



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 511 OF 2011

GEORGE MWANGI WAKANGU.....1ST PLAINTIFF

PENINA WANJIKU MWANGI.....2ND PLAINTIFF

- VERSUS -

SAMUEL MACKENZIE KYHALO.....1ST DEFENDANT

JOYCE NDUNGWA KITONGA.....2ND DEFENDANT

HABIBA MOHAMED HASSANOW.....3RD DEFENDANT

ADOY HILLOW MOHAMED HUSSEIN4TH DEFENDANT

RULING

1. The 3rd and 4th Defendants have asked the court to strike out the suit against them. The basis for that application was that the Amended Plaint did not disclose any cause of action against them.
2. In the Amended Plaint, the plaintiffs assert that they entered into a Sale Agreement dated 16th June 2010. The said Agreement was between the plaintiffs on the one hand and the 1st and 2nd defendants on the other hand.
3. The subject matter of the Agreement was **L.R No. 36/V11/349 EASTLEIGH, NAIROBI**. It was a term of the Agreement that the purchase price of Kshs. 20 million would be payable within 90 days. However, the plaintiffs further assert that the payment of the balance of Kshs. 18 million was conditional upon the successful registration of the conveyance or the transfer in favour of the plaintiffs.
4. It does appear that the 1st and 2nd defendants were unable to provide the plaintiffs' with the requisite Title documents timeously. Therefore, the sale transaction was not completed within the time spelt out in the Agreement. That fact is common ground to all the parties.
5. However, the plaintiffs insist that they were at all times ready, able and willing to perform their part of the contract. George Mwangi Wakangu and Penina Wanjiku Mwangi are the plaintiffs. They will hereinafter be cited as George Wakangu and Penina Mwangi.
6. According to the said George Wakangu and Penina Mwangi, the 3rd and 4th Defendants colluded with the other two defendants to defeat the Sale Agreement dated 16th June 2010.
7. Why do George Wakangu and Penina Mwangi accuse Samuel Mackenzie Kyalo (*hereinafter "Samuel"*) and Joyce Ndungwa Kitonga (*hereinafter "Joyce"*) of colluding with Habiba Mohamed Hassanow (*hereinafter "Habiba"*) and Adoy Hillow Mohamed Hussein (*hereinafter*

“Aday”)?

8. According to George Wakangu and Penina Mwangi, it was the vendors, Samuel and Joyce who were in breach of the Sale Agreement, by failing to make available the Title document on time. Thereafter, when the Title document became available, Samuel and Joyce, through their advocates, sought a professional undertaking from the advocates for the purchasers, that the balance of the purchase price would be payable.
9. George Wakangu and Penina Mwangi assert that their lawyers duly offered their professional undertaking.
10. In my understanding of the plaintiffs’ case, they are alleging that by the conduct of the vendors advocates, the Sale Agreement was deemed to be subsisting even though the contractual period had lapsed. Therefore, when the vendor proceeded to enter into another Sale Agreement with Habiba and Aday, that was construed, by the plaintiffs, as being a fraudulent collusion.
11. It is the plaintiffs’ case that the conveyance dated 28th January 2011, which was registered on 10th February 2011 should be declared null and void. That conveyance resulted in Habiba and Aday becoming the registered proprietors of the suit property.
12. The plaintiffs consider Habiba and Aday to have been fraudulent because they did not inform the plaintiffs that they were entering into the Sale Agreement dated 17th December 2010.
13. The plaintiffs say that Habiba and Aday had known about the Sale Agreement dated 16th June 2010.
14. It is for that reason that the plaintiffs want the court to cancel the conveyance to Habiba and Aday. The plaintiffs will be asking the court to order Samuel and Joyce to execute a conveyance of the suit property in favour of the plaintiffs.
15. According to the plaintiffs, the suit property should not be sold to any person other than the plaintiffs. Therefore, the plaintiffs will be asking the court to order Samuel and Joyce to specifically perform the contract dated 16th June 2010.
16. The plaintiffs also claim against Samuel and Joyce Special Damages amounting to Kshs. 2,787,000/- and General Damages for breach of contract.
17. As against Habiba and Aday, the plaintiffs want the court to order them to execute a conveyance of the suit property in favour of the plaintiffs.
18. In answer to the suit, the 3rd and 4th Defendants asserted that their Sale Agreement with Samuel and Joyce was lawful. They described themselves as Innocent Purchasers for value, who had no prior notice of the plaintiffs’ alleged earlier Sale Agreement.
19. Habiba and Aday contend that they conducted due diligence, which revealed that the suit property was available for sale as it was not encumbered in any way.
20. Habiba and Aday further asserted that they had a good title to the suit property because the conveyance which transferred the property to them had fully complied with all legal processes.
21. It is within that context that the 3rd and 4th defendants now assert that the plaintiffs Amended Plaintiff does not disclose any cause of action against them.
22. The record of proceedings shows that the suit herein was commenced by a Plaintiff which was filed on 7th February 2011. As at that date, the suit was only against Samuel and Joyce.
23. However, Habiba and Aday were enjoined into the suit through the Amended Plaintiff dated 4th April 2011.
24. Whilst that fact may suggest that the plaintiffs did not originally think that they had a case against Habiba and Aday, that alone cannot be sufficient reason to strike out the plaintiff. I so hold because the law does permit parties to amend pleadings, even to the extent of enjoining new parties, as may be necessary.
25. In the case of **NJUWANGU HOLDINGS LIMITED VS LANGATA KPA NAIROBI WEST TRADING CO. LIMITED & 3 OTHERS ELC SUIT NO. 139 OF 2013**. Mutungi J. expressed himself thus as regards the Land Registration Act;

“Under Section 26, the certificate of title is prima facie evidence of ownership and cannot be challenged except on grounds of fraud or where it is shown the title has been acquired illegally, unprocedurally or through corruption”.

26. Where fraud is alleged and thereafter proved against the registered proprietor of land, such

- registration can be challenged in court.
27. I believe that that was why the plaintiffs have pegged their claim against Habiba and Adoy on some alleged fraud.
28. However, it cannot be right to hold the view that as soon as fraud is alleged against a defendant, then the claim challenging the proprietorship of such a defendant must proceed to full trial. If that were allowed to happen it would imply that any plaintiff simply needs to put forth an allegation of fraud, however unfounded it may be, to ensure that the case proceeded through to a full trial.
29. In the case of **PETER N. MIGWI KANG'ETHE VS JOHN GITHUA WAHOME, CIVIL APPEAL NO. 140 OF 2002** (at Nyeri) Makhandia J. (as he then was) expressed himself thus on the issue of the time within which the contract was to have been completed;

“It has been said and indeed it is trite law that courts do not make contracts for parties but merely interpret them. In the circumstances of this case, it was explicitly agreed that the transaction must be completed within six months. With that clause it would appear that time was of essence. To my mind, therefore, once the appellant was unable to abide by the terms of the sale agreement as aforesaid, he automatically breached the contract”.

30. I have restated that position because in the contract between the plaintiffs, on the one hand, with Samuel and Joyce on the other hand, it was an express term of the Sale Agreement that;

“17. TIME IS OF ESSENCE

Time shall be deemed to be of the essence of the contract in all respects and for all the purposes of this Agreement”.

31. That is plain and simple. It requires no elaboration or interpretation.
32. Having agreed between themselves that time was of the essence, we then ask ourselves about the amount of time that the parties agreed to. That is to be found in Clause 7, which was in the following terms;

“7. COMPLETION DATE

The completion date shall be Ninety (90) days from the date of signing of this agreement or earlier if possible with the Agreement of the parties”.

33. Once again, that provision is as clear as day.
34. It is common ground that the Sale Agreement was not completed within the prescribed contractual period.
35. Thereafter, unless the parties mutually agreed to vary the contract, there would have been no contract which could be specifically performed.
36. In any event, the subject matter of the contract had already been put beyond the reach of Samuel and Joyce. They had conveyed the property to Habiba and Adoy.
37. Assuming that Habiba and Adoy had knowledge about the Sale Agreement dated 16th June 2010, that alone would not have given rise to an obligation on their part to tell the plaintiffs that they wished to purchase the suit property after the lapse of the contractual period stipulated in that contract. I so hold because the Sale Agreement dated 16th June 2010 was due to have been completed before the date when Habiba and Adoy signed the Sale Agreement dated 17th December 2010. Therefore, it would not have been unreasonable for Habiba and Adoy to presume that the contract dated 16th June 2010 was no longer operational.
38. My said holding is based upon the presumption that Habiba and Adoy did not know of the extension of time (if any) or the variation of terms (if any) of the original Sale Agreement. It would therefore be a matter of actual evidence as to whether or not there was actual knowledge of any variations of the terms and conditions or of the extension of time.
39. As matters stand currently, there is no assertion by the plaintiffs that the 3rd and 4th Defendants had any such knowledge.

40. Therefore, I was tempted to conclude that it would not be open to the plaintiffs to lead evidence to prove a matter which did not arise from the pleadings.
41. In similar vein, I noted that the claims against the 1st and 2nd defendants include a prayer for General Damages for Breach of Contract. There is also a further prayer against the said 1st and 2nd Defendants for a refund of Kshs. 2,787,000/-. That sum is being sought because it is calculated on the basis of the deposit which the plaintiffs paid to the 1st and 2nd defendants.
42. On a *prima facie* basis, it occurred to me that if the plaintiffs were to succeed in their claims for both the Special Damages and the General Damages, arising out of the alleged breach of contract, they could not, simultaneously, get the orders for specific performance of the contract. An order which gave to the plaintiffs both the suit property and compensation would result in unjust enrichment.
43. For that reason, it is my considered view that the combination of the reliefs sought renders the claims against the four defendants unsustainable, in its current format.
44. That led me to almost strike out the claim against the 3rd and 4th Defendants.
45. However, I then reminded myself that parties were permitted to apply for leave to amend their pleadings at any time, before judgment.
46. In this case, I said to myself that because the plaintiffs may well seek to amend the Plaint, to abandon their claims for compensation; that would leave them with the possibility that the trial court may ultimately conclude that the sale to Habiba and Aday was irregular. At present, I can only say that that is a possibility.
47. If that be the case, then it is necessary to hear both Habiba and Aday, before the court could arrive at an informed decision.
48. If the plaintiffs wished to undo the sale transaction involving Habiba and Aday, then those two (2) defendants must remain parties in the suit.
49. But, as I have already intimated, I cannot see the possibility of the court granting to the plaintiff's both the suit property and also compensation for breach of contract.
50. I have thus come to the conclusion that the application by the 3rd and 4th Defendants fails. But it has resulted in a situation where the plaintiffs must be put to an election. The plaintiff's are therefore required to choose whether to pursue their claim against the 1st and 2nd defendants, for compensation, OR they should pursue all the defendants with a view to being granted the suit property.
51. If the plaintiffs choose to pursue the claim for compensation against the 1st and 2nd Defendants, then the suit against the 3rd and 4th Defendants stands dismissed with costs.
52. But if the plaintiffs choose to pursue their claim for the suit property, they must abandon their claim for compensation. If the plaintiffs choose this option, then the suit against the 3rd and 4th Defendants will remain in place.
53. In view of the fact that the application by the 3rd and 4th Defendants has given rise to a situation in which the plaintiffs have been compelled to make an election, I order that the costs of the application be in the cause. By so ordering, the plaintiffs would be obliged to pay the costs of both the application and of the suit against the 3rd and 4th defendants, if the said plaintiffs choose to pursue their claim against the 1st and 2nd defendants, for compensation.
54. In the alternative, if the plaintiffs choose to only pursue the claim for the suit property, then the costs of the application dated 16th October 2012 shall abide the determination of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

.....for the 4th Defendant.

Mr. C. Odhiambo, Court clerk.