



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.268 OF 2013

HUTHEIFA HAJI AHMED

ISA HAJI AHMED

ABUBAKAR HAJI AHMED

**HALIMA MOHAMED KASSIM (suing as the administrators of THE
ESTATE OF HAJI AHMED SHEIKH ALI).....PLAINITFF**

VERSUS

NONDAHONA COMPANY LIMITED & 155 OTHERS.....1ST DEFENDANT

EGESWA COMPANY LIMITED.....2ND DEFENDANT

JOHN OMUNDI OGANGO.....INTERESTED PARTY

RULING

(Application to enforce a consent; applicants having purchased land from respondents; parties agreeing that the applicants would be refunded the purchase price; Advocate giving an undertaking that the applicants would be refunded once the property is resold to other parties; property sold but no refund made; application allowed; respondents and the Advocate who gave undertaking ordered to ensure refund or else applicants be at liberty to execute)

1. The application before me is the motion dated 22 February 2017 filed by the 2nd defendant and interested parties. It seeks the following orders (slightly paraphrased for there are obvious grammatical errors) which are prayers 3, 4, 5, and 6 of the application :-

(i) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of temporary injunction restraining the respondents/plaintiffs from developing land parcel LR No. 6577/2.

(ii) That this court be pleased to order the implementation/execution of the consent order between the plaintiffs and the 2nd defendant dated 25 April 2013 and filed on 25 April 2013 as the plaintiff had severally promised to refund the purchase price and their advocates had made a professional undertaking to pay but no money has been paid to the 2nd defendant and also no money has been

paid to the 1st interested party.

(iii) That the third party (the purchaser) who is already on the suit land developing the same be stopped until payments have been made to the 2nd defendant and 1st interested party.

(iv) That the plaintiff be ordered to pay the costs of this application and costs of the suit and interest at court rates together with interest on the purchase price paid by the 2nd defendant and the interested party at bank rates.

2. The application is opposed and before I go to the grounds raised, I think it is only proper that I give a little background to this suit.

3. The plaintiffs in this case are the administrators of the estate of one Haji Ahmed Sheikh Ali (deceased). The deceased owned the land parcel LR No. 6577/1 (hereinafter described as "the suit land"). In the year 2002, one of the beneficiaries of the estate of the deceased, by the name Abdi Aziz Ahmed, entered into an agreement with the 1st defendant company (Nondahona Company Limited) to sell the suit land which is said to measure 400 acres. The seller had no authority to sell, and Nondahona Ltd filed suit against Abdi Aziz for refund of the purchase price which suit was allowed. In the year 2012, the plaintiffs and a beneficiary of the estate of the deceased entered into a sale agreement to sell the suit land to Nondahona Ltd and Egeswa Company Limited (the 2nd defendant) with each defendant purchasing 200 acres at a cost of Kshs. 300,000/= per acre. Each defendant paid Kshs. 3 Million to the plaintiff as part of the purchase price and it is averred that full payment was to be made by 31 March 2012. The plaintiff claims that payment was not made as agreed which rendered the sale agreements invalid. However, members of the defendants had moved into the land and started cultivating it. In the suit, the plaintiffs asked for a permanent injunction against the defendants.

4. The plaint was later amended to add individuals, who were probably members of the 1st defendants company as defendants. I also need to mention that one John Omundi Ogango, was enjoined as interested party to this suit on 16 January 2014. He is represented by the law firm of M/s Ogeto & Ogeto Advocates. He is the one described as 1st interested party in this application.

5. On 25 April 2013, a number of consents were filed, which consents were executed by M/s Hari Gakinya & Company Advocates for the plaintiff, and some individual defendants. Of significance is a consent executed by the law firm of M/s Hari Gakinya & Company Advocates for the plaintiffs and one Jepheter Nyabochoa Onchwari, the Chairman of the 2nd defendant company. The consent is as follows :-

1. That the 2nd defendants have paid a total amount of Kshs. 12, 974,000 for 200 acres remaining with a balance of Kshs. 5, 026,000.

2. That the 2nd defendants be shown their land within a period of 2 weeks from the date hereof.

3. That the 2nd defendants to pay the balance of the purchase price on or before the end of the year.

4. *That each party to bear their own costs.*

6. On 23 July 2014, an application dated 21 July 2014 was filed by the 2nd defendant through the law firm of M/s Ogeto & Ogeto Advocates. In the application the 2nd defendant sought orders inter alia for the implementation of the consent of 23 April 2013. In the alternative, the 2nd defendant asked for a refund of the sum of Kshs. 12, 974,000/= and interest. This application came up for mention on 8 July 2015 and a consent was recorded by Mr. Ogeto for the 2nd defendant/applicant and Mr. Gakinya for the plaintiff. The consent was in the following terms :-

(i) The firm of M/s Hari Gakinya & Company Advocates now gives a professional undertaking that the 2nd defendant and 1st interested party will be refunded the purchase price by the plaintiffs

after disposal of the subject matter.

(ii) The issue of costs and interest on the purchase price to be agreed upon after payment of the purchase price.

(iii) The matter be mentioned to confirm payment of the purchase price.

7. It will be observed that in the subject application, the 2nd defendant and the interested party again wish to enforce the consent of 25 April 2013. There are two supporting affidavits, one sworn by Mr. Jepheter Nyabochoa Onchwari on behalf of the 2nd defendant, and the other sworn by John Omundi Ogango, the interested party. In his affidavit, Mr. Onchwari has referred to the consent of 25 April 2013 wherein it was agreed that the 2nd defendant will be refunded the sum of Kshs. 12, 974,000/=. He has stated that there are developments on the suit land meaning that the same has been sold to other parties. He has annexed letters from the law firm of M/s Hari Gakinya & Company Advocates, one dated 1 February 2016 stating that the land has been sold to a third party but the land is yet to be surveyed and no funds can be released until the exercise is finalized. The second is dated 3 February 2017 and it states that there is a dispute as to the amount payable. On his part, the interested party has deposed that he has paid the sum of Kshs. 1, 181, 000/= for 23 acres of the land.

8. The plaintiffs filed Grounds of Opposition stating as follows :-

(i) That the property known as LR No. 6577/2 is no longer in existence.

(ii) That the 2nd defendant and 1st interested party are only entitled to a refund of the purchase price by the plaintiffs upon disposal of the subject matter in terms of consent order dated 8th July 2015.

(iii) That the application is therefore weak and ought to be dismissed.

9. A replying affidavit was also filed by Mr. Hari Gakinya. He has deposed that the 2nd defendant failed to comply with the consent of 25 April 2013 by not paying the balance of Kshs. 5, 026,000/= and the consent was therefore frustrated. He has stated that the consent is not enforceable as it is because the land has since been sold to third parties and the case should be fixed for hearing. He has also deposed that the interested party has not been admitted to the suit procedurally and that the orders sought are not tenable as the land in question does not exist and the plaintiff no longer owns any land.

10. In his submissions, Mr. Ogeto referred to the consent of 25 April 2013 and the later consent of 8 July 2015. He pointed out that the affidavit of Mr. Gakinya admits that the land has been sold and therefore the applicants need to be paid.

11. On his part, Mr. Katithi for the respondents, submitted that this application only refers to the consent of 25 April 2013 and not that of 8 July 2015. He submitted that this consent was frustrated by the 2nd defendant not paying the balance of the purchase price. He submitted that the property was then sold to a third party and the land is no longer available. He stated that there is however a dispute since the plaintiffs deny having received the sum of Kshs. 12, 974,000/=.

12. I have considered the application. There was a consent entered between the plaintiffs and the 2nd defendant dated 25 April 2013. I have already set out the terms of the consent above. It will be noted that it was acknowledged that the 2nd defendant has paid the sum of Kshs. 12, 974,000/- for 200 acres and was left with a balance of Kshs. 5, 026,000/= which was to be paid by the end of the year. The 2nd defendant made an application to enforce that consent but the parties made a further compromise through the consent of 8 May 2015. In the latter consent, it was agreed that the 2nd defendant and interested party will be refunded their money and the law firm of M/s Hari Gakinya & Company did give an undertaking that this will be done once the subject matter is disposed off.

13. In his own affidavit, Mr. Gakinya confirms that the land has been sold. It follows that the 2nd

defendant and interested party therefore must be refunded their money as agreed by the consent. It was said that there is a dispute over the money owing. I see no dispute in so far as the money owing concerns the 2nd defendant. The consent of 25 April 2013, is clear that the money paid is Kshs. 12, 974,000/=. This is the money that must be refunded to the 2nd defendant. In so far as the interested party is concerned, he has tabulated the sum of Ksh. 1, 181, 000/=. There is no replying affidavit coming from the plaintiffs refuting that this is not the money that he paid. Neither has Mr. Gakinya in his replying affidavit disputed this sum.

14. I wonder then, how the plaintiffs can now seek to get away with the very issues that they had agreed in the consent. They agreed to refund the 2nd defendant and interested party what they had received from them once they sell the land. It is acknowledged that the land has been sold. Surely, hasn't the right of the applicants to receive their refund crystallized ? In my own view, it has and so too the professional undertaking by the law firm of M/s Hari Gakinya & Company Advocates. There is no need of complicating this matter any further.

15. I am persuaded that this application must succeed, at least in so far as it seeks to enforce the promise to refund the applicants. The promise to pay was made by both plaintiffs and the firm of M/s Hari Gakinya & Company Advocates. Both of them are jointly and severally obligated to ensure that the refund is made. I now order the plaintiffs and the law firm of M/s Hari Gakinya & Company Advocates to ensure that the 2nd defendant is refunded the sum of Kshs. 12, 974,000/= and the interested party is refunded the sum of Kshs. 1, 181,000/= within 14 days from the date hereof. If no refund is forthcoming within the stipulated period, the applicants are at liberty to execute for these monies jointly and/or severally against the plaintiffs and the proprietor/s of the law firm of M/s Hari Gakinya & Company Advocates.

16. The applicants shall have the costs of this application.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In the presence of :

Mr. Ogeto for the applicants

Ms. Mathenge for the respondents

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU