



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CIVIL SUIT NO. 280 OF 2015**

**HON. DAVID K SIFUNA.....PLAINTIFF**

**-VERSUS-**

**EMILEY KIVALI MULAYA.....1<sup>ST</sup> DEFENDANT**

**NELSON MUTURI DUMBEIYA .....2<sup>ND</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. This is a ruling in respect of two separate applications. The first application is dated 25<sup>th</sup> February 2015, brought by the second defendant. The application seeks dismissal of the plaint and entry of summary judgement in favour of the second defendant as prayed for in the counter-claim. The second application is dated 26<sup>th</sup> April 2016 brought by the plaintiff. The application seeks entry of judgement on admission. It also seeks an order compelling the second defendant to release title in respect of title no subdivision No. 9967, original 9690/7 Section 1 Mainland North to the plaintiff. (Mombasa property). It further seeks and order that title in respect of LR No. Trans-Nzoia/Kapomboi/193 Kitale property be deposited in court pending hearing and determination of cases surrounding it.

2. The tile to the Kitale property had been registered in the name of Henry Wanyama Khaemba now deceased (deceased) . The first defendant was the wife of the deceased. In or around December 2013, some land agents went to the plaintiff's offices in Kitale and told him that the first defendant was selling land at Kapomboi area in Trans-Nzoia County. The agents informed the plaintiff that the land was being sold by the first defendant who had a power of attorney from the deceased. The plaintiff viewed the property and was interested in it. The plaintiff proceeded to enter into a sale agreement with the first defendant.

3. The title to Kitale property was being held by the second defendant a lawyer as lien or security for a sum of Kshs 5,500,000/= for services he had rendered and other monies advanced to the deceased and the first defendant. The plaintiff and the second defendant as well as the first defendant reached an agreement to the effect that the second defendant was to release the title in respect of the Kitale property to the plaintiff on the understanding that the plaintiff was to assume the debt owed to the second defendant by the deceased and the first defendant. It was a term of the agreement that the plaintiff was to give title to the Mombasa property to the second defendant who was to hold it as security to be released upon payment of Kshs.5,500,000/= to the second defendant. The plaintiff further agreed that he was to unconditionally execute transfer of the Mombasa property in favour of the second defendant if the Kshs.5,500,000/= was not paid to the second defendant by the 31<sup>st</sup> December 2014. In default of voluntary execution of transfer in favour of the second defendant, the second defendant was at liberty to execute the agreement through court process.

4. The transfer in respect of the Kitale property was effected in favour of the plaintiff but soon thereafter the deceased caused revocation of the power of attorney the basis of which transfer had been effected. The deceased also filed a criminal complaint against the first defendant which led to her being charged in Kitale Chief Magistrate's court. The deceased also filed Kitale ELC No. 120 of 2014 against the first defendant and the plaintiff in this case. The deceased alleged that the title to the Kitale property been transferred to the plaintiff in a fraudulent manner and that the alleged power of attorney allegedly donated to the first defendant by him was a fraud.

5. It is the turn of events which made the plaintiff to file this suit against the defendants. The power of attorney which was revoked had been drawn by the second defendant. This suit was filed after the second defendant is said to have threatened to dispose of the Mombasa property. This is the background from which the two applications were filed.

**APPLCIATION DATED 25<sup>TH</sup> FEBRUARY 2015.**

6. The second defendant who is the applicant in this case prays that the plaintiff's suit be dismissed as it does not disclose a cause of action

against him and further that summary judgement be entered in his favour as per the counter-claim . The second defendant contends that the plaintiff signed an acknowledgement dated 14<sup>th</sup> February 2014 in which he undertook that if title which had been held by the second defendant was released to him and that he failed to pay kshs.5,500,000/= which he had undertaken to pay, he was to execute transfer in favour of the second defendant in respect of the Mombasa property failing which the second defendant was to move the court for the necessary orders.

7. The second defendant states that the deceased and his wife had signed all the necessary documents transferring the Kitale property to him and that what was remaining was for him to lodge the transfer for registration. He agreed to re-transfer the Kitale property to the plaintiff. The Kitale property has already been registered in the name of the plaintiff. He therefore contends that since this is the case, the court should also order transfer of the Mombasa property to him.

8. The Plaintiff opposed the second defendant's application based on grounds of opposition filed in court on 25<sup>th</sup> March 2015 and a replying affidavit sworn on 23<sup>rd</sup> March 2014. The plaintiff contends that the second defendant's application is an abuse of the process of the court and that it does not meet the threshold for grant of the prayers sought. The plaintiff contends that he entered into the transaction in respect of the Kitale property on the basis of representations made by both the first and second defendants that the power of attorney was genuine. When it turned out that the power of attorney was not obtained legally, the plaintiff had a right to demand back the title to the Mombasa property because it was given based on the assurance that the first defendant had a genuine power of attorney. The power of attorney which was subsequently revoked was prepared by the second defendant and the second defendant cannot deny that the plaintiff has no cause of action against him.

9. I have considered the second defendant's application as well as the opposition to the same by the plaintiff. I have also considered the submissions by the second defendant. The issues which emerge for determination are whether the plaintiff's suit should be struck out and whether summary judgement should be entered in favour of the second defendant as prayed for in the counter-claim.

10. The law is clear that no pleading ought to be struck out unless it is one which is so hopeless that not even an amendment can breath any life into it. In the instant case, the plaintiff has given a chronology of events leading to his purchase of the Kitale property and the subsequent registration in his favour. The record as contained in the pleadings is clear that though the Kitale property was registered in his name, he cannot enjoy the property as there are a number of cases which have arisen out of that registration. What the plaintiff thought was a genuine power of attorney turned out to have been fraudulently obtained . It is the second defendant who prepared it and registered it, The Kitale property was purchased on the basis that the first defendant had a power of attorney from the deceased who was the registered owner.

11. There is no way this case can continue without the second defendant being a party to it. The title to the Mombasa property was surrendered on the basis of the power of attorney which made the plaintiff agree to assume the debts which the first defendant and the deceased owed the second defendant. The plaintiff's case cannot therefore be said to be hopeless that it can be struck out. If a suit has a semblance of a cause of action, it ought to be left to go to trial as trial by affidavit is not the best way to dispose of cases. I therefore find that the suit by the plaintiff cannot be struck out.

12. As regards the issue of whether summary judgement can be entered in favour of the second defendant as prayed for in his counter-claim, the history of this suit has been captured in the background given hereinabove. According to the acknowledgement signed by the plaintiff on 14<sup>th</sup> February 2014, the plaintiff was to pay Kshs.5,500,000/= to the second defendant by 31<sup>st</sup> December 2014 . The transfer in respect of the Kitale property was made in favour of the plaintiff on 25<sup>th</sup> February 2014. The power of attorney which was the basis of the purchase of the Kitale property was revoked in June 2014 and a suit against the plaintiff filed in Kitale in July 2014 by the deceased. As at the time all this was happening, the deadline for payment of Kshs.5,500,000/= to the second defendant had not reached. What the plaintiff had thought was a clean deal had started facing challenges. The plaintiff could not therefore pay the 5,500,000/= as the acquisition of the title to Kitale property had been questioned. The plaintiff was therefore not in breach of the agreement and the plaintiff's action cannot be subject of an application for summary judgement.

13. The second defendant has tried to argue that the sale in respect of the Kitale property was not based on the power of attorney. The second defendant has referred to a statement made by the plaintiff to police officers and his defence in Kitale ELC 120 of 2014. It is not possible that the deceased is the one who signed the agreement otherwise there would be no point of the power of attorney. The second defendant has also tried to argue that the power of attorney which he prepared for the first defendant was a general power of attorney and did not refer to the Kitale property. This argument is without basis. When revocation of the power of attorney was sought, one of the grounds for revocation was that it had been used to sell the Kitale property. If the agreement for sale had been signed by the deceased, he would not have made a complaint that a false power of attorney had been made. He would have instead complained that his signature was forged. This was not the case. The Kitale property was sold pursuant to a power of attorney which was prepared and registered by the second defendant. This power of attorney is one which had already been revoked. I do not find that this is a case where summary judgement can be granted. I decline to grant summary judgement as prayed.

#### **APPLCIATION DATED 26<sup>TH</sup> APRIL 2016.**

14. The plaintiff in this application sought the following orders:-

**1. Spent**

**2. That the Honourable Court be pleased and do hereby enter judgement on admission for the Plaintiff/Applicant and order that the 2<sup>nd</sup> respondent releases the title to sub division no.9967, original No.9690/7 Section 1 Mainland North to the plaintiff/applicant forthwith and the title deed number TRANS-NZOIA /KIPOMBOI/193 forthwith be deposited in court pending the outcome of all the cases surrounding it.**

**3. That the Honourable Court be pleased and do hereby direct that the suit herein do proceed and be fixed for trial to**

**determine the outstanding issues on ownership , transfer and registration of title LR No. TRANS NZOIA /KIPOMBOI/193.**

**4. That costs of and incidental to the application be provided for.**

**5. That such further and other reliefs that this honourable court may deem just and expedient to grant.**

15. The plaintiff has made an application for judgement on admission. The basis of the plaintiff's application is the amended statement of admission filed by the first defendant on 10<sup>th</sup> March 2016. The plaintiff's application for judgement on admission is made pursuant to the provisions of *Order 13(2) of the Civil Procedure Rules* which states as follows:-

**“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just”.**

16. The law regarding judgement on admission is now well settled. If the admissions are plain and clear, judgement ought to be entered. The admissions should be those where one does not need a magnifying lense to see them. In the instant case, the first defendant has filed a statement of admission which is very clear on the facts being admitted. There is therefore no difficult in allowing entry of judgement in favour of the plaintiff on admission.

17. The only challenge is in respect of the other prayers in the application. There is a prayer that the court orders that title in respect of the Mombasa property be released to the plaintiff. The title in respect of the Mombasa property is the subject of both the plaintiff's claim and the second defendant's counter claim. The first defendant has admitted facts in as far as they affect her. The admissions by the first defendant cannot bind the second defendant. The second defendant had his own case in which he seeks transfer of title in respect of the Mombasa property to himself. This case is yet to be heard. If the title in respect of Mombasa property was to be released to the plaintiff, it would amount to allowing part of the plaintiff's claim at interlocutory stage to the detriment of the second defendant's counter claim. If such an order was to be granted, it will not be in furtherance of the overriding objective as stated in section 1A and 1B of the Civil Procedure Act.

18. There is also a prayer that title in respect of the Kitale property be deposited in court until the cases surrounding its acquisition are heard and determined. The cases which surround acquisition of the Kitale property are the criminal case before the Chief Magistrate court against the first defendant as well as ELC No.120 of 2014 against the plaintiff and the first defendant. This court is not hearing any issue as regards the propriety or otherwise of the acquisition of the Kitale property. That is an issue to be determined by the Kitale Court. This is because this court had declined to consolidate the Kitale case with this one or even transfer this case to Kitale. It will therefore serve no useful purpose to make an order that title in respect of Kitale property be deposited in court pending the hearing of cases surrounding its acquisition.

#### **CONCLUSION.**

19. From the analysis herein above I proceed to dismiss the notice of motion dated 25<sup>th</sup> February 2015 with costs to the plaintiff. The notice of motion dated 26<sup>th</sup> April 2016 is partially allowed to the extent that judgement on admission as against the first defendant is hereby entered in favour of the plaintiff. The plaintiff shall have one quarter of costs for the application.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 28<sup>th</sup> day of June 2018.**

**E. O. OBAGA**

**JUDGE**

In the presence of :-

M/s Kiamba for Mr Makokha for Plaintiff

Court Clerk: Hilda

**E. O. OBAGA**

**JUDGE**