I will allow it.

11. The Defendant's statement of defence dated 13th February 2012 is hereby struck out and judgment entered for the Plaintiff for the sum of KShs 2.5 million together with interest at court rates from the date of filing suit until payment in full. It is so ordered.

12. The claims for general damages and refund of legal fees paid in connection with the transaction are bad in law as the Defendant was not a party to the transaction. I decline to award them.

13. The Plaintiff will have costs of the suit.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JANUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 7TH DAY OF FEBRUARY 2014.