



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL CASE NUMBER 32 OF 2018**

**LUCY MUTHONI MUTHUMBI.....PLAINTIFF**

**VERSUS**

**SHAMIRA CHEPKEMEI CHELANG'A.....1<sup>ST</sup> DEFENDANT**

**RAMLA CHERUTO CHELANG'A.....2<sup>ND</sup> DEFENDANT**

**WAIYAKI HINGA (PRACTISING AS)**

**WAIYAKI & ASSOCIATES ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. At all material times to this Originating Summons, and particularly the 14<sup>th</sup> October 2015, the first and 2<sup>nd</sup> Defendants held themselves as the owners “vendors” of a land parcel known as **Nakuru Municipality Block 15/632** measuring 0.0704 Hectares situated within Nakuru Town.

The plaintiff Lucy Muthoni Muthumbi was desirous of purchasing the said land, on terms agreed between the parties.

The plaintiff was represented by M/S Mugambi Nguthari & Co. Advocates while M/s Waiyaki & Associates advocates represented the vendors.

2. By **an agreement** entered into between the parties, and dated the **14<sup>th</sup> October 2015**, the land parcel was sold to the plaintiff by the vendors on terms appearing on the said agreement, which was attested to by the parties respective Advocates.

3. The purchase price was agreed at Kshs.6,500,000/=. A deposit of Kshs.700, 000/= was paid to the vendor’s advocates to hold as stakeholder pending completion. Annexure No 11(a) and 3.1

A further payment was made to the vendor’s advocates on the 29<sup>th</sup> March 2016 in the sum of Kshs.2, 000,000/= by RTGS - annexure No. 11 (b); also a stakeholder.

4. The said Kshs.2, 000,000/= Million was released to the vendors’ advocates upon its undertaking not to use the completion documents in any way adverse to the interests of their clients until they had paid the full purchase price, and upon further undertaking to return the said documents in the same condition, if for any reason the Agreement would not go through.

5. The completion period was 90 days from date of the execution of the sale agreement – Par 5.1 of agreement. The purchaser, having paid Kshs.2.7 Million, the balance stood at Kshs.3,800,000/=. It is noted that the completion documents were released to the purchaser’s advocates on the 15<sup>th</sup> March 2016 upon an undertaking by the said advocates, in terms sent out to the vendor’s advocates on the 24<sup>th</sup> March 2016. – Ext LMM V (a) and (b).

6. However, on the 1<sup>st</sup> November 2016 the vendor’s advocates wrote to the purchaser’s advocates rescinding the sale agreement – Ext LMM VI, and demanded release of the completion documents, without mention about the refund of the deposits.

7. By a letter dated 15<sup>th</sup> March 2017 the purchaser’s advocates wrote accepting rescission of the sale agreement, but demanded refund of the deposits, less agreed liquidated damages as continued in a letter marked as LMM VII, in line with clause 7.1.1 of the sale agreement. It talks of a retainer of 10% of the purchase price being the agreed liquidated damages if the purchaser defaults, or fails to complete payment of the

purchase price within the 90 days completion period, and upon a 21 days notice being given to complete and the default continues thereafter.

8. Following thereafter, the vendors' advocates undertook to refund the deposit vide several letters – LMM IX, LMMX, LMMXI and LMMXII when by the letter dated 22<sup>nd</sup> May 2017 the vendors' advocates sought indulgence of one month to make the refunds.

By a letter dated 5<sup>th</sup> May 2017 the purchaser's advocate wrote to the vendors' advocates seeking to complete the sale, if the penalties are waived in line with Clause 7.1.2 of the sale agreement, which request was agreed to, but on conditions that the purchaser pays ground rates and obtaining clearance certificates, which the purchaser paid, in the sum of Kshs.33,990 and Kshs.3,000/= respectively to the County Government of Nakuru on the 7<sup>th</sup> December 2017 and 15<sup>th</sup> December 2017 – Ext LMM XIV (a), (b), (c) and (d).

9. At this stage and after payment of the dues, the County Government declined to issue a Rates clearance certificate citing an ongoing case between **Jafer Sheikh Abdulkadir –vs- Shamira C. Chelang'a** and others, involving the suit property.

Upon such revelations, the purchaser's advocates perused the court file that revealed that the certificate of lease to the land parcel was issued to one **Felix Kumu Kariuki** on 18<sup>th</sup> February 2005, and on the 24<sup>th</sup> November 2006 was transferred to **Shire Maalim Osman** and another, and on 30<sup>th</sup> July 2014 transferred to **Jaffer Sheikh Abdulkadir**, the plaintiff in this case.

10. It thereafter transpired that the vendors herein obtained the certificate of lease on the 17<sup>th</sup> December 2014 two months after, upon which they were arrested and investigations commenced on how they obtained the certificate of lease. As at date of these proceedings, results of the investigations were not known.

11. Upon realization of the above events, the purchasers advocates, by a letter dated 12<sup>th</sup> January 2018 wrote to the vendors advocates demanding refund of the total deposit of Kshs.2,700,000/=, and further Kshs.100,000/= spent, with their consent –Ext LMM XVII.

Several other demands followed but the deposits were never refunded, and thus the vendors alleged a breach of Clause 8.3.6 of the sale agreement, necessitating filing of this originating summons filed on the 21<sup>st</sup> September 2018.

12. **By the Originating Summons** the plaintiff, (the purchaser in the sale agreement sought answers to several questions, and more importantly,

*(1) Whether the 3<sup>rd</sup> defendant was under a duty pursuant to under the agreement to refund the sum of Kshs.2,700,000/= received from the plaintiff as stake holder as per the sale agreement dated the 14<sup>th</sup> October 2015.*

*(2) Who between the vendors (1<sup>st</sup> and 2<sup>nd</sup> defendants) and the Advocates (3<sup>rd</sup> defendant) ought to refund the purchase price deposit paid pursuant to the sale agreement.*

*(3) Whether the said deposits should be refunded with interest at court rates, and who should bear costs of these proceedings.*

13. By an order, the plaintiff was granted leave to serve the Originating Summons and application for taking directions upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 6<sup>th</sup> May 2019. That was done on the 29<sup>th</sup> May 2019, in the Daily Nation Newspapers on the other hand, the 3<sup>rd</sup> Respondent, **Waiyaki & Associates Advocates** were served with the Originating summons by a licenced court process server, one Martin Musanga Liambala on the 5<sup>th</sup> October 2018 at the advocates offices, who received, signed and stamped. An affidavit of service was filed on the 24<sup>th</sup> December 2018.

14. Though served, no appearance or response to the originating summons were filed. Further hearing notices were also served, but no appearances were made or filed for the Advocates.

To that end, the originating summons stand unopposed.

I have taken the liberty to set out the genesis and reliefs sought in the Originating Summons above.

#### 15. **Analysis and determination**

Sufficient evidence by affidavit has been placed before the court to show that, on the face of the record, the two parties had the intention to enter into a legal relationship as evidenced by the sale agreement.

**The questions however that arise are whether the vendors, though holding a certificate of lease to the land parcel issued on the 17<sup>th</sup> December 2014 had knowledge on the existence of a court case, challenging the ownership of the land parcel to themselves and whether or not they held a valid and genuine certificate of lease which they could legally pass title to the plaintiff by way of sale.**

16. I have perused the proceedings in the ELC case No. 322 of 2015 filed on the 5<sup>th</sup> November 2015 against the vendors.

The legend of the certificate of lease does not show at all how the vendors came to be the registered owners, two months after it was

registered in the plaintiff's favour. They were arrested and an investigation file opened on possible fraud over their acquisition of the title.

17. In the circumstances, I find and hold that as at the date of the sale agreement, the 14<sup>th</sup> August 2015, the vendors knew that the property was not free from encumbrances – Clause 8.1 and 8.3.1, 8.32.

I find so because as at 27<sup>th</sup> April 2015 and thereafter, and before 14<sup>th</sup> August 2015 when they entered into the Sale agreement, they were under investigation by the office of the Director of Public Prosecutions on how they obtained the title to the land parcel.

18. When the ELC case was eventually filed against them they ought to have disclosed that fact, the new circumstances of the plot, pursuant to Clause 8.3.6 of the sale agreement. Instead they continued to demand, and received money from the plaintiff through their advocates.

19. At the time they were paid Kshs.2 Million, they were aware of the case. It is instructive that the 3<sup>rd</sup> defendant, Waiyaki and company advocates were acting for the vendors in the case. They ought to have advised the vendors of the consequences.

In the circumstances therefore, I have no hesitation to make a finding that the vendors, being the defendants herein, breached the terms of the agreement and frustrated its completion as the County Government of Nakuru could not issue rates clearance certificate, as a result of the case, and in particular clauses 8.3.6 (non disclosure).

**19. In this mix, what is the position of the 3<sup>rd</sup> defendant, Waiyaki & company advocates?**

Though served with the Originating Summons, the law firm failed to answer to the allegations.

The advocates held the deposit for the purchaser as stakeholders. A stakeholder in a sale agreement and mostly the vendors advocates, hold the deposit until satisfaction and or completion of the sale transaction or unless, by agreement, the Advocates are instructed to release the same or part therefore, to the vendors or, to a third party.

20. No instructions as far as the plaintiff's averments show, that she authorised release of the money or part of it to the vendors, or anybody else.

The Advocates were thus obligated to hold the deposit until authorised and/or upto completion of the sale transaction, or as they would be authorised to do.

21. If no completion is achieved for various reasons, the stakeholder is obligated to refund the deposit to the party who paid. Thus the sum of Kshs.2.7 Million held by the 3<sup>rd</sup> Defendant ought to be refunded to the plaintiff as the sale agreement was frustrated by events well known by the vendors, even before they entered into the sale agreement.

22. In **George Muriani Muhoro t/a A.M Muhoro Advocate –vs- Ndungu Kamiti, Civil Appeal No. 233 of 2003** the Court of Appeal held that

*“ ... A stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest.”*

The court went further to render that

*“ ... a stakeholder has a duty to deliver the money or property to the owner or owners once the right to legal possession or ownership has been established...”*

There been no contrary claim or explanation by the 3<sup>rd</sup> defendant, out of choice, there can be no other finding, but that the Advocates, Waiyaki & Co. Advocates are under an obligation to refund the full deposit to the plaintiff.

See also **Nelson Mutai t/a Kandie & co. Advocates –vs- Benson Mbuvi Kathenge, (2019) e KLR.**

23. The money deposited with the advocates (3<sup>rd</sup> defendant) was Kshs.2,700,000/=.

The Advocates ought to have maintained the same in its client's account. The court was not informed that instructions for placing the money in an interest earning account were given. It is however prudent that the advocates placed it as such. It is now three years down the line. However without such express instructions, I am unable to order refund of the money with interest.

**Consequently, and for the foregoing I order and direct that M/S Waiyaki and Company Advocates do refund the sum of Kshs.2,700,000/= to the plaintiff.**

24. As to the money paid to the County Government of Nakuru in the sum of Kshs.33, 990/= and Kshs.3, 000/= towards rates and rates clearance certificates, being Kshs.36, 990/= I hold that was an expense by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, which they had requested the plaintiff to pay on their behalf.

Without hesitation, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are under an obligation to refund to the plaintiff, with interest at court rates, from the 5<sup>th</sup> November 2015.

25. In the result, judgment is entered for the plaintiff against the defendants as hereunder:

*(a) A sum of Kshs.2,700,000/= to be paid back to the plaintiff by the 3<sup>rd</sup> Defendant, Waiyaki and Associates Advocates.*

*(b) The sum of Kshs.36,990/= with interest and court rates from the 15<sup>th</sup> December 2017 shall be paid to the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

*(c) The costs of these proceedings shall be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the plaintiff.*

Orders accordingly.

**Delivered, signed and dated at Nakuru this 30<sup>th</sup> Day of January 2020**

**J.N. MULWA**

**JUDGE**