REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 729 OF 2012

SUSAN WANJIKU MWANGI……..PLAINITFF

VERSUS

LEAH WAMBUI NGUGI……..……1ST DEFENDANT

ANDREW KIMWAKI NGUGI……..…….2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 11th February 2013and filed on 16th October 2013 was brought under the provisions of Order 2 Rule 15(1) (a), (b), (c) & (d) of the Civil Procedure Rules 2010. It sought the orders that the Defendants' Statement of Defence be struck out and judgment be entered in favour of the Plaintiffas prayed in the Plaint.
2. The said application was supported by the Plaintiff's Affidavit and Supplementary Affidavit sworn on 11th February 2013 and 7th November 2013 and filed on 16th October 2013 and 9th November 2013 respectively. In response thereto, on 24th October 2013, the 2nd Defendant filed a Replying Affidavit sworn on the same date.
3. The Plaintiff's written submissions were filed on 17th June 2013 while those of the Defendant's (sic) were filed on 25th June 2014. Both sets of written submissions were undated.

PLAINTIFF'S CASE

4. A perusal of the Plaintiff's documentation placed before the court reveals that her case was that on or about 1995, she entered into an oral agreement with the Defendants where she was to purchase and the Defendants were to sell to her a parcel of land measuring 0.5 of an acre that was to be hived from L.R. No 12144/5/4 for a consideration of a sum of Kshs 3,500,000/=. Upon paying a sum of Kshs 3,510,835/= to the Defendants, they gave her a title deed of the said parcel of land now known as L.R. No 12144/102.
5. Acting on the belief that the said title was genuine and valid, she entered into an agreement with one Boniface Okwach for the sale and purchase of the Defendants' parcel of land hereinbefore identified as L.R. No 12144/102 for a consideration of Kshs 17,500,000/=.

6. The Plaintiff submitted that when the said Purchaser's advocates conducted due diligence on the property, it emerged that the certificate of title number 121325 was not genuine as the Defendants had not transferred any title to the Plaintiff or at all and that the said title was a worthless piece of paper as it related to L.R. No 4871/178 situated in Kikuyu and was registered in the name of one Michael Gichora Mugo.

DEFENDANTS' CASE

7. In their Defence dated 1st February 2013 and filed on 4th February 2013, the Defendants denied the Plaintiff's assertions in the Plaint. They denied the said contentions in the Defendant's (sic) aforesaid Replying Affidavit and in particular the fact that there was no oral contract or otherwise for the sale of the aforementioned parcel of land by the Defendants to the Plaintiff as she had alleged or at all.

LEGAL ANALYSIS

8. Particulars of loss suffered by the Plaintiff and those of the Defendants' fraud were itemised in the Plaintiff's Plaint dated 20th November 2012 and filed on 22nd November 2012.
9. As a result of the said loss and fraud, the Plaintiff prayed for the following reliefs:-

a. **Kshs 3,510,835/= being the principal purchase price.**
b. **Kshs 11,936,839/= being interest at 20% per annum from 1998 to the date of filing suit.**
c. **Interest at court rates on (a) and (b) above till payment in full.**
d. **Costs of the suit.**

10. Evidently, the nature of the Plaintiff's claim was one of interest over land. This was pursuant to an implied or constructive trust created in her favour as she had paid the purchase price for the purchase of a parcel of land from the Defendants. In her written submissions, the Plaintiff stated that she was not seeking specific performance but rather she was seeking a refund of all the monies that she paid the Defendants in addition to interest.
11. In their written submissions, the Defendant (sic) identified the following issues for consideration by the court:-

a. **Was it possible to effect a transferof land without any written agreement?**
b. **Were the monies sent for the purchase of land?**
c. **Was the sale of land concluded within the stipulated period?**
d. **Did the interest claimed by the Plaintiff have any a basis?**

12. It is clear from the Plaintiff's advocates' letter dated 29th January 2013 to the Deputy Registrar High Court of Kenya Civil (sic) and Admiralty Division that when the Plaintiff requested for judgment in its Request for Judgment dated 29th January 2013 and filed on 4th February 2013, the said Deputy Registrar declined to enter interlocutory judgment against the Defendants herein. This was premised on the ground that this was a matter that should have been heard in the Environment and Land Court Division.
13. In the Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 13573 dated 20th September 2012,it was expressly stipulated as follows:-

> **"6. All new cases relating to the environment and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court."**

14. This was the same direction that was contained in the Practise Direction Gazette No 1617 dated 9th February 2012 which was subsequently superseded by Gazette Notice No 13573 cited hereinabove.

15. Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 16268 relating to the Environment and Land Court Act No 19 of 2011 dated 9th November 2012 subsequently superseded Gazette Notice No 13573cited hereinabove. The same provided as follows:-

> **" 4. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by the Chief Registrar.**
>
> **12. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 7** (being those that had been filed at the Magistrates' courts)-(emphasis court) **shall be filed at the nearest Environment and Land Court for hearing and determination by the said court."**

16. This court could not therefore have agreed more with the Deputy Registrar of the High Court of Kenya Commercial and Admiralty Division that this a matter that squarely falls within the jurisdiction of the Environment and Land Court Division as the dispute related to an interest over land. The suit herein was filed on 22nd November 2012 when the Chief Justice, the President of the Supreme Court of Kenya, had already made very concise Practise Directions. Parties ought not to file matters in courts which are convenient to them but rather they must follow the clearly laid down procedures for the sake of good orderto avoid forum shopping.
17. In light of the foregoing and having looked at the pleadings placed before the court and those on the court record, it is very clear that there is no commercial element in this matter. The same should never have been filed in the High Court of Kenya Milimani Law Courts Commercial and Admiralty Division in the first place.

DISPOSITION

18. Accordingly, the court will not consider the merits of the Plaintiff's present application but it will instead transfer this file to the Environmental and Land Court Division for determination.
19. As the Plaintiff's advocates did not heed the advise of the aforementioned Deputy Registrar when he gave the same, the court hereby directs that parties take a date at the Environment and Land Court Division registry when this matter will be mentioned before the Presiding Judge High Court of Kenya Milimani Law Courts Environment and Land Court Division for her further orders and directions herein.
20. There will be no order as to costs as the court did not hear the substantive issues herein.
21. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th day of September 2014

J. KAMAU

JUDGE