



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 154 OF 2017 (O.S)

PETER KAHARA MUNGA.....PLAINTIFF

VERSUS

**SWALEH MOHAMED DORMAN (Sued in his capacity as the administrator of the
Estate of Hafusa Nduta Kanyi (Deceased)).....DEFENDANT**

RULING

1. The Plaintiff herein filed an originating summons dated 5th October 2017 under certificate of urgency seeking determination of following issues;
 - a. *Whether this application should be certified urgent and service dispensed with in the first instance. (sic)*
 - b. *Whether the honourable should be so pleased as to issue a conservatory order prohibiting any dealings with all that parcel of land known as LOC. 11/Maragi/898 pending the hearing and determination of this application.*
 - c. *Whether the honourable court should be so pleased as to issue a mandatory injunction against the Defendant herein in his capacity as administrator to the estate of Hafusa Nduta Kanyi to specifically perform the sale agreement dated 20th February, 2012 between the Plaintiff herein and Hafusa Nduta Kanyi (deceased).*
 - d. *Whether in default of 3 above, the court should be so pleased as to order that the balance of the purchase price be deposited into court with the Deputy Registrar executing all documents necessary for the transfer of the property to the Plaintiff.*
 - e. *Whether the costs of this application should be in the cause.*
2. The gist of the said originating summons was that the parties herein had entered into a sale agreement for the sale of the suit property (ie *Title No. Loc 11/Maragi/898*) way back on 20th September 2002 for an agreed purchase price of Kshs 25,500,000. It was contended by the Plaintiff that the Defendant had breached the agreement by failing to obtain and forward the consent of the Land Control Board. The application was supported by the affidavit of the Plaintiff sworn on 5th October 2017 which reiterated the grounds on the face of the motion.
3. The Defendant filed a replying affidavit sworn on 27th October 2017 in opposition to the said application. The Defendant opposed the reliefs for interlocutory orders as well as the orders for specific performance of the contract dated 20th September 2012. It was contended that the said agreement was rescinded in 2012 which rescission the Plaintiff's former advocates had accepted by demanding for a refund of the deposit of Kshs 2,500,000 which had been paid.
4. The Defendant further stated that the consent of the Land Control Board which was obtained had long expired hence there was no basis for seeking the reliefs in the originating summons. The Defendant was, therefore, ready and willing to refund the deposit of the purchase price.
5. In my understanding, the Plaintiff's position was that the sale agreement of 20th September 2012 was still alive whereas the Defendant contended that it was rescinded in the same year by the Defendant. It is also evident that, whereas the Plaintiff accused the Defendants of breach in failing to obtain and forward the consent of the relevant Land Control Board, the Defendant accused the Plaintiff for having defaulted in payment of the balance of the purchase price.
6. When the said originating summons came up for hearing on 16th November 2017, the advocates for the parties agreed to dispose of it through written submissions. The Plaintiff filed his submissions on 5th December 2017 whereas the Defendant filed his on 25th January 2018. The court will, therefore, proceed to determine the said originating summons on the basis of the affidavits and submissions on record.

7. The Plaintiff framed and submitted on 5 issues in his submissions. First, it was submitted that the sale agreement of 20th September 2012 did not provide for a completion date and that in the absence of the same, reference had to be made to the Law Society of Kenya Conditions of Sale 1989. It was contended that the Law Society of Kenya Conditions provided that in respect of controlled transactions the completion date was 42 days after receipt by the vendor of the consent of the Land Control Board. It was submitted that there was no evidence of such consent having been obtained hence the sale agreement could not be said to have been terminated.
8. Second, it was submitted that no valid completion notice was served since the letter exhibited by the Defendant was prematurely issued and it was for a period of less than 21 days contrary to the Law Society of Kenya Conditions of Sale. Service of the completion notice upon the Plaintiff's advocate was also disputed.
9. Third, it was submitted that the party in breach of the sale agreement was the Defendant since a caution was placed on the suit property hence the property could not be transferred. It was further submitted that the Defendant was in breach of a term of the sale agreement which provided that the suit property was sold free of all encumbrances.
10. The fourth issue was on whether the sale agreement was rescinded or repudiated. It was submitted that in view of the submissions on the first 3 issues, the agreement could not be rescinded or repudiated.
11. Finally, it was submitted that the Plaintiff was entitled to specific performance because the breach was committed by the Defendant's side and that the Plaintiff was ready and willing to pay the balance of the purchase price.
12. The Defendant submitted on 6 main issues in opposition to the Plaintiff's originating summons. The first was that the originating summons was incurably defective and bad in law for violating the provisions **Order 37 Rule of the Civil Procedure Rules** and for mixing prayers for interlocutory relief and final orders in the same application. It was submitted that the procedure of originating summons was only available under the said Rule where there was no question affecting the existence or validity of the contract.
13. Secondly, it was submitted that an originating summons was intended to deal with simple and straight forward matters and not for serious and complex issues of law as was the case in the instant suit. The Defendant relied upon the cases of **Kibutiri Vs Kibutiri [1982] KLR 1, Kenya Commercial Bank Ltd Vs Osebe [1982] KLR 296 and Masiaya Ole Oloije Vs William Simintei & Others, Civil Appeal No. 235 of 2011.**
14. Thirdly, it was submitted that the sale agreement of 20th September 2012 was clear that it constituted the entire agreement between the parties hence there was no basis for any reference to the Law Society of Kenya Conditions of Sale. The Defendant relied upon the case of **Makika Chai Dzombo Vs Coast Development Authority [2014] eKLR** in support of that submission.
15. Fourth, the Defendant submitted that it was the Plaintiff who was in breach of clause 3(b) of the sale agreement in failing to pay the balance of the purchase price after the consent of the Land Control Board was obtained.
16. The Defendant relied on a letter dated 12th September 2012 from the Defendant's former advocates indicating that consent had been obtained. It was contended that notification of the Plaintiff's advocate amounted to sufficient notice to the Plaintiff himself.
17. The 5th issue was on whether or not the agreement was rescinded. It was submitted that the Defendant's advocates served a completion notice giving the Plaintiff 14 days to pay up the balance of the purchase price vide a letter dated 4th April 2012. It was submitted that the rescission took effect upon expiry of the notice period when the Plaintiff failed to pay the balance of Kshs 23,000,000/-.
18. The sixth issue was on the availability of the remedy of specific performance. It was submitted that the remedy is discretionary and equitable remedy; that a party seeking the remedy must come to court with clean hands; and that it was only available on an existing and enforceable contract. It was contended that the Plaintiff being in breach of the sale agreement of 20th September 2012, he was not entitled to the equitable relief. It was further contended that the sale agreement having been rescinded, there was no basis upon which specific performance could be granted. The Defendant relied on the case of **Gurdev Singh Birdi & Another Vs Abubakar Madhuti CA No 165 of 1996** on availability of the order for specific performance.
19. In my opinion, it is necessary to determine the competency of originating summons before the court in the first instance. The court has noted that the Plaintiff did not directly make any submission on this issue. The Defendant's replying affidavit did not directly bring out this issue with sufficient clarity. However, because the competency of the suit may affect the jurisdiction of the court, the court shall determine the issue in the first instance.
20. The court has considered the provisions of **Order 37 Rule 3 of the Civil Procedure Rules** and the authorities cited by the Defendant. The provisions of **Order 37 Rule 3** are clear that a vendor or purchaser may take out an originating summons in respect of a sale transaction for determination of any question which may arise as long as the question of the existence or validity of the contract is not in issue. As is evident from the affidavits of both parties, the existence of the sale agreement dated 20th September 2012 is in issue. The Plaintiff contends that the contract is still in existence whereas the Defendant contends that it was rescinded in 2012. The nature of the dispute herein clearly falls outside the scope of **Order 37 Rule 3 of the Civil Procedure Rules** under which the originating summons dated 5th October 2017 was filed.
21. In the case of **Kibutiri Vs Kibutiri** (supra), the court held, *inter alia*, that;

“1. The procedure by way of originating summons was intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way. The procedure is, however, not meant to determine matters which involve

serious and complex questions of law and fact (Re Giles (2) [1890] 43 Ch D 391 and Kulsumbai Vs Abdulhussein [1957] EA 699. 2. In cases where complex issues and contentious questions of fact and law are raised, the judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit because the scope of inquiry which is made and dealt with on an originating summons is limited (Bhari Vs Khan [1965] EA 94”.

22. The court has considered the aforesaid authority and the other authorities which were cited by the Defendant’s counsel. The court is persuaded that the dispute between the parties cannot be resolved through an originating summons. There are several contested issues of fact and law, some of which are complex and which would require resolution through a normal civil suit. The court is also satisfied that in, any event, the originating summons as filed falls outside the scope of the provisions of **Order 37 Rule 3 of the Civil Procedure Rules.**

23. The upshot of the foregoing is that the Plaintiff’s originating summons dated 5th October 2017 is found to be incompetent and the same is hereby struck out with costs to the Defendant. The Plaintiff shall be at liberty to agitate his claim through an ordinary civil suit.

24. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** day of **MARCH, 2018**

In the presence of Ms Rose Njeru holding brief for Ms Maitai for the Plaintiff and in the absence of the Defendants.

Court clerk Leadys/Njue

Y.M. ANGIMA

JUDGE

21.03.18