



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 75 OF 2014

1. ALEC ROGER AGNES VAN WUK

2. MWAMBUNGU BAY LIMITED.....PLAINTIFFS

VERSUS

ANGELO OWINO T/A

ANGELO OWINO & CO. ADVOCATES.....DEFENDANT

J U D G M E N T

1. This suit was instituted by a plaint dated the 9/5/2014 and filed in court on 13/6/2014 by which the plaintiffs sought recovery of an aggregate sum of Kenya shillings eight million (Kshs 8,000,000) allegedly paid to the defendant as a lawyer who transacted a sale and receive payment over **Kwale/Ramisi Kinondo Squatter Settlement Scheme/117 and 88** said to have been registered in the names of Feldina Wangui Kingori and John Njombon Kingori respectively. The agreement was dated 12/9/2013 and provided among other terms that the purchase price would be Kshs.8,000,000/= for each title and the agreed deposit of Kshs 4,000,000 for each title would be held in trust by the defendant's firm as stakeholders pending completion.

2. Once the deposit was paid to the defendant and before completion, third parties to the agreement came up bearing the original title and laid a claim to be the rightful owner of the property thus raising doubt on the title by the vendors represented by the Defendant. On such realization, the plaintiffs plead that they demanded a refund of the deposit paid only to be informed by the Defendant that the same had been released in breach of the defendant's fiduciary duty as a stakeholders and while acting fraudulently in collusion with the masquerade vendors by releasing the deposit without the plaintiffs authority, personally and physically seeking to withdraw the money in cash and failing to give details on how the money was paid out.

3. On account of such happenings it was pleaded that the plaintiffs had suffered loss and were entitled to a judgment against the defendant to the sum together with costs and interests. Filed together with the plaint was a witness statement by one Apollo Mutisyo Muinde detailing the transaction history and payment of the deposit, together with a list containing some 16 documents as exhibits in the matter?

4. When served the defendant filed a statement of defence in which it was conceded that he did act for the vendors believed to have been Feldina Wangui Kingori and John Njomba Kingori over the subject property and that the deposit was only released upon all the completion documents having been released to the plaintiff's advocates.

5. The defendant however contended that there was no specific clause in the agreement for sale that made provision for stakeholding and that he did release the deposit to his clients upon agreement between the vendors and the purchasers to so release and that the release was done on the belief that the payees were the true and genuine vendors. That the title by his client was impugned was admitted together with the fact that a report was made at Urban Police Station where statements were recorded including a statement by Mr. Apollo Muinde Advocate. It was then pleaded that the agreement between the parties specifically provided that the vendors would be liable to refund the deposit if there was a failure to deliver all documents so as to achieve completion and that the obligation to refund was upon the vendors and not the defendant as their advocate.

6. It was additionally pleaded that the property was bought as it were and that there was no agreement for stake holder and that any stake holding could only be by Apollo Muinde Advocate and not the defendant. The defendant also filed a witness statement in which the pleadings are reiterated with an admission that he did withdraw the sum in cash and paid to the vendors who then signed acknowledgment. The defendant equally filed a list of some 9 documents which are essentially the same documents filed by plaintiff.

7. To the said defense the plaintiff filed a Reply to Defense on the 28/7/2014 in which it was asserted that the variation of percentage of deposit from 10% to 50% was not a blanket exclusion of the Law Society Conditions of Sale and further that there was never agreement, by the plaintiffs, as purchases, to have the deposit released to the vendors.

8. With the leave of the court the defendant issued a third party notice against the two vendors to the transaction but there is no evidence that the said notices were ever served. This notwithstanding the fact that on the 24/5/2016 the defendant's advocate promised to file Affidavit of service. Equally, no attempt was made to seek directions on the notices and I infer that the defendant did not intend to genuinely pursue the notice and have it dealt with by the court. I will thus not have regard to the Third Party Notices in this determination.

9. Before evidence was taken and at the trial conference three issues were identified and isolated, for determination by the court, as follows:-

- i. Was the sum of Kshs.8,000,000/= paid to the defendant as stakeholder being the advocate for the vendors?
- ii. Whether the sum of Kshs.8, 000,000/= is recoverable from the defendant.
- iii. Whether the 3rd parties indeed sold the parcels of land and if so, were they paid the defendant the sum of Kshs.8,000,000/=
- iv. Who should meet the costs of the suit?

Evidence by the plaintiff

10. After several adjournments to enable parties attempt an out of court settlement, without success, the matter was heard by the complainant calling the two witnesses who had filed witness statement while the defendant was the only witness who gave evidence. The list of documents dated 9/5/2014 was by consent produced as exhibits P1 – 16.

11. pw 1, 1st plaintiff adopted his witness statement dated 10/7/2014 as evidence in chief with the only correction being that one of the properties was plot no. 117 and not 177. The gist of the evidence is that having identified the properties for sale, he executed an agreement and had the money transferred to his advocate for onward transmission to the defendant as advocate for the vendors but thereafter there emerged a problem of other persons claiming title to the land and he then informed his advocate to establish the truth.

12. On cross-examination, the witness said that after the deposit was paid the real proprietors of the land visited Mr. Apolo Muinde's office with the original documents and therefore he did not complete payment by paying the remaining 50% of purchase price. On the identity of the vendors he dealt with, he said he only met a man and not a woman. In re-examination, the witness said the person he later met in Mr. Apolo's office had the original title and said he was not selling the land.

13. PW 2, APOLLO MUIINDE, ADVOCATE, also gave evidence by adopting his witness statement dated 9/5/2014 and filed on 13/6/2014 as evidence in chief. That statement had the chronological events from inception of the transaction to the time it become apparent that the persons who posed as the vendors were in fact masquerades.

14. He said that he did successfully have the sum of Kshs.8,000,000/= paid to the defendant's account on 27/9/2013 at 2.41pm but on 30/9/2013 he received the information that the real owners of the parcels of land had surfaced with their claim upon which information he called the defendant who then informed him that he was still in possession of the funds and informed him of the development with advice that the sums ought not be released. On further due diligence as to the ownership of the parcels of land, the witness said that he dispatched an agent to go to Kwale land Adjudication offices to establish who had paid the stand premium for the parcels and made a discovery that even though the payments were made by person with the same name as those in the titles, the identity card numbers differed from those in the title documents provided by Mr. Owino. From the land Registrar, Kwale, the witness got the contacts of the genuine proprietors who were notified and did visit his offices with the original documents.

15. Thereafter the witness said that Mr. Owino started avoiding his calls and he then decided to suspect foul play by fraud and then reported the matter to the police and advised the plaintiffs to seek refund from the defendant.

16. When cross examined, the witness said that it was the defendant who gave to him the names of the vendors for purposes of drafting the agreement for sale. He said the land was identified by the 1st plaintiff's friend who then also identified the defendant as the lawyer for the vendors. He pointed out that the deposit of Kshs. 4,000,000/= for each property was paid to the defendant as stakeholder and was not due for release to the vendors before the completion by transfer to the plaintiffs. The witness made specific reference to the agreement at clause 10 B(i) & (ii) to have provided the remedies in case of default. He said the defendant did provide the documents of title for purposes of completion but a verification proved that the identification card number were indeed for different people and that the identity cards and pin certificate copies given to him were in fact fake. When questioned by the court the witness said no undertakings were exchanged between him and the defendant which he considered was an error but reiterated that the deposit was to be held as a stakehold in terms of the LSK conditions of sale.

17. On his side the defendant gave evidence by adopting his witness statement filed in court on the 11/11/2014 and produced the list of documents as exhibits. The essence of that evidence was that he availed to the plaintiff's advocate complete set of documents for purposes of transfer but the same were never presented nor returned to him to the date of giving evidence and that he came to learn that people different from his client had surfaced as the real owners of the land. He denied any agreement for stakeholder and therefore he denied liability for refund of the money paid to him on the basis that the agreement was inconsistent with the law society conditions of sale. He produced payment vouchers dated 2/10/2013 as evidence of disbursement and insisted that the plaintiffs should proceed and have the transfers registered in their names.

18. When cross examined, the defendant told the court that the vendors were introduced to him by an agent when they approaching him in his office for purposes of acting for them in the transaction. He conceded that his agent obtained the Land Control Board consent and that the agreement incorporated LSK Conditions of Sale by which conditions 7 bound him, if he was a stakeholder, to only release the deposit upon the written consent of the purchasers advocate but contended that he did not know that he was to hold the money till completion.

19. When referred to the acknowledgment of payment by the vendors the defendant said that he prepared the same on 2/10/2013 that it was the lady who received both payment and that the man appeared older than the lady. He confirmed having paid out by cash on two consecutive days having withdrawn the cash on two different days even though the acknowledgments are dated the same day.

20. On the third party notices, he said he had served same through a process server whose name he could not remember and that he had no Affidavit to evidence service adding that in the application for third party notice he did not exhibit the acknowledgement of the alleged payment. On re-examination and when questioned by the court the defendant conceded that the acknowledgments were over only one property and that he could not remember the exact date he paid the vendors since the acknowledgments were signed before payment.

21. With the evidence of the 3 witnesses, both cases were closed and parties then sought to offer written submissions to be highlighted orally. The plaintiff submissions are dated 11/12/2017 and filed on 13/12/2017 while those by the defendant are dated and filed on the 26/2/2017. I have had the benefit of reading and appreciating the submissions and I will give full regard to the same in this decision.

Analysis of the pleadings and evidence

22. That the plaintiffs entered into written agreements dated 12/9/2013 for the sale of two parcels of land from two others persons represented as the proprietors of the registered interests thereon at an agreed price and that the sum of 8,000,000/= being 50% of the purchase price was deposited with the defendant as an advocate for the vendor are not disputed but common grounds. The only dispute is on what basis and capacity was the defendant so paid.

23. In the agreement produced as a common exhibit between the two parties, there is clause 5 which expressly incorporate The Law society conditions of sale (1989) edition. Of those conditions, the provision I find relevant and of assistance to court reads:-

“The purchaser shall on or before entering into the contract pay to the vendor’s advocate as stakeholder such a sum as will, together with any preliminary deposit paid to the vendor or his agent, amount to Ten per centum of the purchase money...”

24. I do find that the Law Society Conditions of sale were expressly made part of the agreement for sale between the parties and that by those conditions of sale deposit paid to an advocate for the vendor is paid to him in the capacity and position of a stakeholder. In that capacity, he remains a trustee for the funds mandated to hold the same pending the happening of an agreed event of completion short of that, the release can only be with the consent of the purchaser.

25. When so paid as a stakeholder, the defendant had no semblance of any right to release the said for to his client before completion and without an express authority of the purchase or his advocate. In failing to do so he breached his professional duty and is bound to make good such breach.

26. The second reason the defendant position is not capable of countenance is the assertion that the acknowledgments produced by him were signed before he withdrew the money on date he could not remember. The two acknowledgments exhibited were evidently signed by one person over one parcel yet the payment was due to two different persons for two separate parcels. Even if one was to believe the defendant that he indeed disburse, that disbursement could only be in respect of one vendor and over one property.

27. The upshot is that I do find that the defendant is liable for each of the plaintiffs for the refund of Kshs.4, 000, 000/= each, making an aggregate of Kshs.8,000,000/=.

28. For that sum I do enter judgment for the plaintiff against the defendant together with interest from the date of payment till payment in full.

29. The plaintiffs further get the costs of the suit.

Dated and delivered at Mombasa this 31st day of July 2019.

P.J.O. OTIENO

JUDGE