



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 214 OF 2013

SIMON MURIUKI MUTHIKE.....PLAINTIFF/RESPONDENT

=VERSUS=

WYCLIFFE OCHIENG ABOK.....DEFENDANT/PPLICANT

R U L I N G

Introduction:

1. Before me is the Defendant's Application dated 26th May, 2014, seeking for the following reliefs:
 - (a) **THAT upon hearing the instant application inter-partes, the Hon. Court do proceed to strike out the suit filed herein *in limine* with costs.**
 - (b) **THAT the Respondent do bear the costs of this application.**
2. In response to the Application, the Plaintiff's advocate deponed that the Application offends Order 2 Rule 15 of the Civil Procedure Rules because it is seeking omnibus prayers; that the suit raises triable issues and that striking out of pleadings is a draconian act that the court must employ only in the clearest and hopeless of cases.
3. According to the Plaintiff's counsel, he may amend the Plaintiff to bring forth the issues in controversy to be determined by the Court.
4. The Defendant's/Applicant's counsel submitted that the suit seeks for an order of rescission of contract between the Plaintiff and the Defendant yet an offer was made, the consideration was paid and the title document was issued in favour of the Defendant.
5. According to counsel, the contract having been performed, the same cannot be rescinded; that the Plaintiff has not pleaded the particulars of coercion and fraud in his Plaintiff and that the suit should be dismissed with costs.
6. The Plaintiff's/Respondent's advocate submitted that under Order 2 Rule 15 of the Civil Procedure Rules, the Applicant must elect on which ground he wants the suit dismissed.
7. According to counsel, the Plaintiff raises triable issues because there was an unconscionable bargain between the parties. Counsel submitted that they shall be filing an application to amend the Plaintiff.

Analysis and findings

8. According to the Plaintiff that was filed in this court on 28th November 2013, the Plaintiff entered into a sale agreement dated 26th September 2013 with the Defendant for the sale of ten acres of

- land known as Lamu/Hindi/Magongoni/548 for a consideration of Kshs.4,050,000.
9. The parties entered into a further agreement on 14th March 2013 in which it was agreed that the Defendant was to offset the balance of the purchase price within 3 months.
 10. The Plaintiff has alleged in the Plaintiff that it is one advocate who acted for both parties and that it is apparent that the two agreements were unfair to the Plaintiff and that no terms were set out in the two agreements to safeguard the Plaintiff's interest. It is the Plaintiff's contention that the two agreements were entered into as a result of unconscionable bargain and undue influence on account of his illiteracy.
 11. The Plaintiff's claim is for the rescission of the agreement and in the alternative damages for breach of contract.
 12. The Defendant has averred in his Defence that pursuant to the two contracts, title deed number Lamu/Hindi Magogoni/1772 for 4.05 Ha was issued to the Defendant on 4th July 2013 after sub-division of Title Number LAMU/HINDI/MAGOGONI/548 then belonging to the Plaintiff.
 13. It is the Defendant's deposition that on 13th September, 2013, he entered into a sale agreement with Catherine Nduta Mbugua, Liberetta Njeri Kamaru and Ndure's family for the sale of Lamu/Hindi Magogoni/1772 for Kshs.9,500,000 and that the Plaintiff maliciously instituted this suit because of that arrangement.
 14. The Plaintiff has not disputed the fact that upon entering into an arrangement with the Defendant, the suit property was transferred to the Defendant pursuant to those agreements. The Defendant is currently the registered proprietor of LAMU/HINDI MAGOGONI/1772 which is a sub division of LAMU/HINDI MAGOGONI/548.
 15. A party may seek for an order of rescission of contract on the grounds that the contract was entered into under duress, undue influence, by mistake or that it is unconscionable. The effect of rescinding a contract is to abrogate a contract, effective from its inception, thereby restoring the parties to the position they would have occupied if no contract had ever been formed.
 16. A right to rescind must be exercised promptly or within a reasonable time after the discovery of the facts that authorize the right. In most cases, a party to a contract rescinds a contract because of substantial nonperformance or breach by the other party.
 17. A contract can be rescinded on the ground of fraud. A party can succeed in an action of rescinding a contract if he shows that he was induced to part with some legal right or to assume some legal liability that he otherwise would not have done but for the fraudulent representation. A contract can also be rescinded if it was obtained by duress, undue influence, mistake amongst other grounds.
 18. Having pleaded in the Plaintiff that he entered into the two agreements with the Defendant as a result of an unconscionable bargain and undue influence, the Plaintiff should be allowed to have his day in court and prove those allegations. It does not matter that the contract has been wholly performed considering that the Civil Procedure Rules allows a party to amend his pleadings at any time. I am reluctant to dismiss this suit at this stage in view of my sentiments above. As has been held time and again, the court ought to sustain a suit and not dismiss it if the suit can be revived by way of amendment. In the case of **Shah vs Pademshi** (1984) KLR 531, Madan J A stated as follows:

“A trial must be allowed if a triable issue is found to exist, even if the court strongly feels that the Defendant (or the Plaintiff) is unlikely to succeed at trial. The court must not attempt to anticipate that the Defendant (or Plaintiff) will not succeed at the trial”.

19. The Plaintiff has shown in the Plaintiff that there is a substantial question of law to be determined viz-a-viz the completed agreements. In any event, the Plaintiff may be improved on by way of amendments.
20. In the circumstances, and for the reasons I have given above, I dismiss the Defendant's Application dated 26th May 2014 with costs.

Dated and delivered in Malindi this 12th day of **September**, 2014.

O. A. Angote

Judge