



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT 1 OF 2011

STEPHEN WANYEE ROKI.....PLAINTIFF

-VERSUS-

K-REP BANK LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

DAVID WAWERU.....3RD DEFENDANT

JUDGMENT

BACKGROUND

1. The Plaintiff, filed this suit against the Defendants seeking the following prayers:-

- a) A permanent injunction restraining the Defendants jointly and severally either by themselves, their agents, servants, employees or otherwise whomsoever from selling or alienating or transferring the Plaintiffs land known as **LR. Dagoretti/Riruta/ 3753 and LR. Dagoretti/ Riruta 4724**.
- b) A declaration that the Plaintiff is to pay the overdraft upon being paid his debt by NCC/ County Government of Nairobi.
- c) The 2nd Defendant be ordered to pay Kshs 78,709,174.95 together with interest at 38.5% per annum and all bank charges till payment in full and damages for breach of contract and the psychological torture of the Plaintiff.
- d) The cost of the suit.
- e) The interest on 3 above.
- f) Any further or other remedy the Court may be allowed to grant

2. The 2nd Defendant in their draft defence dated 10th February 2015 denied ever entering into a contract with the Plaintiff for the construction of a school as particularized in the Plaintiff.

3. The 3rd Defendant in their statement of Defence dated 25th of August 2014 and filed on the 27th of August 2014, denied the entire contents of the amended plaintiff and avers that the 1st Defendant subsequently disposed the suit property being title **No. Dagoretti/ Riruta/ 3753 and Dagoretti/ Riruta/ 4724** by way of Public Auction where the 3rd Defendant was declared the highest bidder at the fall of the hammer hence the purchaser thereof on the 11th of January 2011 and therefore acquired a good title to the land upon the purchase thereof.

SUBMISSIONS BY THE PARTIES

PLAINTIFF

4. The Plaintiff filed submissions dated 18th September 2019. On the issue of *locus standi*, the Plaintiff submitted that it is trading as **S. Rocky General Constructor Limited** and that the 2nd Defendant acknowledged the Plaintiff made payments through him.

5. Plaintiff further submitted that the issue of *locus standi* was dealt with by **Hon Lady Justice Mary Kasango** in the application dated 21st November, 2018 filed by the 2nd Defendant and the assertion by the 2nd Defendant is therefore a waste of time.

6. As to whether there was a breach of contract between the Plaintiff and the 2nd Defendant, Plaintiff submitted that the 2nd Defendant carried out a valuation report and the findings were that the project was 97% complete but the 2nd Defendant delayed in payments and the same accrued interest. Plaintiff drew Court's attention to the case of **Radcliffe v Evans (1892) QB**.

7. In respect to the issue as to whether the 3rd Defendant was an innocent purchaser for value without notice, Plaintiff submitted that the conduct of the 3rd Defendant betrays him as he says he did not know the place and time when the auction took place. Further, the mode of advertisement was vague, as it did not provide for the place, time, purchase price and property details. Plaintiff refers to **Section 90 of the Land Act**.

8. The Plaintiff submitted that the total amount of money payable to him is Kshs 78,709,174.95 as pleaded in the plaint calculated at 38.5% from 30th of April 2014.

1ST DEFENDANT'S SUBMISSIONS

9. 1st defendant filed submissions dated 7th of October 2019. It submitted that it granted the Plaintiff loan facilities of Kshs 200,000, Kshs 1,000,000 and Kshs 400,000 on the 17th of July 2002, 16th of August 2004 and 21st of February 2007 respectively; that the aggregate loan advanced to the Plaintiff as at 21st of February 2007 was Kshs 3,115,798 exclusive of interest. The loans were secured by two charges over properties namely **Dagoretti/ Riruta/ 3753** (charged on the 13th of August 2002) and **Dagoretti/ Riruta/4724** (charged on the 1st of September 2004).

10. The 1st Defendant submitted that the Plaintiff defaulted in servicing the loan despite several reminders and as at 5th of December 2008, the loan remained in arrears with an outstanding balance of Kshs 3,816,527.73 which prompted the 1st Defendant to commence the process of recovering the loan(realising securities).

11. That on the 5th of December 2008 by way of registered post, the 1st Defendant issued statutory notice pursuant to **Section 74, 77 and 79 of the Registered Land Act (now repealed)**.

12. 1st Defendant further submitted that, the Plaintiff failed to repay the loan within the period given and on the 5th of October 2010, the 1st Defendant instructed **Garam Auctioneers** to conduct sale of the property by public auction to recover the outstanding loan. Notification of sale was sent to the Plaintiff via registered post on 10th November 2010.

13. That on instruction of the 1st Defendant, **Garam auctioneers** advertised placed an advertisement for sale of the property in the Daily Nation Newspaper pages 34 and 35 on 8th December 2010. The advertisement notified the Plaintiff and public of an intended auction on the property to be held on the 11th of January at 11.00am at the Auctioneer's office at **Muhu House, Commercial Centre, Nairobi**.

14. 1st Defendant submitted that the 2 properties were auctioned as advertised. Dagoretti/ Riruta/ 3753 auctioned at Kshs 1,400,000 and Dagoretti/ Riruta/ 4724 auctioned at Kshs 1,600,000.

a) They identified 2 issues for determination as follows:

i. Whether the 1st Defendant's statutory power of sale had crystalized.

ii. Whether the Plaintiff had met the threshold for granting of an order of permanent injunction.

iii. Whether the Plaintiff was entitled to the relief sought.

iv. Who should bear the cost of the suit.

15. While submitting as to whether the loan had crystalized, the 1st Defendant stated that Plaintiff and 1st Defendant entered into a loan facilities agreement advancing to the Plaintiff an Aggregate sum of Kshs 3,115,798 and during cross examination, the Plaintiff admitted that he did not repay the loan by the 21st of April 2007 and explained the reason for the default that the 2nd Defendant had allegedly failed to pay him monies owed to him under **tender No. 5 PAP/ CE/ 07/ 2005- school construction/ enhancement Korogocho/ Ngunyumu Primary School**.

16. Further, that it was a term of the contract that *interalia*, in the event of default the cost of recovering the loan and incidental expenses were to be borne by the Plaintiff; that Plaintiff's admission of non-payment of the outstanding loan confirm their non-performance of their obligation to repay the loan.

17. 1st Defendant further submitted that it was not privy to the contract between the Plaintiff and 2nd Defendant and the repayment of the loan was not subject to any extraneous factors. 1st Defendant further added that under the principle of sanctity of contract, the Plaintiff was bound by the terms of the contract and ought not to renege on his word at the expense of the 1st Defendant. 1st Defendant cited the case of **Machakos HCCC No. 215 of 2018- Jopa Villas LCC v Private Investment Corp & 2 others** where the court stated as follows:-

“Applicant is running away from the obligation lawfully imposed. Courts should not aid it in the quest but will instead uphold the rights of the 1st Defendant to recover monies lawfully advanced.”

18. 1st Defendant submitted that relief sought by Plaintiff is an equitable one and equity demand that **“he who comes to equity must come with clean hands”**; it submitted that by failure to repay the loan, the Plaintiff demonstrate guilty conduct and is not entitled to equitable relief sought. 1st Defendant cited the case of **Showind Industries v Guardian Bank Limited & Another (2002) 1 EA 284** where the court held that **being that an injunction is granted very sparingly...may be denied where the Applicant’s conduct does not meet the Approval of Court of Equity.**

19. On the issue of fraud, 1st Defendant cited the case of **Vijay Morjaria v Nansingh Madhusing Darbar & Another [2000] eKLR** where the court held that **fraud must be specifically pleaded and that particulars of fraud must be stated.**

20. 1st Defendant further submitted that, the Plaintiff seeks an equitable remedy of an injunction, purporting to stop an impending sale of the suit properties which were sold 8 years ago; relief sought has therefore been overtaken by events.

2ND DEFENDANT’S SUBMISSIONS

21. The 2nd Defendant filed submissions dated 30th of September 2019. He submitted that the Plaintiff does not have locus standi; that the issue was raised in the Notice of Preliminary objection dated 21st of November 2018.

22. 2nd Defendant further stated that indeed there was an advertisement for tender **PAP/ CE/ 07/ 2005** but the tender was awarded to **M/S Rocky General Contractors** which is a limited liability company with 2 directors namely : **Irene Njeri Kirima** (10 ordinary shares) and **Stephen Wanyee Roki** (90 ordinary shares) and not the Plaintiff,

23. He drew Court’s attention to the rule in **Foss v. Harbottle** to the effect that the proper Plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. He also referred to the case of **Salomon v Salomon (1897) A. C. 22 HL, Grace Wanjiru Munyinyi & another V Gedion Waweru Githunguri [2011] eKLR** and **Amin Akberali Manji & 2 others V Altaf Abdulrasul Dadani & another [2015] eKLR** that provided the exception to the rule in **Foss v Harbottle.**

24. 2nd Defendant concluded that the issue of *Locus Standi* is not a procedural issue that can be cured by **Article 159 (2) (d)** and on that limb alone the Plaintiffs case should collapse.

25. Secondly, the 2nd Defendant submitted the parcels were sold by way of public auction on the 11th of January 2011 thus prayer 1 of the amended plaint as it is, has been overtaken by events.

26. 2nd Defendant further submitted that the 2nd prayer in the amended plaint is not tenable since it appears there was a loan of Kshs 1,000,000 awarded to the Plaintiff on the 12th of May 2005 while the tender awarded was on the 24th of June 2005. This was way after the Plaintiff had already charged the parcels to the 1st Defendant.

27. 2nd Defendant further submitted that the letter of irrevocable authority was addressed to **S. Rocky General Contractors** and not the Plaintiff. All payments were to be made through K-Rep Bank. This did not amount to the 2nd Defendant standing in as a guarantor. The 1st Defendant wrote to the 2nd Defendant requesting the confirmation that the letter was from the 2nd Defendant and the 2nd Defendant never wrote back.

28. 2nd Defendant further submitted that it was not party to the loan agreement between the 1st Defendant and the Plaintiff and 2nd Defendant is not therefore liable to pay Kshs 4,477,598.84. 2nd Defendant denied being issued with a demand letter nor a notice of intention to sue.

29. In counterclaim, the 2nd Defendant seeks the following orders :

- i. A declaration that the Plaintiff breached the contract he entered into with the 2nd Defendant for the construction/ enhancement of Korogocho primary school Contract no. PAP/ CE/ 07/ 2005
- ii. General damages for breach of the agreement
- iii. The Plaintiff to be compelled to pay the 2nd Defendant Kshs 400,000 together with interest thereon
- iv. Costs of the counterclaim and interest thereon
- v. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2nd Defendant further seek general damages for breach of the agreement on ground of poor workmanship as follows:-

Ngunyumu primary School

- i. The Keys done to external walls were not horizontal and were poorly done.
- ii. Wall plate to the roof was not continuous.
- iii. Anchorage to the wall place was not with bolts as specified in the bill of quantities.
- iv. The roof covering was not fitted with rubber washers as required.

The areas not done are as follows:

- i. Finishes to eaves
- ii. Windowsills
- iii. Electrical fittings

Daniel Comboni Primary School

- i. The whole roof was not well aligned horizontally
- ii. The cover sheets were not in one place and no rubber washers were used
- iii. The water tank bearers were not placed vertically
- iv. The man holes were not aligned and were poorly constructed
- v. The wall plate was not well anchored.

The areas not done are as follows:

- i. Finishes to eaves
- ii. Ironmongery to doors
- iii. Electrical wiring and fitting
- iv. Connection to public sewer

30. On costs the 2nd Defendant drew court's attention to the case of **Attorney General V Halal Meat Products Limited [2016] eKLR** where the court held that **costs ought to follow the events unless the Court otherwise orders for good reasons** and no exceptions apparent or have been advanced for this Court to decline granting the 2nd Defendant costs of the proceedings.

3RD DEFENDANT'S SUBMISSIONS

31. In submissions dated 8th of October 2019, the 3rd Defendant submitted that the suit property was sold by public auction on the 11th of January 2019.

32. 3rd Defendant submitted that the Plaintiff has expressly admitted that there was an auction and its trite law that facts need not be further proved by evidence; that the certificate of sale issued confirms that the 3rd Defendant was declared purchaser in the sale by public auction held on the 11th January 2011. He referred to the case of **Njoroge Regeru Wanda Baird as the Administrator of the estate of the late George Neil Baird & 4 other [2015] eKLR** where the court held that certificate of sale issued to the 1st interested party is sufficient evidence that an auction took place.

33. In conclusion, the 3rd Defendant submitted that the Plaintiff has not demonstrated any fraud or invalidity on the part of the Auction; that the Plaintiff's remedy, if any, lies in damages but not cancellation of a sale to a *bona fide* purchaser for value without notice.

ANALYSIS AND DETERMINATION

34. I have considered evidence adduced by parties herein. I have also perused and considered documents and submissions filed. It is not disputed that loan was advanced to the Plaintiff by the 1st Defendant. The Plaintiff's property namely **Dagoreti/Riruta/3753** and

Dagoreti/Riruta/4724 were charged to the 1st Defendant to secure the loan. It is also not disputed that the loan advanced was not repaid as scheduled; which resulted in the Plaintiff's property being auctioned. The Plaintiff's argument is that the 2nd Defendant guaranteed to facilitate repayment of the loan to the 1st Defendant from proceeds of tender awarded by 2nd Defendant to Plaintiff.

35. Upon considering evidence adduced, I consider the following to be in issue:-

- a) Whether issue of *loci standi* in respect to Plaintiff was dealt with by Court and if not whether the Plaintiff has *loci standi* to file the claim herein.
- b) Whether there was privity of contract between Plaintiff and 2nd Defendant/whether the loan was guaranteed by the 2nd Defendant.
- c) Whether there was fraud in auction of the property herein/ Whether the 3rd Defendant is a *bonafide* purchaser of the suit property.
- d) Whether the Plaintiff is entitled to payment of kshs 78,709,174.95 from the 2nd Defendant.
- e) Whether the 2nd Defendant's counterclaim was proved.

36. In respect to issue of *loci standi*, I have perused the ruling delivered by **Justice Kasango** on 5th March 2019 in respect of preliminary objection dated 21st November 2018. She stated in the ruling that the applicant abandoned objection No.1 and No.3. The 2nd Defendant having abandoned the objection on *loci standi* means it conceded that Plaintiff had capacity to file this suit and should not be raised again at this stage. I treat the issue as abandoned as per **Justice Kasango's** ruling.

37. As to whether the 2nd Defendant guaranteed repayment of loan by the Plaintiff to 1st Defendant, what came out clearly from evidence is that 2nd defendant upon giving tender to the Plaintiff, it undertook to remit payments through K-rep bank. Does that amount to guarantee. The Plaintiff argued that the 2nd Defendant issued an irrevocable letter of guarantee. The 2nd Defendant's argument is that the letter of guarantee which was addressed to **S. Rocky Contractors** was that it committed to make all payments which fell due to S. Rocky in accordance with clause 30 of conditions of contract through K-Rep bank and that it did not amount to the letter standing as guarantee for S. Rocky General Contractors.

38. On perusal of the letter dated 15th August 2005 from the 2nd Defendant to the 1st Defendant bank, I note that it states as follows:-

“I hereby grant irrevocable authority for all payments which fall due to you in accordance with clause 30 of conditions of the contract to be remitted to you through K-Rep bank...”

39. By letter dated 5th May 2006, K-Rep bank wrote to the 2nd Defendant to confirm whether it issued the said letter dated 15th August 2005 and whether the undertaking remain in force until cancelled by the 1st Defendant and in the alternative do fresh undertaking to the bank (1st defendant) it emerged from evidence that the 2nd Defendant never responded to the 1st Defendant. From the letter written by the bank to Plaintiff, the 2nd Defendant was committing to remit payments through it (K-Rep bank). The bank is not stating that it will guarantee payment of the loan to 1st Defendant. The letter says when payments fall due. It is an arrangement of channel of paying the Plaintiff when the payments fell due. It is an arrangement between Plaintiff and 2nd Defendant. The letter is not addressed to the bank but copied to it.

40. Further when the bank sought confirmation from the 2nd Defendant, there is no response. No fresh undertaking was either given by 2nd Defendant.

41. From the foregoing, I find that the by the 2nd Defendant never guaranteed repayment of loan by the Plaintiff to the 1st Defendant.

42. I now wish to consider whether proper process was followed in auctioning the property. 3rd Defendant's argument is that he is a purchaser for value who purchased the property in a public auction on 11th January 2011. The question is whether he used his position as Member of Parliament for Dagoreti South to influence the auction. The 3rd Defendant however testified that he was elected to parliament 2 years after the sale, March 2013. 3rd Defendant said he saw advert for sale of the property by Garam Auctioneers. He said he personally attended the auction at Muhu Holdings House on 11th January 2011 and bided together with others and among bidders close to 10 he was declared highest bidder for the 2 properties for total bid of kshs 3,000,000 and paid 25% deposit immediately. He produced in court certificate of sale issued by auctioneer.

43. No evidence was tendered to suggest that the 3rd Defendant interfered with the auction process as alleged by Plaintiff. There is confirmation that an auction was conducted and 3rd Defendant attended the auction and other persons participated as shown by list of bidders.

44. From the foregoing I find that the auction conducted on 11th January 2011 and the 3rd Defendant declared highest bidder and is there bonafide purchaser of the two properties herein.

45. In respect to plaintiff's claim of kshs 78,709,174.95 by the Plaintiff against the 2nd Defendant, the 2nd Defendant's counterclaim citing non-compliance of the contract by the Plaintiff noncompliance as set. Breaches alleged are particularised as captured in the counterclaim. The 2nd Defendant challenged final report prepared by PW2 and that the report is alleged to have been prepared in 2010 yet it is signed on

29th November 2018. 2nd Defendant contend that the report is an afterthought prepared in the pendency of this suit; 2nd Defendant further questioned why it was not filed together with the suit in January 2011; that the Plaintiff did not specifically plead or prove by way of any receipt kshs 23,452,423.40 and never showed how the figure kshs 78,709,174.95 was arrived.

46. The 2nd Defendant questioned the following

- a) That there is no proof of labour paid is shown nor prove that there was idle plant on site; and if they were hired, documents should have shown.
- b) That delayed payment was not provided in the contract.
- c) How PW2 arrived at the figures for preliminaries yet in his evidence, he said he did not see contract.
- d) That as per their architect which have shown how kshs.5,571,094.60 on preliminaries in respect security, water, insurance, electricity, access roads was tabulated.
- e) That the contract did not provide for tied up capital assessed at kshs 8,523776.
- f) That exgratia of kshs 4,477,598.84 is not explained.
- g) Auctioneer fee is special damages which ought to have been specifically pleaded and further that it was as a result of failure by plaintiff to service the loan.
- h) That there is no judgment for defamation to justify claim of kshs 1,500,000 for defamation.
- i) On administrative cost 2nd Defendant submitted that the Plaintiff was to meet its own administrative cost
- j) poor workmanship

47. 2nd Defendant urged court to dismiss entire kshs.23,452,423,40. On costs, 2nd Defendant submitted that no demand notice was issued by Plaintiff before filing suit and in the unlikely event that he succeed, he should be denied costs.

48. That Plaintiff was further in breach by delaying in providing performance bond in that, instead of providing within 30 days from 24th June 2005, it provided on 11th October 2005 and was not able to complete project as agreed in the contract in October 2010, 5 years from initial completion date of October 2005. That clause 16.1 provide for kshs 20,000 per week which brings a figure of kshs 5,200,000 for the 5 year period of delay. Further that to date no completion certificate has been issued which makes delayed period 14 years thus 52 weeks multiply by 20,000 bring a sum of kshs 14,560,000.

49. 2nd Defendant seek declaration that Plaintiff is in breach in contract it entered with Plaintiff in construction of Korogocho Primary School contract No. PAP/CE/07/2005.

50. 2nd Defendant argued that it did what it acted to mitigate the loss by providing Plaintiff with drawings of toilet to connect to sewer but Plaintiff engaged in disappearing acts; that the toilet to date cannot be used as it is not connected to sewer.

51. On the other hand, Plaintiff's argument is that the work is 97% complete and is entitled to amount claimed from the 2nd defendant. This is confirmed by audit of project done on 16th April 2010. Plaintiff deny being in breach.

52. The particularized claim by Plaintiff and counterclaim by 2nd defendant arise from the contract executed between the two parties. There is no dispute that the contract was entered into and it is evident that dispute arose concerning performance of the contract.

53. I have perused contract between Plaintiff and 2nd Defendant and note that clause 21 provide mode of settlement of dispute that may arise from the contract. It provides that any dispute that cannot be amicably settled between the parties shall be referred by either party to arbitration where they were to agree on appointment of arbitrator failure which chairman of Chartered Institute of Arbitrators Kenya branch would appoint. There is no mention of reference having been made to arbitrator. There is no doubt that a dispute arose between the Plaintiff and 2nd Defendant on performance of the contract. The dispute has not been settled and the parties having chosen arbitration as a mode of resolving their dispute, my view is that they should have exhausted that as between themselves.

54. From the foregoing, I do refer the dispute in respect of performance of contract between Plaintiff and 2nd Defendant to arbitration. They can agree on appointment of arbitrator within the next 14 days failure which Chairman Chartered Institute of Arbitrators Nairobi Branch to appoint arbitrator.

55. FINAL ORDERS

1. That the 2nd Defendant did not guarantee loan advanced by the 1st Defendant to the Plaintiff.

2. That the Plaintiff's property was properly auctioned and 3rd Defendant is *bonafide* owner of properties namely: Dagoretti/Riruta/3753 & Dagoretti/Riruta/4724.

3. That dispute between Plaintiff and 2nd Defendant on performance of contract is referred to Arbitration. Parties to appoint an Arbitrator within the next 14 days from today's date failure which Chairman Chartered Institute of Arbitrators Nairobi Branch to appoint Arbitrator.

4. Plaintiff to pay 1st and 3rd Defendants' costs of this suit.

Judgment dated, signed and delivered at Nairobi this 21st day of February, 2020.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Langat: Court Assistant

Maina h/b for Mwangi for Plaintiff

Odunga for 1st Defendant

Mokua for 2nd Defendant