



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAL, J.J.A.)

CIVIL APPEAL NO. 71 OF 2015

BETWEEN

GEORGE STEPHEN MUHORO.....APPELLANT

AND

CATHERINE WANJIKU.....1ST RESPONDENT

RICHARD MWANDORO SAFARI.....2ND RESPONDENT

SIENNA LIMITED.....3RD RESPONDENT

PATRICK OTSOMO OYUGI.....4TH RESPONDENT

MAURICE OTIENO OYUGI.....5TH RESPONDENT

SERAH MWERU MUHU.....6TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court (L.N. Gacheru, J.) delivered on 25th February, 2014

in

ELC No. 607 of 2011)

JUDGMENT OF THE COURT

In the year 2010 some enterprising Kenyans came together and decided to buy a parcel of land. They were the appellant, **George Stephen Muhoro** and the 1st to 5th respondents **Catherine Wanjiku Njuguna** (1st respondent), **Richard Mwandoro Safari** (2nd respondent), **Maurice Otieno Oyugi**, **Patrick Otsomo Kondo** (4th respondent) and (5th respondent). They identified a parcel of land **L.R. No. 194/16** situate in Karen measuring about 1.835 Ha then owned by **Sarah Mweru Muhu** (the 6th respondent). They agreed to purchase the whole parcel as a block for Kshs.93,000,000 and the same was to be subdivided to the appellant and the said respondents together with **Sienna Limited** (the 3rd respondent) in an agreed formula set out in a Memorandum of Understanding which set out respective allocation depending on each party's contribution. That arrangement was reduced into writing in an Agreement for Sale dated 18th November, 2010 which set out various conditions of the agreement where 10% deposit was to be paid to the 6th respondent; completion was to be 90 days from the date of execution of the agreement and the 1st respondent, a lawyer who traded as **C.W. Njuguna and Company advocates** was appointed as the lawyer for the purchasers. Each party to the agreement contributed in the payment of the deposit of the 10% purchase price but it would appear from the record that there was a disagreement between the appellant and the other purchasers. In the cause of time the appellant appointed another lawyer to represent him in the transaction.

There is on record a letter by the law firm **J.M. Mugo and Company advocates** acting for the vendor (6th respondent) dated 9th March, 2011 being a Completion Notice issued in accordance with the Agreement for Sale where it was stated amongst other things that the 6th respondent as vendor was ready to complete the transaction; that the purchasers had failed to remit the balance of purchase price and they were required to make good default by forwarding the balance of purchase price together with interest as per the sale agreement within 21 days in default of which the deposit paid of 10% purchase price would be forfeited. That letter was addressed to C.W. Njuguna and Company Advocates for the purchasers.

There is also on record a letter dated 19th July, 2011 by C.W. Njuguna and Company Advocates to the appellant where it is stated that the appellant had failed to pay his share of purchase price and was in breach of the agreement and that the other purchasers had been forced to pay the appellant's share of Shs.1,200,000 to the 6th respondent. The appellant was required by that letter to reimburse to his co-purchasers a sum of Shs.9,500,000 together with Shs.1,200,000 being interest.

On 4th November, 2011 the appellant filed suit at the High Court of Kenya at Nairobi being **ELC No. 607 of 2011** against the respondents. He alleged amongst other things that he had personally been involved in the process of subdivision of the parcel of land which they were to purchase but that the respondents had conspired to fraudulently deprive him of his share of the land. He therefore prayed for an injunction to restrain the respondents from selling or transferring or subdividing the said parcel of land and a declaration that 0.2 Ha of the said parcel beonged to him and an order of specific performance in his favour.

The appellant also filed an application for injunction but that is not the subject of this appeal.

The 1st, 2nd, 3rd, 4th and 5th respondents filed a joint statement of defence where it was alleged amongst other things that the appellant had breached the agreement and had not complied with the memorandum of understanding that the parties had entered into before the agreement for sale.

The 6th respondent also filed a defence where it is stated amongst other things that she was not privy to the relationships of the purchasers of her land and that she dealt with the advocate appointed by the purchasers.

There is on record documentation showing that completion documents were duly forwarded by the lawyers of the 6th respondent to the lawyer of the purchasers and that the transaction was completed where transfer was made, the land was subdivided and registered to respective purchasers who did not include the appellant.

The 6th respondent who was the original owner of the land filed an application in that suit praying that the suit against her be struck off with costs on the grounds that she was improperly and wrongly enjoined to the suit; that the suit disclosed no cause of action against her and no relief had been sought nor could be attained against her and that it was fair and just that the suit against her be struck off.

In the affidavit in support of the application the 6th respondent enumerated the history of the matter stating:

“5. THAT I only agreed to sell the suit propety to the Purchasers as one block and it was not my concern what the Purchasers wanted to do with the property or if and how they would subdivide it after the sale.

6. THAT I was not at any time made privy to any arrangement between the Purchasers before or after the execution of the agreement for sale.

7. THAT the parties to the transaction were represented by advocates and the Purchasers confirmed that they were all represented in the transaction by the 1st Defendant through her firm (C.W. Njuguna & Company Advocates).

8. ...

9. ...

10. THAT the Purchasers paid the balance of the purchase price in June 2011 only after I had issued the completion notice and again I was not privy on who among the purchasers paid the amount through (sic) by a copy of a letter dated 19-7-2011 sent to my advocates and shown to me the Purchasers advocate indicated the Plaintiff had failed to pay his share of the balance of the purchase price. Annexed hereto is a copy of the letter marked @SM-3”.

11. ...

12. THAT I was advised by my advocates on record that my obligation was to execute the Instrument of Conveyance as drawn by the Purchasers’ advocates since ostensibly they acted as instructed by all the Purchasers

13. ...

14. THAT I exhausted my obligations in the said transaction after I executed the Conveyance drawn by the Purchasers’ advocates which was then forwarded to the Purchasers’ advocates with all other completion documents including the original document of title on 6-6-2011. Annexed hereto is a copy of the letter forwarding the completion documents marked “SM-4”.

The application was heard by **L.N. Gacheru, J.** who in a ruling delivered on 25th February, 2014 found amongst other things that the 6th respondent was not a necessary party in the suit. The judge found that the appellant's claim would be adequately addressed by the other respondents and in effect the suit against the 6th respondent was struck out. The suit against the other respondents is pending and we should not make many comments or findings here so as not to embarrass the judge when the suit comes up for hearing.

The appellant was dissatisfied with those findings and filed this appeal which is premised on the memorandum of appeal drawn by his lawyers **Macharia Kahonge and Company Advocates**. The appellant complains that the judge erred in law and fact in striking out the claim against the 6th respondent in a summary manner when according to the appellant serious and weighty issues had been raised in the replying affidavit of the appellant and that the judge erred in holding that since the 6th respondent had already transferred the property she no longer had

proprietary interests on the same. It is said that the judge misapprehended the law on striking out of pleadings and that she proceeded on erroneous principles of law. It is therefore prayed that we allow the appeal by setting aside the ruling and order made by the High Court so that the whole suit can proceed for hearing.

The appeal came for hearing before us on 1st April, 2019 when **Mr. P. Kahonge** learned counsel appeared for the appellant; **Mr. Titus Koceyo** appeared for the 1st to 5th respondents while **Miss Wakarura Irungu** appeared for the 6th respondent. Mr. Kahonge relied on written submissions and a list of authorities which he had filed. In a highlight counsel collapsed all the grounds into one which was whether the 6th respondent was a necessary party to the suit. Counsel submitted that the judge erred in striking out the suit against the 6th respondent as according to him the substratum of the suit involved sale of land by the 6th respondent to the appellant and the other respondents. The appellant had paid a deposit and according to counsel the appellant had then caused the land to be subdivided but that the completion notice by C.W. Njuguna and Company advocates had not reached the appellant. Counsel further submitted that the case on striking out a pleading is whether a party is affected by pending litigation and that the order on striking out of a pleading should be interpreted widely.

Mr. Koceyo for the 1st to 5th respondents did not take any position in the appeal and left the whole matter to us.

Miss Irungu for the 6th respondent relied on written submissions and a list of authorities filed. In a highlight it was counsel's submission that the 6th respondent was not privy to how the land was subdivided, what the purchasers would do with the land or how the purchase price was to be raised. According to counsel, when the completion date arrived the purchasers were not ready to complete and thus a completion notice was served. The completion notice having been received, balance of purchase price was paid and all the steps for completion of the transaction were undertaken. According to counsel the 6th respondent transferred the land as a block and having done so was not a necessary party in the suit. The prayers sought which included injunction, declaration and specific performance could not lie against the 6th respondent.

In a brief reply Mr. Kahonge submitted that the appellant had paid a deposit which he was claiming back and according to him the 6th respondent should remain a party in the suit so that all questions in dispute could be resolved.

We have considered the whole record and as observed earlier the suit by the appellant at the High Court is still pending awaiting hearing. The learned judge considered the application before her and considered the provisions of **Order 1 Rule 10** of the **Civil Procedure Rules**. Under the said rule there may be substitution of parties where wrong persons have sued or been sued. Where the court finds that a wrong party has been enjoined in a suit it may order that that name be struck out.

In the application before the judge the 6th respondent stated that she was not a necessary party to the suit.

As we have shown the 6th respondent was the original owner of the parcel of land. The appellant and the other respondents approached the 6th respondent to purchase her land and an agreement was reached. Purchase price for the land was paid and the land was transferred by the 6th respondent. The 6th respondent claimed in the application that she was not privy to the relationships between the parties who bought her land. She transferred the land as a block and was paid purchase price in full. The learned judge found that the 6th respondent had no further interest in the suit. We agree with that finding. The 6th respondent is not a necessary party in the matter before the High Court because she sold and transferred the land as a block and was paid purchase price in full. Whether the appellant is entitled to any portion of the land or whether he is entitled to refund of deposit paid with interest is a matter between him and the persons named as purchasers in the sale agreement. The original registered owner has no interest in the matter at all and is not a necessary party to the suit. This appeal has no merit and we dismiss it with costs to the the 6th respondent.

Dated and delivered at Nairobi this 5th Day of July, 2019.

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR