



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE NO. 287 OF 2016

DANIEL KIPCHIRCHIR KOMEN.....PLAINTIFF

VERSUS

ISAAC KIPKEMEI TERER.....1ST DEFENDANT

PAULS COOKIESMAN.....2ND DEFENDANT

RULING

Daniel Kipchirchir Komen (*hereinafter referred to as the plaintiff*) has come to this court by way of plaint against Isaac Kipkemei Terer and Pauls Cookiesman claiming that at all material times, the 1st defendant was the legal counsel, representative and advisor of the plaintiff and acting for the 2nd defendant in a land transaction in issue. That on or about the 8th day of April 2008, the 1st defendant being plaintiff's advocate and financial manager called and advised him to invest in properties known as L. R. No. 12448/7 and L.R. 12448/8, valued at Kshs.12,000,000/=. That the two met on the 8th of April, 2008 at the defendant's office where the plaintiff paid him the instructions fee as per his request of Kshs.5,000,000/=. The defendant further advised the plaintiff that in order for him to sign the Sale Agreement, he must transfer a sum of Kshs.4,000,000/= to the account of 2nd defendant whom he claimed are the vendors of the said property, which Mr. Komen did on the 22nd of April, 2008.

That on the 24th of April 2008, the 1st defendant again called and advised the plaintiff to pay Pauls Cookieman Ltd a sum of Kshs.5,000,000/=:, which he did pay by issuance of a bankers cheque. On the 28th of April 2008, the said 1st defendant again called the plaintiff to his office and took him to the firm of M/s Gicheru & Company Advocates, where they finally signed the sale agreement of the transfer of the abovementioned property. The plaintiff fully trusting the 1st defendant, did not realize that the defendant had inserted his name in the sale agreement as co-purchaser. That upon realization that the 1st defendant and his then Advocate had also signed as a purchaser, the plaintiff confronted the defendant whose response was an assurance that the title deed would only have the plaintiff's name as the sole owner of the property.

That on the 24th of June 2008, in order to complete the purchase of the said property, the 1st defendant called the plaintiff and asked him to deposit the balance of Kshs.1,000,000/= to the 2nd defendant which he did. To date, no transfer has occurred and no document and/or title deed has been issued to plaintiff. The plaintiff avers that the value of the said property has accrued to about Kshs.150,000,000/= and as such it is the defendant's fault that the plaintiff has lost the property. That due to the Actions of the defendant, the plaintiff has lost of the said property to the tune of Kshs.150,000,000/=. The plaintiff has particularized the fraud as follows:

a. Willfully acting in his capacity as an advocate with the object of defrauding the plaintiff, receiving cheques and presenting of the said cheques for collection.

b. Conspiring and/or colluding with the 2nd defendant with the object of defrauding and injuring the plaintiff in its credit by making payments of the said cheques, knowing very clearly that the said transaction was a sham.

c. Failing to inform the plaintiff that the defendant was a beneficiary of the sale agreement and including his name as part owner of the property.

d. Wrongfully and maliciously debiting the plaintiff's current account with the amount of the said cheques.

e. Failing and/or maliciously neglecting to give the plaintiff an account of how the money was spent.

f. Failing and/or maliciously avoiding to give any assistance, or maliciously withholding any assistance to the plaintiff in its endeavours to get back his money or parcel of land.

The particulars of fraud against the 2nd defendant are:

a. Conspiring and/or colluding with the 1st defendant with the object of defrauding and injuring the plaintiff in its credit by making payments of the said cheques, knowing very clearly that the said transaction was a sham.

b. Wrongfully and maliciously debiting the plaintiff's current account with the amount of the said cheques.

The plaintiff claims a sum of Kshs.12,000,000/= loss of income of Kshs.150,000,000/= inter-alia. The 1st defendant filed defence denying the plaintiff's allegation and states that the plaintiff was a business partner in a joint business venture he and the plaintiff founded towards acquisition and sale of property at a profit and that the suit properties were jointly acquired by the plaintiff and the defendant in pursuance of the said venture.

That in addition to the foregoing, the 1st defendant avers that he was not the plaintiff's financial manager and further denies the plaintiff's averments and states that the plaintiff has never paid him the sum of Kshs.5,000,000/= as instruction fees as alleged by the plaintiff at paragraph 6 of the plaint.

The 1st defendant states that the contents of paragraph 7 and 8 of the Plaint are partially factually true to the extent at which it mentions that the sums of Kshs.4,000,000/= and Kshs.5,000,000/= was paid to the vendor of the suit properties, the 1st defendant however, vehemently denies the plaintiff's allegations that he advised the plaintiff that for him to sign the agreement, he had to deposit the sum of Kshs.4,000,000/= as the said demand was made by the vendor.

In essence, the 1st defendant states that though the plaintiff paid Kshs.1,000,000/= to the 2nd defendant, the suit property was not to be transferred to the plaintiff. The plaintiff was fully compensated for his contribution in the acquisition of the suit properties.

Accompanied with the plaint, is a Notice of Motion which the plaintiff prays for orders freezing the defendants' current and fixed deposits account pending hearing and determination of the suit. In the alternative, the plaintiff prays for an order that the defendants deposit sum of Kshs.12,000,000/= as security pending hearing and determination of the suit.

The application is grounded on facts that the applicant herein has invested to a tune of Kshs.12,000,000/= in order to purchase the property. That despite the said investment and intention to purchase the property

for value, the same has not been transferred to his name since 2008. That there is a very big risk that the respondent together with his agents might decide to transfer and sell the property and or utilize the plaintiff's money. That the applicant has incurred losses and continues to incur losses by not utilizing the property. That in the even that this honourable court fails to intervene, the applicant stands to incur irreparable harm. That the said preservation would not prejudice the rights of any parties herein.

The brief facts supporting the application are that the plaintiff was advised by the 1st defendant of existence of properties L.R. No. 12448/7 and L.R. 12448/8 valued at Kshs.12,000,000/=. The plaintiff paid instruction fees of Kshs.5,000,000/= and was advised by the 1st defendant to transfer Kshs.8,000,000 to the 2nd defendant. He signed a sale agreement before the firm of Gicheru & Company Advocates for transfer of the said properties, however, the 1st defendant inserted his names in the sale Agreement. Later, the plaintiff paid the balance of Kshs.1,000,000/=: however, to-date, he has never received a document with rights to the transfer of the property.

The 1st defendant on his part states that the plaintiff was his businessman partner and that they entered into a joint venture of acquiring and selling properties at a profit though they did not reduce the joint venture into writing. It was a term of the joint venture that capital contribution made by either of the contributors would be retained to the contributors after sale of the property. They identified the suit property which was for sale for a total of Kshs.12,000,000/=. It was agreed that the plaintiff would contribute Kshs.10,000,000/= and the balance of Kshs.2,000,000/= was to be paid later. The plaintiff deposited Kshs.5,000,000/= in the 1st defendant's account, which he transferred to the vendor. They paid Kshs.10,000,000/= directly to the Vendor. He denies having inserted his name in the sale agreement. He states that after the purchase of the properties in 1979, the plaintiff and defendants embarked on the process of transfer, sub-division and registration of the resultant titles while at the same time procuring third parties to purchase the sub-divided property.

The rest of the affidavit explains how there was delay in the process, frustration in the joint venture, attempts to buy other properties, negotiations which can be dealt with at the hearing of the main suit.

The 2nd defendant states in the replying affidavit filed on 5.1.2017 that the issues herein are between the plaintiff and the 1st defendant as they received the transfer documents hence the vendor was not in breach of the agreement.

The plaintiff filed a further affidavit denying any joint venture agreement to speculate on property. The plaintiff further denies any business transactions with the 1st defendant. The other land transaction according to the plaintiff are irrelevant as they are not related to this case.

The **gravamen** of the plaintiff's submissions is that he has established a prima facie case with a likelihood of success as he was the 1st defendant's client and deposited large sums of money into the account of the 1st defendant for purchase of the parcels of land which are subject to the case. The 1st defendant instead of registering the property in the names of the plaintiff, registered the property in his names. There is no agreement of any joint venture.

On the issue of irreparable injury which would not adequately be compensated by an award of damages, the plaintiff argues that he provided sufficient consideration of the full purchase of the said land through the office of the 1st defendant and therefore, has the purchase of the suit property and not the 1st defendant. He is the absolute owner of the property and that the 1st defendant has procured the registration through fraud, illegality, misrepresentation on corrupt scheme. The value of the property has risen 8 times and therefore, the plaintiff has been denied the legitimate expectation to own interest in the property through investment.

On balance of convenience, the plaintiff argues that he stands to lose more if the property remains supervised by the court. The plaintiff argues that the 1st defendant has title to the property despite the fact that the plaintiff paid the purchase price. The plaintiff is a retired athlete and has no further means of

making a living whilst the 1st defendant is a lawyer, a member of County Assembly and an aspiring politician.

The 1st defendant submits that the plaintiff has not established a prima facie case with a likelihood of success. He argues that the properties were being brought for purposes of sub-division and sale with the aim of making profits by the joint venture and that there was no mandatory obligation that the property would be registered in the plaintiff's name. Moreover, that the properties have been sub-divided and sold to third parties and therefore, an injunction cannot issue in vain.

On irreparable loss that cannot be adequately be compensated by an award of damages, the 1st defendant argues that any loss that might be suffered by the plaintiff is capable of being compensated by way of damages. In fact, he argues that the plaintiff has been compensated by way of transfer of L.R. No. Pioneer/Langas Block 1 (Malel)/499, motor vehicle and costs.

On balance of convenience, the 1st defendant submits that it tilts towards dismissing the application for injunction as the prayers have been overtaken by events as the properties do not exist. On the issue of security, the 1st defendant argues that the plaintiff has not laid a basis for gist of the for security. On the prayer for an order to freeze the 1st defendant's account, the 1st defendant submits that the defendant is claiming for an order of injunction and an order of freezing in the same prayer which cannot be granted in law.

The starting point in such application in Kenya is the Civil Procedure Act, Cap. 21, Laws of Kenya and the Civil Procedure Rules Order 40 thereof, Rules 1 and 2 which provide for the instances where an injunction can be granted. Under Order 40, Rule 1, one has to prove that the suit property is likely to be wasted, damaged or alienated. In this case, the suit property has been transferred to 3rd parties and therefore, already alienated by to nonparties to the suit. A temporary Injunction in such case, cannot be granted as it will be in vain.

The plaintiff also ought to establish that defendant intends or threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. To this extent, no evidence has availed to court that the defendant intends to remove his property or dispose the same in a manner that will obstruct the plaintiff from executing any decree passed against him.

However, under Order 40, Rule 2(2), the court has the power to grant injunction to restrain breach of contract or other injury on such terms as the inquiry as to damages, the discretion of injunction, keeping account, giving security or otherwise as the court deems fit. Unfortunately, I do find that the orders sought by the plaintiff are not for restraining breach of contract or other injury. Indeed, the orders being sought by the plaintiff are the freezing of the defendant's account and in the alternative, ordering that the defendant deposits Kshs.12,000,000/= as security pending hearing and determination of this suit.

The plaintiff argues that he has established a prima facie case with a likelihood of success. I do find that the plaintiff's case is not frivolous as it is evident that he paid Kshs.12,000,000/=. There is a sale agreement where he is mentioned as the purchaser alongside the 1st defendant. It was expected that the property was to be transferred in the names of purchasers, though the plaintiff argues that the 1st defendant inserted his name in the Sale Agreement. The 1st defendant alleges that there was an oral agreement for a joint venture between the plaintiff and the 1st defendant in respect of speculation for real property. This agreement is not in writing and therefore the defendant will have to prove its existence during the main hearing.

The facts herein meet the test in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others – Civil Appeal No. 39 of 2002**, where the Court of Appeal held that a prima facie case is a case in which on the material presented to the court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from

the latter.

On irreparable harm that cannot be adequately compensated by an award of damages, I do find that the value of the properties lost can be ascertained and the plaintiff paid the said value. In fact, the plaintiff is claiming the sum of Kshs.12,000,000/= as the purchase price and loss of income of Kshs.150,000,000/=. I do find that the plaintiff can adequately be compensated with damages.

On a balance of convenience, I find that it tilts towards the 1st defendant as granting the orders sought of freezing the 1st defendant's account is very drastic in nature and cannot be granted without a basis. Moreover, the property sought to be preserved have already been transferred to third parties.

The security being sought herein is not premised on Order 39 of the Civil Procedure Rules as there is no evidence that the 1st defendant with intent to delay the plaintiff;

Order 39 rule 1 provides for the instances where defendant may be called upon to furnish security for appearance thus:-

1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

2. Security [Order 39, rule 2.]

1. Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.

There is no evidence that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him has absconded or left the local limits of the jurisdiction of the court or is about to abscond or leave the local limits of the jurisdiction of the court; or has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof. I do agree with the 1st defendant that the plaintiff has failed to establish the threshold of the orders he seeks. The application is dismissed. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE