



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**COMM CASE NO. 287 OF 2020**

**BETWEEN**

**MARK PROPERTIES LIMITED.....PLAINTIFF**

**AND**

**COULSON HARNEY LLP ADVOCATES.....DEFENDANT**

**AND**

**LE MAC MANAGEMENT COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**RAVI KUNVARJI VASTA.....2<sup>ND</sup> APPLICANT**

**RULING NO. 2**

1. There are two chamber summons applications before the court filed by the Intended Co-Plaintiffs/Interested Parties/Applicants dated 10<sup>th</sup> and 11<sup>th</sup> June 2021 respectively. In the first application Ravi Kunvarji Vasta (“Ravi Vasta”) seeks to join the suit as a Co-Plaintiff or Interested Party while in the second application, Le Mac Management Company Limited (“Le Mac”) seeks to join the suit as a Co-Plaintiff and or interested party. Both applications seek an order or direction from this court that *Wamae and Allen Advocates* should not, in effect, be permitted to act for or represent the Plaintiff. There is also a Notice of Preliminary Objection dated 20<sup>th</sup> May 2021 objecting to the dual representation of the Plaintiff, as charger, and I & M Bank Ltd which has placed the Plaintiff under Administration, as charge, by the firm of *Wamae and Allen Advocates*.

2. In addition, the previous advocates on record for the Plaintiff and now advocates for Le Mac, *Chris N. Mutuku and Company Advocates* oppose the adoption of the consent letter dated 10<sup>th</sup> June 2021 executed by Advocates for the Plaintiff, now under Administration, *Wamae and Allen Advocates* and *Njoroge Regeru Advocates* for the Defendant in which they seek to take over an escrow account where Chris N. Mutuku and Company Advocates was the signatory. The consent is opposed through the Affidavit of Christopher Ndolo Mutuku sworn on 13<sup>th</sup> June 2021.

3. Le Mac is a Management Company incorporated pursuant to the Agreements for Sale and Subscription of Shares and the Leases in respect of *Le Mac* Building situated on Land Reference 1870/V/217 in Westlands area within Nairobi developed by the Plaintiff, with the mandate of, among other obligations, provision of all utility services (electricity, water, lifts) within the property, maintenance, hygiene, security, etc. of the property, and to which the reversionary interest will eventually vest. Ravi Vasta is Plaintiff’s Managing Director.

4. The applications are supported by the affidavits of Christopher Ndolo Mutuku, an Advocate, sworn on 11<sup>th</sup> June 2021 and that of Ravi Vasta sworn on 10<sup>th</sup> June 2021. They are opposed by the Defendant (“the Advocates”) through the replying affidavit of Alex Githinji Njage, an advocate and partner in the Advocates’ firm, sworn on 21<sup>st</sup> June 2021 and the replying affidavit of Ponangipali Venkata Ramana Rao, the Administrator of the Plaintiff (“the Administrator”), sworn on 24<sup>th</sup> June 2021. The parties have also filed written submissions in support of their respective positions.

5. For ease of reference, I will restate the brief facts of this matter leading to the dispute and developments in the course of the proceedings. The Plaintiff is a Developer and has developed a 24-storey mixed user building commonly known as *Le’ Mac* with the intention of selling

various portions of the development as banking halls, restaurants, office and commercial spaces and residential apartments (“Units”) to interested purchasers. In due course, the Plaintiff was introduced to the Advocates and an Advocate—Client relationship was consummated in a letter of engagement dated 13<sup>th</sup> September 2012 wherein the Plaintiff mandated the Advocates to provide legal services in relation to the sale of Units on Le Mac Building.

6. A dispute arose between the Plaintiff and the Advocates following disagreements on a number of issues which led to the termination of their relationship in August 2020 leading to the Plaintiff filing of this suit seeking the following reliefs:

*1. A declaration that the monies paid to the Defendant as Advocates for the Plaintiff in all transactions respecting ..... the property commonly known as Le Mac were so paid for purposes of registration of the Leases on the said property.*

*2. A declaration that the monies paid to the Defendant by 3<sup>rd</sup> Parties on account of Stamp Duty were to be held in trust by the Defendant and it was not open to the Defendant to do any other act with, or apply the said monies to any other use, other than payment of Stamp Duty towards registration of Leases in .... The property commonly known as Le Mac.*

*3. A declaration that the monies paid to the Defendant by 3<sup>rd</sup> Parties on account of registration of the leases in ..... Le Mac, were paid to the Defendant strictly in their capacity as advocates for the Plaintiff/Vendor, and upon termination of the Advocate/Client relationship, the Defendant must forthwith transfer all such monies to the account of the Plaintiff's new advocate.*

*4. A declaration that the remuneration of the advocate in respect of a sale or a purchase of immovable property or an interest under Rule 18(a) can only occur once property passes to the purchaser upon proper execution of a valid contract of sale and until the agreed conveyance formalities which vest the legal title to the purchaser are completed, and therefore the Defendant had abandoned its onus midway and is required to reimburse the Plaintiff for the costs of alternative legal services for completion of the conveyances in ... Le Mac.*

*5. A permanent injunction restraining the Defendant, its servants ..... from interfering with ..... or in any way dealing with the monies paid to them on account of Stamp Duty for the Registration of Leases in Land Reference 1870/V/271, NAIROBI , or related to Le Mac building, amounting to Kshs. 101,987,912,00.*

*6. A permanent injunction restraining the Defendant, its servants ..... from .... In any manner whatsoever dealing with the monies paid to them on account of Plaintiff's/Vendor's legal costs, Government and Agents' fees & charges on transfer and registration of Leases in Land Reference 1870/V/271, NAIROBI , or related to Le Mac building, amounting to Kshs. 34,949,551.*

*7. A mandatory injunction directing and requiring the Defendant to forthwith, and in any event within 3 days of the issuance of the Order of the Court, transfer the sum of Kshs. 101,987,912.00 to the Plaintiff's counsel.*

*8. A mandatory injunction directing and requiring the Defendant to forthwith , and in any event within 3 days of the issuance of the Order of the Court, release and make available to the Plaintiff's counsel on record all the files, communication and documents in their possession, or held to their call by any person or authority, pertinent to the conveyances and registration of the Leases in Land Reference 1870/V/271, NAIROBI , or related to Le Mac building.*

*9. THAT a proper account, with all necessary inquiries on accumulated interest, un-rendered /abandoned legal services and obligations, unjust and fraudulent enrichment, disservice, among other considerations, be taken on the amount of Kshs. 136,937,462.00 paid to the Defendant on the account of the Plaintiff or as counsel for the Plaintiff, and all monies found to be due to the Plaintiff or for its use in fulfilling its legal obligations under the Leases for Land Reference 1870/V/271, NAIROBI, or related to Le Mac building, be forthwith pad to the Plaintiff.*

*10. Refund of Kshs. 200,000.00 paid as legal fees.*

*11. General Damages.*

*12. Costs and Interest.*

7. The Plaintiff's case was that in terminating the retainer, the Advocates abandoned the conveyances that had been paid for and that it was incumbent upon the Advocates to surrender the Plaintiff's legal fees and the deposits on Stamp Duty to the Plaintiff to enable it complete the process of registration of the Leases. This led to the Plaintiff instituting this suit followed by a host of other interlocutory applications by both the Plaintiff and the Advocates.

8. By the ruling dated 15<sup>th</sup> March 2021, I held that the claim for accounts by the Plaintiff was partly compromised by a consent dated 6<sup>th</sup> October 2020 where it was agreed that trust funds held on account of Stamp Duty, Lease Registration Fees, Agent's Fees, Service Charge Deposit, First Quarter Service Charge, Share Premium and Cost of Transferring Reversionary interest be held in a joint escrow account in the names of the advocates of the Plaintiff and the Advocates at the time *Chris N. Mutuku Advocates and Njoroge Regeru and Company Advocates*. I directed that the rest of the issues being raised by the Plaintiff and the Advocates in relation to the monies paid by the purchasers, money held by the advocates, legal fees and matters relating to the property were to be determined during the hearing of the main suit.

9. On 26<sup>th</sup> March 2021, the Plaintiff was placed under administration by its financier and chargee, I&M Bank Limited and the Administrator subsequently appointed to manage the affairs of the Plaintiff pursuant to proceedings in **Insolvency Cause Number 010 of 2021- IN THE MATTER OF MARK PRIME PROPERTIES LIMITED (IN LIQUIDATION)**. The Administrator has since taken steps to change the

Plaintiff's representation by replacing the firm of *Christopher N. Mutuku & Co Advocates* with that of *Wamae & Allen Advocates*.

10. I have gone through the applications, depositions and submissions and the main issue falling for determination is whether Le Mac and Ravi Vasta should be joined to this suit as co-plaintiffs or interested parties. In my view, this question turns on the reliefs sought in the Plaint dated 11<sup>th</sup> August 2020 which I have set out at para. 6 above. Before I proceed to deal with the issue of joinder, it would be appropriate to deal with the effect of Administration of the Plaintiff under the **Insolvency Act**.

11. It is not in dispute that Plaintiff has been placed under Administration under the provisions of the **Insolvency Act**. Once a company is placed under the Administration, the management of the company vests in the Administrator to the exclusion of the directors of the company whose functions are suspended. Thus, the Administrator is correct to point out that upon commencement of administration, the Administrator, as the proper agent of the Plaintiff, has the power to assume control of the assets of the Plaintiff and manage its affairs to achieve the objectives set out under **section 522** of the **Insolvency Act** and that pursuant to **Section 576** and the **4<sup>th</sup> Schedule** to the **Insolvency Act**, the Administrator of a Company has the power to bring or defend any action or other legal proceedings in the name and on behalf of the company. Further, the Administrator has powers to compromise any such matters on behalf of the Plaintiff and that the **4<sup>th</sup> Schedule** further grants the Administrator the power to appoint an advocate or any other professionally qualified person to assist the Administrator in the performance of the Administrator's functions.

12. Without further ado, I find and hold that the Administrator has the power to appoint the firm of *Wamae and Allen Advocates* to act on its behalf and to take over the conduct of this suit in place of *Chris N. Mutuku Advocates*. This court cannot restrain or interfere with those powers at least in this suit. Any issue relating to the administration ought to be taken up with the court exercising insolvency jurisdiction, that is, within proceedings in **Milimani High Court IC No. E010 of 2021 Re: Mark Prime Properties Limited [Under Administration]** in accordance with **section 591** of the **Insolvency Act**.

13. The Administrator is entitled to appoint and has indeed appointed *Wamae and Allen Advocates* to act for it in these proceedings. I therefore reject the attempt by Mr Mutuku, Advocate to oppose the consent dated 10<sup>th</sup> June 2021. I also reject the plea that the said firm should be stopped from effectively representing the Plaintiff which is now under Administration.

14. Le Mac and Ravi Vasta seek to join the suit as Plaintiffs. **Order 1 Rule 1** of the **Civil Procedure Rules** provides for who may be joined in a suit as plaintiffs as follows:

*All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.*

15. The Court of Appeal, in **Civicon Limited v Kivu watt Limited & 2 others MSA CA Civil Appeal No. 45 of 2014 [2015] eKLR** expounded extensively on the applicability of **Order 1** above and the duty of the court in considering joinder as follows:

*Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or;*

*whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.*

*the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

16. Le Mac contends that it is a necessary and proper party to this suit as there are monies that had been paid to the Advocates by the purchasers on account of 1<sup>st</sup> Quarter Service Charge Deposits, 1<sup>st</sup> Quarter Service Charge, Share Premiums, Utility Deposits and Reversionary Interest that ought to have been transferred to Le Mac immediately they were received by the Advocates and that some of these funds are still being held by the Advocates. The Advocates do not dispute this position and admit that as per Clause 22 of the respective Agreements for Lease and Subscription of Share, Le Mac ought to have been in receipt of funds under those respective heads.

17. From the reliefs sought in the Plaint, it is clear that the dispute in the matter is between the Advocates and its client relating to monies deposited with them in order to facilitate the sale of Units in Le Mac Building. In so far as Le Mac is concerned, the payments due to it are an obligation of the Plaintiff and not the Advocates under the various agreements. The Advocates were at all material times an agent of and acting under the Plaintiff's instructions and are obliged to account to the Plaintiff. It is well settled that a party cannot sue or make a claim against an agent of a disclosed principal as the Le Mac now purports to do (see **Anthony Francis Wareham and 2 Others v Kenya Post Office Savings Bank NRB CA Civil Appeal Nos. 5 and 48 of 2002 [2004] eKLR** and **City Council of Nairobi v Wilfred Kamau Githua t/a Githua and Associates and Another NRB CA Civil Appeal No. 206 of 2008 [2016]eKLR**). Le Mac does not suggest that the Advocates acted for it in any transaction.

18. I agree with the Advocates that the following issues arising from the suit do not implicate Le Mac but are matter between the Plaintiff and its Advocates:

- Whether the Advocates are culpable for the delay, if any, in the completion of the requisite conveyancing transactions?
- Whether the Advocates received the alleged Kshs. 136,937,463.00 allegedly broken down as: Kshs. 31,645,471.00 on account of Vendor's Legal Costs; Kshs. 101,987,912.00 on account of Deposit on Stamp Duty; Kshs. 1,348,080.00 on account of Government Fees and Costs of Transferring Reversionary Interest; and Kshs. 1,956,000.00 on account of Agents' Fees on Registration of Transfers Total: Kshs 136,937,463.00 and;
- Whether the Advocates are withholding any portion of the foregoing sums unlawfully.

19. If Le Mac has any claims, then these are between it and the Plaintiff arising from the various sale agreements between the Plaintiff and purchasers. I therefore come to the conclusion that both Le Mac and Ravi Vasta are not necessary parties to these proceedings required to be joined in this court to effectually and completely adjudicate upon and settle all questions involved in the suit.

20. The Chamber Summons' dated 10<sup>th</sup> and 11<sup>th</sup> June 2021 together with the Preliminary Objection dated 20<sup>th</sup> May 2021 lack merit and are accordingly dismissed with costs to the Plaintiff and Defendant. Likewise, the Consent dated 10<sup>th</sup> June 2021 be and is hereby endorsed as an order of the court.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Chris N. Mutuku, Advocate for the Applicants/Interested Parties.

Mr Wawire instructed by Wamae and Allen Advocates for the Plaintiff.

Mr Regeru instructed by Njoroge Regeru and Company Advocates for the Defendant.