



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 300 OF 2012
AFRITRACK INVESTMENT (E.A).....PLAINTIFF
VERSUS
JANE WAMUYU MWAI.....DEFENDANT

R U L I N G

Due to the urgency of this matter and the fact there was an application for consolidation to be heard by a different Judge, I delivered judgement extempore from my notes. The notes are on the court file. Below is set out the Ruling delivered and Order made on 4th November 2014.

1. In the matter before me the issues relate to the sale of a property LR 14902/18 LR NO 102095(hereafter referred to as “*The Property*”). This matter is listed for the hearing of the trial.
2. The Plaintiff’s counsel says that he is ready to proceed. He intends to call three witnesses, the Surveyor, the Structural Engineer and the witness he refers to as “*the Party*”. The Plaintiff is a limited company and the witness referred to is infact the Chief Executive Officer of the Plaintiff Company, a Ms. Sabena Yohannes. Unfortunately the two professional witnesses have not attended Court and will not be available to give evidence if the hearing were to proceed today. I am informed by Counsel for the Plaintiff that when they were told of the hearing they already had prior professional commitments and so cannot attend. It was not clear when they could attend. It seems that it is therefore inevitable that, if we were to proceed today the hearing will be adjourned for further witnesses.
3. It has also been brought to my attention by Counsel for the Defendant that the Advocates who acted for the Plaintiff in the purchase (M/S Wainaina Karimi) have issued proceedings against Afritrack Investments Ltd (the Plaintiff before me). That is case No. 235 of 2014. In addition they have issued an application to consolidate that action No.235 of 2014 with this action No.300 of 2012. I have been provided with a copy by Counsel for the Defendant. That application is due to be heard before my brother, Judge, Gikonyo on Thursday 6th November, 2014. The issues in dispute within this suit relate to the purchase of the Property by Afritrack, the Plaintiff and whether there were such defects in the buildings upon the land to give rise to the causes of action in the Plaintiff.
4. The Defendant who is the Vendor of the land and buildings thereon seeks payment of the balance of the purchase price Ksh.17,000,000 and does so through the Disciplinary Proceedings against the Purchaser’s Advocates. The balance of the purchase price was to be paid pursuant to an Advocates

undertaking given by Wainaina & Karimi Company Advocates, in other words the Plaintiff in Case No.235 of 2014 for the sum of Ksh.17,000,000 ie. same as balance. The Advocate who represented the Plaintiff as Purchaser in the sale is also the subject of the Disciplinary Proceedings and this matter therefore has implications on his professional standing.

5. The application to consolidate (dated 4th June 2014) has attached to it the Supporting Affidavit of Mr. Paul Wainaina Kimani sworn on 4th June 2014. This affidavit very helpfully sets out the salient particulars of the Agreement for Sale and includes the Agreement in within the documents attached.

6. Further the Notice of Motion sets out that the Advocate's undertaking has been neither stayed nor discharged. The Plaintiff Company has not made the funds for payment available to the Advocate. The relief sought in paragraphs 3 and 4 of the Notice of Motion deal with payment.

7. I note from aforesaid Affidavit that the undertaking was given on obtaining the plans and other approvals (paragraph 6). The date on which this was done is a fundamental part of the evidence in the case before me. (HCC No.300 of 2012). The Plaintiff's Chief Executive Officer made clear to me quite vociferously that she was opposed to consolidation and to the matter being heard by Hon. Mr. Justice Gikonyo.

8. The Notice of motion is to be heard this Thursday by Justice Gikonyo. It seems clear to me that the issues between the two causes are inextricably and intrinsically linked. Other factors to consider are:

a. Plaintiff is ready to start but not to complete evidence so adjournment inevitable.

b. No prejudice to Plaintiff that cannot be compensated by damages.

c. The prejudice to Defendant is two-fold - (1) delay and (2) – may be prejudiced by issues raised on Thursday and may not have opportunity to hear/be heard unless consolidation succeeds. This consideration should not be interpreted as an attempt to prejudge the consolidation application.

9. Overriding objective requires that a matter be dealt with justly and expeditiously. Delay should be avoided. As the two matters appear to be closely interlinked, the way forward is best decided after Thursday when the consolidation application will be heard. The question whether the Plaintiff is entitled to withhold balance of purchase price is a fundamental issue. It is also fundamental to the issue of the undertaking.

10. They relate to same:

a. Facts

b. Transaction

c. Parties and participants

The Plaintiff has raised objection to Judge Gikonyo hearing this matter. She should refer her request to Hon. Mr. Justice Gikonyo or the Presiding Judge, of the Division. The Plaintiff requests that the substantive matter be heard either by Presiding Judge or myself. I have not agreed to that request.

11. Plaintiff objects to Gikonyo Judge hearing this matter. The Plaintiff requests that the substantive matter either be reserved to myself or the Head of Division/Presiding Judge. Request hearing of Notice of Motion be heard by head of Division/Presiding Judge.

12. Counsel for the Defendant states that these issues are not appropriate to this forum and should be raised at the correct time in the correct place. If it is the Plaintiff's intention to ask any Judge to recuse themselves, it should follow the correct procedures.

13. Adjourned the matter. Grant adjournment.

14. I make the following Orders.

a. List for mention on 4th December 2014.

b. Costs reserved.

DATED, Signed and Delivered at Nairobi this 4th day of November, 2014.

FARAH S.M AMIN

JUDGE