



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

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

**CIVIL CASE NO. E150 OF 2020**

**BETWEEN**

**DAVID LANG ROSS .....PLAINTIFF**

**AND**

**KODI KODI LIMITED.....1<sup>ST</sup> DEFENDANT**

**WAWERU KURIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The material and undisputed facts giving rise to this case are set out in the Plaintiff dated 11<sup>th</sup> May 2020 and subsequently amended. That on 31<sup>st</sup> August 2018, the Plaintiff entered into a Joint Venture Agreement with the 1<sup>st</sup> Defendant for development of real estate in Nanyuki. As a result of the Joint Venture Agreement, the Plaintiff and the 1<sup>st</sup> Defendant incorporated Kodi Kodi Haven Limited to carry out all the business of the Joint Venture Agreement.

2. In May 2019, a dispute involving the mismanagement of about Kshs. 7,625,913.00 by the Defendants arose out of and in connection with the Joint Venture Agreement. The Joint Venture Agreement was terminated on terms negotiated in a Settlement Agreement (“the Agreement”) dated 19<sup>th</sup> July 2019. In the said Agreement, the Defendants admitted responsibility for the embezzlement of funds and agreed to pay Kshs 36,000,000.00 (“the Settlement Amount”) to the Plaintiff. The Agreement further provided that the Defendants would pay the Settlement Amount by paying an initial amount of Kshs. 4,000,000.00 before 12<sup>th</sup> August 2019 and the balance of **KShs 32,000,000.00** would be paid in installments of Kshs 2,500,000.00 until payment in full

3. In the event of default, the Settlement Amount was to be subject to a default penalty of Kshs 4,000,000.00 making the entire Settlement Amount, Kshs. 40,000,000.00 (“the Default Settlement Amount”). Additionally, the Defendants agreed to put up as security, all those properties set out in Schedule II and III of the Agreement as well as Affidavits of Resignation of the 2<sup>nd</sup> Defendant as a Director/Shareholder of the 1<sup>st</sup> Defendant. The Agreement further provided that if the Defendants defaulted, failed and/or neglected to make full, timely payments of the Default Settlement Amount, then the 2<sup>nd</sup> Defendant would forfeit his interests, proprietary or beneficial, and all receivables related to or involved with all those Properties set out in Schedules II and III and the Plaintiff would be entitled to exercise his right by realizing these securities however he would choose subject to existing rights in relation to any signed agreements by the 2<sup>nd</sup> Defendant.

4. The Defendants executed blank Agreements for Sale and Transfer Deeds as well as the Land Control Board Consent Application Forms and Share Transfer Forms which were to be held by the Plaintiff as securities to be realized upon default. With respect to the Properties set out in Schedule II and III, it was agreed that the Defendants would facilitate Capital Gains Tax Certificates or Exemptions, as may be applicable, in the event of default to enable the Plaintiff pay for Stamp Duty. As additional comfort to the Plaintiff, the Defendants voluntarily lodged a Restriction against the Properties in Schedule II of the Agreement at the Laikipia District Land Registry to the effect that any completion of the registration could only be made in favour of the Plaintiff’s nominee.

5. The Defendants failed to pay the Default Settlement Amount and the Plaintiff began the process of realizing the securities. In due course, the Plaintiff requested the Defendants to facilitate the processing of Capital Gains Tax (“CGT”) Certificates or Exemptions to enable him pay for Stamp Duty and complete the transactions. The Defendants processed the CGT requirements for 31 properties in Schedule II and all the properties in Schedule III. The Defendants applied for CGT Exemption with respect to the 31 properties in Schedule II which required them

to co-operate with KRA for purposes of the Plaintiff completing the payment of Stamp Duty. With respect to Schedule III, the Defendants applied for CGT Certificates which required CGT duty to be paid before the Plaintiff could proceed to pay for stamp duty.

6. The Plaintiff complains that despite several reminders to the Defendants requesting them to complete the CGT processes, they have not done so thus halting further processing of the remaining 47 properties under Schedule II. The consequence was that the Plaintiff only had the option of paying for CGT duty on behalf of the Defendants in respect of 4 Properties under Schedule III in order to proceed with the payment of Stamp Duty but could not proceed further with the properties under Schedule II.

7. The Plaintiff complains that the Defendants have used the CGT technicality so as to defeat the realization of the properties under Schedule II and forced it to incur CGT duty costs which should have been borne by the Defendants. The Plaintiff further complains that the Defendants have refused to participate in their own-requested valuation of Property not itemized in Schedules II and III of the Agreement effectively frustrating the Plaintiff/Applicant from realizing the Properties under Schedule II of the Agreement.

8. The Plaintiff therefore seeks the following reliefs from the court:

i. A Declaration that the Defendants breached the Settlement Agreement through their failure, neglect and/or refusal to pay the Settlement Amount as provided for in Clause 3 of the Agreement.

ii. A Declaration that the 1<sup>st</sup> Defendant has breached the terms of the Agreement *by failing, neglecting and or refusing to either pay the Default Settlement Amount of Kenya Shillings Forty Million (KShs. 40,000,000/=) or to forfeit its interests, propriety or beneficial, and all receivables related to or involved with all those Properties set out in Schedules II and III of the Agreement as provided for in Clause 5.3 of the Agreement.*

iii. A Declaration that the 1<sup>st</sup> Defendant has breached the terms of the Agreement by intentionally frustrating the Plaintiff's efforts to realize the securities by refusing and or declining to pay or complete Capital Gains Tax requirements and or refusing to make the necessary applications for CGT exceptions where necessary.

iv. An Order of Specific Performance compelling the Defendants to pay the Default Settlement Amount as provided for in Clause 3.2 of the Agreement.

v. An Order directing the Defendants to facilitate the transfer of the securities, being all those Properties set out in Schedules II and III of the Agreement as provided for in Clause 5.3 of the Agreement, to the Plaintiff and/or his nominee by processing all the necessary documents needed for the transfer to be effected.

vi. In the alternative to prayer (v) above, an Order compelling the Deputy Registrar, Laikipia District to effect the transfer of the securities, being all those Properties set out in Schedules II and III of the Agreement as provided for in Clause 5.3 of the Agreement, to the Plaintiff and/or his nominee.

vii. In the alternative to prayer (v) and (vi) above, an Order directing the 1<sup>st</sup> Defendant to forfeit its interests, propriety or beneficial, and all receivables related to or involved with all those Properties set out in Schedules II and III of the Agreement as provided for in Clause 5.3 of the Agreement by facilitating the Capital Gains Tax Exemptions.

viii. In the alternative to prayer (vii) above, an Order compelling the Kenya Revenue Authority to waive the requirement for CGT exemptions for the properties in Schedule II and III of the Agreement to allow the Plaintiff pay for stamp duty on the Properties to facilitate the transfer of the properties to the Plaintiff or its nominees.

ix. In the alternative to prayer (viii) above, an Order compelling the Kenya Revenue Authority to advise on a nominal amount to be paid as Capital Gains Tax for properties in Schedule II and III of the Agreement and allow the Plaintiff to pay the same in spite of the failure, neglect and/or refusal to do so by the Defendants.

x. In the alternative to prayers (iii) and (iv) and (v) above, an Order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay to the Plaintiff a sum of **Kenya Shillings Forty Million Only (KShs 40,000,000/=)**, being the Default Settlements Amount provided for in Clause 3.2 of the Agreement.

xi. An Order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to facilitate the transfer of the securities to the Plaintiff and/or his nominee by processing all the necessary documents needed for the transfer to be effected.

xii. An Order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants not to interfere in any manner whatsoever with the Properties in Schedules I and II by making representations to anyone else over the same Properties.

xiii. General damages for breach of contract by the Defendants.

xiv. Costs of the suit

xv. Interest on costs and damages at court rates from date of filing until date of payment in full.

xvi. Any further relief that the Court deems fit to grant.

9. The Defendants have filed a Defence and Counterclaim dated 6<sup>th</sup> October 2020. The Defendants admit the Settlement Agreement. Material to this determination is the averment by the Defendants that they are willing to assist in completion of the CGT approval process but the Plaintiff's attempt to transfer all the security to his name or his nominee while also attempting to devalue the Securities he held have caused the Defendants to halt the process and attempt to resolve the stalemate. The Defendants add that despite several efforts, the Defendants ceased to completely negotiate with the Plaintiff because he did not provide a basis for valuation and refused to produce an independent audit that contradicts the Defendants valuation figures. It is worth noting that in the Counterclaim, the Defendant pray for, inter alia, the following orders:

- i. An order of Specific performance that the Plaintiff selects property worth the Default Settlement Amount from the three projects and that which is in excess be returned to the Defendants in observance with the Settlement Agreement;
- ii. As an alternative to prayer (i), an Order that the Defendants be allowed to submit a proposal selecting property worth the Default Settlement Amount to be transferred by the Plaintiff.

10. It is clear from the facts I have recited above, the dispute between the parties concerns how to implement the Settlement Agreement. The Plaintiff's concern as shown in the reliefs sought in the Plaintiff is either payment of the Settlement Amount or payment of CGT to enable him realize the securities in his hands. The Defence and Counterclaim shows that the Defendants are willing to complete the process but they contest the value of the properties that the Plaintiff seeks to realize.

11. In the course of these proceedings, I implored the parties to see if they can resolve the matter amicably but this was not possible hence I am called upon to determine the Plaintiff's Notice of Motion dated 2<sup>nd</sup> April 2020 in which the Plaintiff seeks the following orders:

[3] THAT this Honourable Court be pleased to issue an order directing the Defendants/Respondents to deposit in Court or in a joint interest earning Bank Account in the joint names of the Advocates for both parties the Settlement Amount of Kenya Shillings Forty Million Only (Kshs. 40,000,000/=) as Security pending the hearing and determination of this Suit.

[4] THAT this Honorable Court be pleased to issue an order of injunction restraining the Defendants/Respondents, their employees, servants and/or agents or beneficiaries from selling, transferring, alienating, developing or otherwise in any way whatsoever dealing with all that property under Schedule II of the Settlement Agreement dated 16<sup>th</sup> July, 2019 to the detriment of the Plaintiff pending the hearing and determination of the suit herein.

12. The application is supported by the affidavits of the Plaintiff, sworn on 11<sup>th</sup> May 2020 and 2<sup>nd</sup> October 2020 respectively. It is opposed by the Defendants through the replying affidavit sworn on 26<sup>th</sup> August 2020 by Waweru Kuria, the Chief Executive Officer of the 1<sup>st</sup> Defendant. Both parties have filed written submissions in support of their respective positions. For reasons that will be apparent I do not propose to rehash the nature of the dispute as the issues in dispute are clear from the outline I have set out above.

13. The only issue for determination is whether I should grant an injunction restraining the Defendants from transferring or in any dealing with the properties subject of the Settlement Agreement. I say so because the Plaintiff has pleaded that the Defendants executed blank Agreements for Sale and Transfer Deeds as well as the Land Control Board Consent Application Forms and Share Transfer Forms which are held by him as securities to be realized upon default. Since the Plaintiff holds the title documents as security, he cannot insist on deposit of money pending hearing and determination of the suit.

14. The court will issue a temporary injunction only if the Plaintiff proves that the Defendants threaten to dispose of the subject matter of the suit. In this instance, the Plaintiff admits he is in possession of the title documents and all the necessary documents necessary to effectively transfer the properties to himself or any third party.

15. Further, any transfer of the suit properties by the Defendants would be impeded by the restriction in favour of Mr Tom Okuku Ngeri, the Plaintiff's nominee, dated 7<sup>th</sup> August 2019 addressed to the Laikipia District Land Registrar by the advocates for the 1<sup>st</sup> Defendant requesting the Land Registrar, "*to place a conditional restriction that the transfer of the referenced properties can only be in favour of Mr Tom Okuku Ngeri (ID No. \*\*\*) as nominee of David Lang Ross.*" The letter further states that the 1<sup>st</sup> Defendant confirms that, "*It shall not attempt to transfer any of the referenced properties to any party whatsoever unless Mr Tom Okuku Ngeri discharges the conditional restriction.*" The letter is executed by the 1<sup>st</sup> Defendant and by Mr Tom Okuku Ngeri who states that he has read and confirmed the contents of the letter dated 7<sup>th</sup> August 2019.

16. The Settlement Agreement is clear on how the subject matter is to be secured and the Plaintiff has additional comfort provided by the Defendants forbearing to take any steps to transfer the suit property in terms of the letter dated 7<sup>th</sup> August 2019 addressed to the Land Registrar. I therefore do not see any purpose for granting an injunction pending the hearing and determination of the suit.

17. I have avoided commenting on the merits of the parties' positions because I hold that this is a matter in which the parties would benefit from alternative dispute resolution given the nature of the parties' investment, interest of third parties involved and the need for quick resolution of the matter, I propose to refer it to arbitration. It is also for that reason I will not award costs as this would only aggravate the dispute and undermine alternative dispute resolution which this court is enjoined by **Article 159** of the Constitution to promote.

18. For the reasons I have set out above, I therefore make the following orders:

- a. I dismiss the Notice of Motion dated 2<sup>nd</sup> April 2020 but with no order as to costs.
- b. The parties are hereby directed to show cause why I should not refer this suit for arbitration under **section 59C** of the **Civil**

**Procedure Act** as read with **Order 46 rule 20** of **Civil Procedure Rules** on 4<sup>th</sup> December 2020.

**DATED** and **DELIVERED** at **NAIROBI** this **30<sup>th</sup>** day of **NOVEMBER 2020**.

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Ms Omiti instructed by Ngeri, Omiti and Bush Advocates LLP for the Plaintiff.

Mr Omakalwala instructed by Kazi Advocates LLP for the Defendant.