



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 52 OF 2014

SAID AHMED MAHMOUD.....PLAINTIFF

VERSUS

MERCY CASSANDRA M'MBOGA.....DEFENDANT

RULING

1. On or about 6th April 2018, the Plaintiff filed a Chamber Summons application of even date seeking orders that:

- 1. The Honourable Court be pleased to direct Jacqueline Waihenya Maina Advocate to honour the undertaking contained in the order dated 21/4/2015 and the letters dated 12/5/2015 and 22/5/2015;***
- 2. Any other or further order that the Honourable Court may deem fit to grant in the circumstances; and***
- 3. That the Costs of this application be provided for.***

2. Upon being served with the said application, the Respondent Advocate filed a Notice of Preliminary Objection on 7th May 2018 objecting to the Chamber Summons application on the following grounds:-

1. That the application if at all, ought to have been commenced by way of Originating Summons by the Advocates on record and not by the Plaintiff in this matter as:-

i) The professional undertaking was issued to the Advocate on record; and

ii) All correspondence has been undertaken with the Advocate on record.

2. That in any event the dispute resolution mechanism adopted by the parties herein is by way of arbitration and the same ought to be referred to arbitration in the first instance.

3. That the application is incurably defective, fatal and should be struck out and/or dismissed with costs to the Respondent.

3. When the application came up for hearing, the parties agreed to first dispose off the Preliminary Objection by way of Written Submissions. I have considered the Preliminary Objection and the Written Submissions as filed herein by the Learned Advocates for the parties.

4. As was stated in *Mukhisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd(1969)EA 696:-*

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. The Preliminary Objection before me raises two major issues. In the first instance the Respondent contends that the claim by the Plaintiff ought to have been mounted by way of originating summons as required under Order 52 Rule 7(1) (b) and not in the manner in which it has been brought herein. In this regard, it is the Respondent’s case that the undertaking sought to be enforced were not on the face of the record and have only been given by way of the correspondence between the Plaintiff’s Advocates and the Respondent.

6. A perusal of the record herein reveals that the suit was instituted vide a Plaint dated 20th March 2014 wherein the Plaintiff sought inter alia orders of vacant possession and mesne profits, a declaration that the agreement between the Plaintiff and the Defendant had been terminated by operation of the law and, in the alternative, payments of the sum of Kshs 1,100,000/-. Upon being served with the summons, the Defendant responded with her own Defence and Counterclaim.

7. However on 21st April 2015, the parties recorded the following order by consent in open Court.

“By consent, the Defendant shall pay the Plaintiff the sum of Kshs 1,742,038/75/- comprising the principal amount plus interest at 14% per annum compounded between August 2012 and April 2015.”

The Parties shall execute the following documents

(1) A Deed of Variation of Sale Agreement.

(2) The Transfer.

(3) Application of Land Control Board Consent.

(4) The Affidavit by the Plaintiff in confirmation of his name. The Plaintiff will provide the documents and consent as set out in the Deed of Variation.

(5) The Defendant will pay the decretal amount within 14 days of registration of the transfer in her favour. The costs herein shall be agreed upon by the parties and in default of an agreement the cost shall be taxed by the Taxing Master.”

8. It is apparent that following the adoption of the consent order by the Court, the parties exchanged a number of correspondences including the undertaking which is the subject matter of the Chamber Summons application dated 6th April 2018. In response to a letter from the Plaintiff's Advocates dated 12th May 2015, the Respondent responded on 22nd May 2015 stating inter alia as follows:-

“We confirm that the aforesaid documents are released to us upon our professional undertaking to release the balance of the purchase price outlined in the deed of variation of sale agreement upon successful registration of the transfer in our client's favour.”

9. By the said Chambers Summons application, the Plaintiff accuses the Respondent of failing to honour the undertaking despite the fact that the transaction was finalized and the transfer registered in her client's favour.

10. Order 52 Rule 7 of the Civil Procedure Rules provides as follows:-

“(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made-

(a) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(b) In any other case, by Originating Summons in the High Court.

2) Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter an order in enforcement be made.

11. I have considered the Objection by the Respondent and the Submissions that the Plaintiff/Applicant ought to have filed a fresh suit by way of an Originating Summons to enforce the undertaking. I did not, with respect, find much ground in this argument. Evidently, by the consent order of 1st April 2015, the parties herein intended to conclusively determine this suit and all that remained was fulfilment of the terms of the order.

12. That being the case, there can be no dispute that the correspondence by the parties and the undertaking made by the Respondent was in furtherance of the suit filed herein. While Order 52 of the Rules refers specifically to the High Court, it is now self-evident that this Court is of equal status with that Court exercising jurisdiction as conferred upon it by Article 162 of the Constitution and Section 13 of the Environment and Land Court Act.

13. Accordingly and breathing the above provisions of the Constitution and the Environment and Land Act into Order 57 of the Civil Procedure Rules, I find and hold that the applicable provisions in this regard would be Order 57 Rule 7(1) (a) and the first limb of the Preliminary Objection is thus without basis.

14. In the second limb of the Objection, the Respondent submitted that the Deed of variation between the parties was self-evident that all disputes arising out of the subject matter of the Agreement shall be referred to arbitration. As I have found herein above however, the parties had by their consent of 21st April 2015 effectively determined the dispute herein. That order was adopted as a Judgment of this Court and all that remained was the payment of the balance of the purchase price and an agreement on costs.

15. Order 46 Rule 1 of the Civil Procedure Rules in regard to Arbitration and other Alternative Dispute Resolution mechanisms provides as

follows:-

“(1) Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suits shall be referred to arbitration, they may, at any time before Judgment is pronounced, apply to the Court for an order of reference.”

16. In the matter before me, a consent Judgment has already been adopted and I did not find anything outstanding that would be referred to arbitration. As it were, this Court has a duty to facilitate the just, expeditious, proportionate and affordable resolution of the disputes before it. In my view, referring this matter that is basically concluded at this stage to arbitration would be tantamount to the Court abdicating its responsibility to ensure a fair and expeditious resolution of disputes.

17. In the result, I did not find any basis for the Preliminary Objection dated 7th May 2018. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE