



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

E.L.C NO. 294 OF 2011

EUNICE WAIRIMU MUTURI.....1ST PLAINTIFF/APPLICANT

WASHINGTON MUCHIRI MUTURI.....2ND PLAINTIFF/APPLICANT

VERSUS

RUTH NYAMBURA CHUCHU.....1ST DEFENDANT/RESPONDENT

ZIPPORAH WANGUI CHUCHU.....2ND DEFENDANT/RESPONDENT

FLORENCE NJERI CHUCHU.....3RD DEFENDANT/RESPONDENT

RULING

In the application dated 29/12/2016, the Plaintiffs seek an order that the Defendants deposit in court the sum of Kshs. 2.3 Million pending the hearing and determination of the suit. The application is supported by the 2nd Plaintiff's Affidavit. It is based on the grounds that the Defendants were paid a deposit of Kshs 2.3 million by the late Gerald Muturi Maina on 19/3/2010 pursuant to an agreement for the sale of L.R. NO. 36/III/222 situated in Eastleigh, Nairobi ("the Suit Property"). The late Gerald Muturi Maina authorized the firm of Muchangi Nduati & Co. Advocates to release part of the funds paid as a deposit to the Defendants to cater for their medical bills. While collecting the funds, Defendants indemnified the firm of Muchangi Nduati & Co. Advocates against any claims that may be raised regarding the sale of the Suit Property including any monies paid out of the sale proceeds.

The Plaintiff later learnt that the Defendants had spent the entire sum of Kshs. 2.3 Million paid as a deposit. The Defendants subsequently rescinded the sale agreement.

A copy of the ruling in **Nairobi ELC 164 of 2014 (OS) Eunice Wairimu Muturi & Another v Muchangi Nduati t/a Muchangi Nduati & Advocates** was annexed to the Affidavit. The court struck out this suit which the Plaintiffs herein brought against the Defendants' Advocates for paying out the entire deposit to the Defendants. The Court observed that the Defendants herein had stated on oath that they were ready and willing to refund the deposit were it not for the suit filed by the Plaintiffs seeking specific performance of the agreement of sale. This admission by the Defendants is what prompted the Plaintiffs to make the instant application.

The 2nd Plaintiff at paragraph 8 of his affidavit sworn in support of the instant application confirms that the Plaintiffs are seeking specific performance against the Defendants. The 2nd Plaintiff expresses his apprehension at paragraph 16 of his Affidavit thus:

16. That, the Plaintiffs are apprehensive that if the orders are not granted they stand to be prejudiced if the main suit is decided not in their favour.

If I understand them correctly, the Plaintiffs anxiety appears to be that they stand to be prejudiced if the suit is decided in their favour. That is why they seek to have the 10% deposit they paid for the Suit Property deposited in court before the case is heard and determined.

The question the court has to consider is whether it ought to make an order directing the Defendants to deposit the sum of Kshs. 2.3 Million in court pending determination of this suit.

Looking at the plaint dated 16/6/2011, the main prayers the Plaintiffs seek are a permanent injunction to restrain the Defendants from selling, charging, transferring subdividing, leasing or in any manner dealing with L. R. 36/III/22; and, an order of specific performance compelling the Defendants to complete the sale agreement dated 19/3/2010. They do not seek a refund of the sum they paid as a deposit for the Suit Property.

The court notes that when the Plaintiffs' application for injunction was ultimately argued *inter partes*, the court granted orders restraining the Defendants, their agents or servants from selling, charging, leasing, subdividing, alienating or in any other manner dealing with the Suit Property until the hearing or determination of the suit. That ruling was delivered on 17/7/12. The court further directed that the main suit was to be heard and determined within one year in default of which the injunction would lapse.

The court has considered the application, pleadings and submissions of the Plaintiffs' counsel and is of the view that it is not prudent to grant the orders sought in the application. If the Plaintiffs successfully prove their claim at trial, the reliefs the court will grant are those sought in the plaint, to wit, a permanent injunction to restrain the Defendants from dealing with the Suit Property, and an order of specific performance compelling the Defendants to conclude the sale of the Suit Property to the Plaintiffs. There is no basis for making an order that the deposit of Kshs. 2.3 Million be deposited in court since the Plaintiffs have not claimed a refund of their deposit in their plaint. The Plaintiffs are to set down the case for hearing so that this dispute may be determined once and for all.

The application is dismissed. The costs shall be in the cause.

Dated and delivered at Nairobi this 27th day of April 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Manyara for the Plaintiffs

No appearance for the Defendants

Mr. V. Owuor- Court Assistant