



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 80 OF 2011

JOAKIM NJUGUNA KARANJA.....1 ST PLAINTIFF

ALICE WACEKE NJUGUNA.....2 ND PLAINTIFF

=VERSUS=

AMOS KABUE MWANGI.....1 ST DEFENDANT

MARY NGIMA MUNYU.....2 ND DEFENDANT

HOUSING FINANCE

COMPANY OF KENYA LTD.....3 RD DEFENDANT

AND

SIMON MUTURI NJOROGE.....INTERESTED PARTY

RULING

Introduction

1. Before me for determination are two applications. The first application is a notice of motion dated 10/7/2018 and filed on 10/7/2018 by the 1st and 2nd defendants seeking the following orders:

1. That this honourable court do review the ruling and orders of the Honourable Justice Gacheru granted on 18/3/2016 with a view to bringing the dispute between the parties to a conclusion.

2. That this honourable court do hear the 1st and 2nd defendants' application dated 8th May 2013 a fresh or in the alternative, this honourable court do give a determination on the following issues which the Honourable Justice Gacheru did not give a determination on. (sic)

3. That this honourable court do review its orders of 25th January 2012 with a view of determining the following.

i. Which costs of the transfer to the plaintiffs the 1st and 2nd defendants were to pay considering the tabulations given by the plaintiffs lawyers to the 1st and 2nd defendants. Which they believe it should be under the following heads(sic);

a. Amount paid to HFCK Limited the 3rd defendant.

b. Interest on (1) above at 12% per annum.

c. Disbursements incurred while effecting the transfer excluding the stamp duty and legal fees.

d. The costs of this suit.

4. That this honourable court do find that the 1st and 2nd defendants have paid the plaintiffs the total sum of Kshs. 6,206,450/= up to date being settlement of the outstanding amount from the 1st and 2nd defendants to the plaintiffs.

5. That this honourable court do order the plaintiffs' lawyer to release the documents for Title Land Reference Number 2259/706 to the 1st and 2nd defendants immediately because their claim has been settled and there is no reason or justification for them to continue holding the same.

6. That this honourable court do order the plaintiffs' lawyer to file his bill of costs for taxation by this honourable court.

7. That this honourable court in the interest of justice and fairness do grant any other orders that it may deem fit.

8. That the costs of this application be borne by the plaintiffs.

2. The second application is the notice of motion dated 3/12/2018 and filed on 6/12/2018 by the plaintiffs seeking the following orders:

1. That this honourable court be pleased to review and /or vary its ruling and all consequential orders made by the Honourable Justice Gacheru on 18th March, 2016 and order that the interest rate to be utilized is 22% per year.

2. That in the alternative to prayer 1, this honourable court be pleased to reinstate the application dated 16th July 2013 for fresh hearing.

3. That such further and other relief be granted as this court deems fit and expedient in the circumstances.

4. That the costs of this application be borne by the defendants.

3. The case of the 1st and 2nd defendants is that they presented an application to this and the court (Gacheru J) rendered a ruling on the said application but the ruling did not determine the issues which the application had raised. It is for this reason that they seek the above orders. On their part, the plaintiffs similarly contend that they brought an application to this court but this court (Gacheru J) inadvertently failed to specify the interest rate to be applied in computing the amount payable to the plaintiffs from the 1st and 2nd defendants. Consequently, the parties to this suit are not able to compute the amount outstanding because they have not been able to agree on the applicable interest rate.

Contextual Background

4. A brief contextual background to the two applications is necessary at this point. At all material times, the 1st and 2nd defendants were proprietors of Land Reference Number 2259/343 situated in Karen and measuring approximately 0.20235 hectares. They charged the land to the 3rd defendant. While the land was still charged to the 3rd defendant, and without the written consent of the 3rd defendant, they sold half of an acre of the land to the plaintiffs through an agreement dated 15/2/2010. The plaintiffs paid the entire purchase price but the 1st and 2nd defendants did not clear the loan amount due to the 3rd defendant in order to procure a discharge of the title held by the 3rd defendant. Consequently, the plaintiffs brought this suit against the defendants and prayed for the following orders:

a) An order for specific performance compelling the defendants to forthwith complete the sale transaction herein and give the plaintiffs title to half an acre of the subdivision of Land Reference number 2259/343, Nairobi, being Land Reference Number 2259/707 comprised in Deed Plan Number 29958 and registered as IR No 70384/5.

b) A declaration that the plaintiffs are entitled to half an acre of Land Reference Number 2259/343, Nairobi.

c) In the alternative to prayer (a) above, an order of permanent injunction to restrain the defendants, jointly and severally, by themselves, their officers, servants, workmen, agents or any other persons acting on their behalf from howsoever selling, subdividing, disposing, alienating, and or registering any dealings whatsoever upon Land Reference 2259/343, Nairobi, or any of its subdivisions thereof.

d) An order compelling the 3rd defendants to release the title document in respect of Land Reference Number 2259/343. Nairobi for purposes of excising half an acre thereof to be registered in favour of the plaintiffs and reinstatement of the charge security in their favour on the remainder of the parcel thereof at the cost of the defendants.

e) In the alternative to prayers (a) and (d) above, an order compelling the 1st and 2nd defendants to refund the entire purchase price of Kshs 9,600,000/- plus all expenses incurred by the plaintiffs in developing the land, damages as per the contract of sale, costs and interest.

f) Damages

g) Costs and interest of this suit

h) Any other relief that the court may deem fit and just to grant.

5. Through a statement of defence dated 31/4/2011 and filed in court on 11/5/2011, the 1st and 2nd defendants admitted that they sold to the plaintiffs the half acre which was to be excised from Land Reference Number 2259/343. They averred that they were willing to complete the transaction but the 3rd defendant had refused to give a partial discharge of charge to facilitate completion of the sale. They however contested the plaintiffs' claim for damages.

6. Subsequently, on 22/6/2011, the plaintiffs brought a notice of motion of even date seeking the following orders:

1) That this honourable court be pleased to issue an order to the effect that upon the plaintiffs settling the loan account held by the 1st and the 2nd defendants with the 3rd defendant as at the date of this order, the 2nd defendant does discharge and release the original title in respect of Land Reference 2259/343, Nairobi, to the plaintiff's advocates for the plaintiffs to effect a sub-division thereof and transfer half an acre thereof to themselves.

2) That this honourable court be pleased to order that upon the said sub-division and transfer of half an acre to the plaintiffs, the balance thereof of half an acre does remain charged in favour of the plaintiffs for the total sum of interests, costs and disbursements they will have paid in redeeming the loan account with the 3rd defendant and the total costs of sub-division and effecting the transfer to the plaintiffs names.

3) That this honourable court be pleased to issue an order of inhibition and or caveat forbidding the registration of any dealings whatsoever in respect of the remainder of Land Reference 2259/343, Nairobi, upon the sub-division and registration of the half acre in the plaintiffs names until the 1st and 2nd defendants have repaid the sums expended in redeeming the loan account, interests, disbursements and costs of subdivision and effecting the transfer.

4) That this honourable court does order that the Registrar of the High Court or any person deputizing him to sign and execute the papers, documents and or conveyances as may be necessary on behalf of the defendants or either of them in the event they refuse to sign or execute upon seven days' notice.

5) That the cost of the application be borne by the defendants

7. Lady Justice Nyamweya heard the application dated 22/6/2011 and on 25/1/2012, she rendered a ruling on the application. She found that in essence, the orders sought in the application were to have the effect of settling the 1st and 2nd defendant's loan account with the 3rd defendant and the 3rd defendant was in return to discharge the title to enable the sub-division and transfer of the half acre sold to the plaintiffs to take place. She granted prayer 1 of the application because the 1st and 2nd defendants did not object to that limb of the application. Secondly, she considered prayer 2 of the application, found it merited and granted it. Thirdly, she declined to grant prayer 3 of the application which was a plea for an order of inhibition. Fourthly, she considered and granted prayer 4 of the application. Lastly, she found and held that the suit against the 3rd defendant was disposed of and ordered the plaintiffs to pay the 3rd defendant costs of the suit.

8. Subsequent to the ruling rendered by Nyamweya J on 25/1/2012, on 9/5/2013, the 1st and 2nd defendants brought a notice of motion dated 8/5/2012 seeking the following orders:

1) That this application be certified as urgent.

2) That service of this application be dispensed with in the first instance due to its urgency and this honourable court be pleased to hear this application ex-parte in the first instance

3) That this honourable court be pleased to issue an order of injunction to restrain the plaintiffs jointly and severally together with their agents or any other persons acting on their behalf from registering any charge over Land Reference Number 2259/706 pending the interpartes hearing and the final determination of this application.

4) That this honourable court be pleased to temporary stay its orders of 25th January 2012 and in particular order number 2 thereof until the final determination of this application.

5) That this honourable court do re-view its order of 25th January 2012 with a view to determining the following.

i. Which costs of the transfer to the plaintiff the 1st and 2nd defendant were to pay considering the tabulations given by the plaintiff's lawyer by their letter dated 29th April 2013.

ii. The rate of interest to be used when calculating the interest to be paid to the plaintiffs on the amount of Kshs. 3,935,000/- that they paid to the 3rd defendant on behalf of the 1st and 2nd defendant.

6) That this honourable court do order the plaintiff's lawyer to file his bill of costs for taxation by this court.

7) That this honourable court in the interest of justice and fairness do grant any other order that it may deem fit to.

8) That the costs of this application be borne by the plaintiffs.

9. Second in line was a notice of motion dated 16/7/2013 brought by the plaintiff seeking the following orders:

1) That the 1st and 2nd defendants do forthwith pay to the plaintiffs the admitted sum of Kshs 4,901,000.00 to cater for expenses incurred by the plaintiffs in giving effect to the court orders of 25th January 2012.

2) That in the partial alternative to prayer 1 above and in order to give further effect to the orders of this court issued on 25th January, 2012, this honourable court be pleased to issue an order that the plaintiffs be and are hereby allowed to charge the 1st and 2nd defendant portion of land being Land Reference 2259/706, Nairobi, for a sum of Kshs 9,271,971.87 or such other sum or balance thereof as the court may direct as at 29th April, 2013 plus interest thereon at 22% per annum till payment in full.

3) *That the plaintiffs be at liberty to dispose the said property Land Reference 2259/706, Nairobi, by way of public auction if the 1st and 2nd defendant will not have redeemed the same within six months of charge.*

4) *That this honourable court be pleased to direct the Registrar of Titles to make appropriate entries of charge on the certificate of title in respect of Land Reference 2259/706, Nairobi, and the corresponding records at Lands Office to give effect to the orders of charge herein without demanding for further documentation.*

5) *That this honourable court does order that the Registrar of the High Court or any person deputizing him do sign and execute any papers, documents and or conveyances as may be necessary on behalf of the 1st and 2nd defendants or either of them in the event they refuse to sign or execute upon seven days' notice.*

6) *That this honourable court be pleased to grant such other orders as it may deem fit and just.*

7) *That the costs of this application be borne by the defendants.*

10. Third in line was a notice of motion dated 17/2/2015 brought by one Simon Muturi Njoroge seeking a joinder order and other orders in the following terms:

1) *That this honourable court be pleased to grant leave to Simon Muturi Njoroge to be enjoined to these proceedings as an interested party.*

2) *That this honourable court be pleased to issue an order prohibiting the 1st and 2nd defendants from transferring or charging in any way other than as may be directed by this honourable court their property known as Land Reference Number 2259/706, being a subdivision from Land Reference Number 2259/343.*

3) *That this honourable court be pleased to grant an order for the sale of the said Land Reference Number 2259/706 by the interested party to satisfy the decretal sum due and outstanding pursuant to a judgment made in favour of the interested party against the 1st and 2nd defendants in Milimani HCCC No. 525 of 2010, Simon Njoroge Muturi v Amos Kabue Mwangi and Mary Ngima Munyu.*

4) *That this honourable court be pleased to issue directions as to how the balance of the sale proceeds from the sale of Land Reference Number 2259/706 should be dealt with.*

5) *That this honourable court does order that the Registrar of the High Court or any person deputizing him to sign and execute any papers, documents or transfers as may be necessary on behalf of the 1st and 2nd defendants or either of them in the event that they refuse to sign or execute upon 7 days' notice.*

6) *That costs of this application be provided for.*

11. The three applications were heard by Lady Justice Gacheru who rendered a ruling on them on 18/3/2016. Firstly, Gacheru J noted that on 25/2/2015, Simon Muturi Njoroge had been admitted to the suit as an interested party. Secondly, Gacheru J found that the way to resolve the emerging issues between the plaintiffs on one part and the 1st and 2nd defendants on the other part was to first ascertain how much money the 1st and 2nd defendants had paid to the plaintiffs towards settling the sums owed to the plaintiffs. Gacheru J directed the plaintiff's advocates and the 2nd defendant to do reconciliation and report to the court on the actual amount already paid to the plaintiffs by the 1st and 2nd defendants. She added that the court was to thereafter issue further directions after the reconciliation of the amounts paid. Lastly, Gacheru J found that Mr Simon Muturi Njoroge had failed to prosecute the notice of motion dated 17/2/2015 and dismissed the said application.

Disposal

12. The two applications under consideration in this ruling were triggered by the above ruling of Gacheru J rendered on 18/3/2016. Applicants in both applications are seeking a review of the ruling. I have considered the parallel applications. I have also carefully gone through the ruling rendered by Gacheru J on 18/3/2016. Firstly, Justice Gacheru did not make any final finding or determination on the rate of interest applicable. She stated at page 24 of the ruling as follows:

“ I have considered the order given by the court and it is obvious that the court did not specify the rate of interest to be applied. The plaintiffs have not stated which rate they used to compute the rate of interest. Ordinarily the rate of interest are always calculated at the court rate unless specifically stated otherwise by the court”

13. Secondly, Gacheru J did not make any conclusive findings on any of the prayers which were sought in the rival applications. It was her view that reconciliation was to be done and the court was to thereafter give directions on the matter.

14. It is clear from the contextual background of this matter that this court (Nyamweya J) made some final and conclusive findings and orders in this suit and those orders have been enforced. It is also clear from the record that there are outstanding issues in the suit which require determination by the court. Among the issues is the question relating to the interest rate to be reckoned on the amount payable to the plaintiffs by the 1st and 2nd defendants. Similarly, the exact costs and disbursements payable to the plaintiffs by the 1st and 2nd defendants remain a contentious issue. In essence, the rival applications under consideration in this ruling seek a resolution of the outstanding issues. The parties contend that Gacheru J did not resolve the outstanding issues.

15. I have deeply reflected on the appropriateness and efficacy of disposing the pending issues through the present parallel interlocutory applications in the manner suggested by the protagonists in this suit. In my view, the outstanding issues in this suit will best be resolved through a final judgment to be rendered after trial. The final judgment will inevitably have to take into account the final orders which were rendered by Nyamweya J and which were duly enforced and culminated in redemption of the title and vesting of half acre portion of the suit property in the plaintiffs. The parties will have the liberty to draw a consensual statement of issues and consensually elect whether trial should be by way of affidavit evidence or by way of *viva voce* evidence. In the absence of consent on the issues or on the mode of trial, the court will give directions after taking into account the parties' views. This decision is informed by the realization that without a final judgment, the ongoing circus of rival applications will continue.

16. Consequently, the 1st and 2nd defendants' notice of motion dated 10/7/2018 and the plaintiffs' notice of motion dated 3/12/2018 are disposed in the following terms:

a) The outstanding issues in this suit are to be canvassed by the parties through a full trial and determined by the court in a final judgment as opposed to the present interlocutory applications which do not fully dispose the main suit.

b) The court will give trial directions at the time of delivering this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Kiruki holding brief for Mr Kirimi Advocate for the Plaintiffs

Mrs Munyu - 2nd Defendant - Acting in Person

Court Clerk - June Nafula