



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC SUIT NO.1159 OF 2016

CHRISTOPER IRUNGU WAMBUGU.....PLAINTIFF

=VERSUS=

CATHERINE WAIRIMU MUGO T/A

MUGO WAIRIMU ADVCOATES.....DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 24th May 2017 in which he seeks an order striking out the defendant/respondent's defence and entry of judgement as per the Plaintiff. The respondent is an advocate of the High Court of Kenya. The applicant intended to purchase a property known as LR No. Nairobi/Block 1/10/339 located at Thome Estate in Nairobi (suit property). The vendor of the suit property was one Michael Chege Thuo (deceased)
2. The purchase price of the suit property was Kshs.17,000,000/= . The respondent was acting for the deceased in the transaction. A sale agreement was drawn in which the applicant was to pay a deposit of Ksh.4,000,000/= to the respondent to be held as stakeholder. The deceased had told the applicant that the title to the suit property had minor issues in that someone had wanted to defraud the deceased of his property by changing the records at the lands office. The deceased therefore wanted Kshs.500,000/= out of the deposit released to him to enable him rectify the records at the lands office so that the transaction would go on. The deceased's request for release of Kshs.500,000/= was incorporated in the agreement.
3. Later an addendum to the agreement was drawn in which a further sum was to be released to the deceased for purposes of processing title documents at the Lands office. The transaction delayed forcing the applicant to carry out a search at the lands office which showed that the title to the suit property was in the name of three individuals unlike the single name which the deceased had in the title which he had shown the applicant. Given this new turn of events there were meetings between the defendant and the applicant's lawyers in which it was agreed that the original title deed held by the deceased was to be forwarded to the lands office for verification. The respondent undertook to forward the title deed for verification but she never did that.
4. It became apparent that the deceased had no good title to pass to the applicant even though he had allowed the applicant to build a perimeter fence around the suit property and construction of a site house. The applicant was approached by the deceased's wife who informed him that the suit property had been sold to a third party and that the amount which the deceased had received had been paid back to the deceased's lawyer for onward transmission to the applicant. The deceased's wife asked the applicant to vacate the suit property. It is after this that the applicant stepped up his efforts to get a refund of his Kshs.4,000,000/= from the respondent in vain.
5. The applicant made a criminal complaint against the respondent which led the respondent being charged for a criminal offence. The respondent was also taken before the advocate's disciplinary Tribunal. The Advocates Disciplinary Tribunal has since found the respondent guilty and convicted her and recommended that she refunds money to the applicant.
6. When the applicant was sued in this case, she filed a defence which is now the subject of this application. The applicant contends that the applicant's defence is only meant to delay the quick finalization of this case as it does not disclose a reasonable defence and hence is for striking out.
7. The respondent has filed a replying affidavit in which she contends that her defence raises triable issues and that it should not be dismissed; that the money which she is being asked to refund is money belonging to a deceased person whose relatives are yet to take out letters of administration and to deal with such money will amount to intermeddling in the affairs of the estate of the deceased and that there are certain accounts which require to be ascertained and this can only be done in a full trial.
8. I have carefully considered the applicant's application as well as the opposition thereto by the respondent. I have also considered the

submissions filed by the parties herein. There is no contention that the respondent received Kshs.4000,000/= which was to be held by her as stakeholder. The only monies which she was authorized to release to the deceased was Kshs.1,000,000/= . The first amount to be released was Kshs.5,00,000 which was expressly indicated in the agreement of 2nd January 2015. The second amount was authorized through an addendum to the agreement signed on 27th February 2015.

9. The deceased received Kshs.350,000/= on 7th January 2015, Kshs.100,000/= on 11th February 2015 and Kshs.550,000/= on 25th February 2015 totaling to Kshs.1,000,000/= . The acknowledgements of these amounts were drawn by the first respondent and were duly signed by the deceased. When the deceased passed on, his wife, Josephine Wanjiru Njeri prepared a banker's cheque of Kshs.995,000/= payable to the firm of the respondent. This banker's cheque was acknowledged by the respondent on 23rd April 2015. This is the amount which was to be refunded back to the applicant as the suit property had been sold to a third party and the applicant had been asked to vacate the suit property.

10. The applicant managed to obtain bank statements of the account operated by the respondent. The statements were obtained from the CID who were investigating the respondent. The respondent was charged in court. The statement shows that Kshs.4000,000/= was credited into the account of the respondent. There is also a credit for Kshs.995,000/= which had been received from the deceased's wife who prepared a cheque in favour of the respondent.

11. The respondent is holding the Kshs.4000,000/= because Kshs.1,000,000/= which had been paid to the deceased was refunded to her by the deceased's wife. The respondent's argument that the money is property of the deceased which can only be released once the process of succession is done does not hold water. The respondent tried to raise the same reason before the Advocates Disciplinary Tribunal but her arguments were dismissed.

12. I am aware that striking out of a pleading ought to be done in the clearest of cases. However the circumstances of this case clearly show that the respondent's defence is a sham and is only intended to delay the quick finalization of this case. There are no accounts to be taken here. It is clear that the deceased had no good title to pass to the applicant. Once the deceased died, the wife refunded what he had received. If it was intended to make the matter a subject of succession, she would not have refunded that money. It does not therefore make sense for the respondent to claim that this is a matter which should be subjected to succession.

13. In the case of **Transcend Media Group Limited Vs Independent Electoral & Boundaries Commission (IEBC) eKLR Justice Aburili** summarized circumstances when a pleading can be said to be frivolous. A matter is frivolous if *(i) it has no substance or (ii) it is fanciful or (iii) when a party is trifling with the court or (iv) when to put a defence would be wasting the court's time or (v) when it is not capable of reasoned arguments.* The respondent's defence has all the characteristics enumerated herein. There is no point of allowing such a defence to remain on record. There is nothing in this claim as the respondent claims in their submissions.

14. As was clearly stated by Justice Mutungi in **Kent Libiso & Another Vs Cirson Trust Co.Ltd & 2 Others (2013) eKLR**, the essence of deposit moneys in sale transactions, ordinarily being required to be paid to the vendor's advocates to hold as stakeholders pending completion of transaction is so that if the transaction is not completed as stipulated for any reason such money would be available to be refunded to the purchaser.

15. The transaction in this matter had collapsed and once that was the case, the respondent had no reason for not refunding the money. I find that this is a clear case where the defence should be struck out. I proceed to strike out the defence and enter judgement for the plaintiff in terms of prayers **(b) (c)** and **(d)** of the Plaintiff.

It is so ordered

Dated, Signed and delivered at Nairobi on this 28th day of May 2018.

E.O.OBAGA

JUDGE

In the absence of:-

Mr Bosire for Mr Rono for Respondent and Mr Mwangi for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE