



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 284 OF 2015

MICHAEL MWAURA NJOROGE PLAINTIFF

VERSUS

PETER KAMAU MUNENE..... DEFENDANT

BEATRICE KORI.....INTERESTED PARTY

RULING

1. This court is called upon to determine the Notice of Motion application dated **1st April 2019**. By that application **Peter Kamau Munene** (Munene) seeks the release of **Ksh 1,068,614.95** and the accrued interest held at joint interest earning account of the advocates in this matter.

2. That application cannot be considered in isolation of the background of this matter.

BACKGROUND

3. This matter has a murky background which almost can read like a movie thriller.

4. Munene was the registered owner of the property **DANGORETTI/RIRUTA/5810** (the suit property). He had charged that property to Kenya Commercial Bank Limited (KCB) as security for loan facility.

5. On **24th March 2015** Michael Mwaura Njoroge (Njoroge) entered into a contract with Munene to purchase the suit property. The agreed purchase price was Ksh 11,500,000/=. By **April 2015** Njoroge paid Munene all the proceeds of that sale except Ksh 2,950,000 which was paid to the then advocate as stake holder, who was acting for both him and Munene.

6. In May, Njoroge learnt that Munene had failed to pay off the loan he had with KCB. Because Njoroge was also having problems of tracing Munene to inquire why he had not made payment to KCB, as agreed, Njoroge lodged a caution against the title of the suit property. Njoroge also filed this case against Munene as the defendant and KCB as the third party.

7. It transpired, later in September 2015, that Munene had also sold the suit property to Beatrice Kori (Beatrice) who joined this action as an interested party.

8. Beatrice by her affidavit dated 9th September 2015 stated that she entered into a sale agreement dated 19th June 2015 with Munene, of the sale of the suit property whereby Beatrice was to pay Ksh 10,000,000 as the purchase price. She fully paid the purchase price. Munene released to her completion documents, including the discharge of charge, which were later to be confirmed by the Registrar of Land not to be genuine.

9. It will therefore be seen that the suit property had two buyers who had paid Munene the agreed purchase price.

10. Justice Ochieng, who was then presiding over this case requested the Directorate of Criminal Investigation (DCI) to investigate the documentations relating to the sale transaction. DCI confirmed that both agreements for sale for Njoroge and Beatrice were signed by one hand, that of Munene.

11. The learned advocate for Beatrice by an application dated **27th October 2016** sought an order to restrain Munene from collecting rent of the buildings on the suit property and also sought that the rental income be deposited interest earning account of the advocates for Njoroge

and Beatrice. The court granted that prayer as sought on **2nd March 2014**.

12. On **7th November 2017** advocates for Njoroge, Munene and Beatrice recorded the following consent.

“IN COURT ON 7TH DAY OF NOVEMBER 2017

BEFORE HONOURABLE JUSTICE FRED OCHIENG

ORDER

UPON THIS MATTER coming up for **MENTION** in the presence of the Advocate for the Plaintiff, advocate for the Defendant, Advocate for the Third Party and Advocate for the Proposed Aggrieved/Interested Party and **UPON** hearing the parties;

IT IS HEREBY ORDERED BY CONSENT:

1. **THAT** the suit property being **DAGORETTI/RIRUTA/5810** be transferred to the joint names of Michael Mwaura Njoroge and Beatrice Kori, who shall be at liberty, through a recognized real estate agent, to dispose of the same.
2. **THAT** the Transfer to effect this order shall be executed by the Deputy Registrar of the Commercial Division.
3. **THAT** mention on 13.2.2018 for further orders and directions.”

13. **Justice Ochieng** on **3rd May 2017** ordered the funds held by Kirwa Koskei & Company advocates (Munene’s advocate) be deposited in the joint interest earning account in the joint names of the advocates for the plaintiff, defendant and the interested party.

14. It is that money deposited in the joint names of the advocate that Munene seeks by his application to be released to him.

15. The application is opposed by Njoroge and Beatrice. They submitted that they both did not breach their sale agreement, since they paid in full the purchase price agreed in the agreement for sale. That Munene in selling the suit property to both of them sought to unjustly enrich himself. They also submitted that Munene seeks to benefit from his fraud and the court should not aid him in getting the funds. They relied on the case Republic –v- Ministry of Roads & Another Ex part Vipingo Ridge Limited & Another (2016) eKLR thus

“In **STANDARD CHARTERED BANK LIMITED VS. INTERCOM SERVICES LIMITED & 4 OTHERS** (Civil Appeal No. 37 of 2003), unreported, the Court of Appeal referred to the English case of **HOLMAN VS. JOHNSON (1775-1802) ALL ER 98** at page 99, where Lord Mansfield C.J. said –

“The principle of public policy is this, Ex dolo malo, non oritur actio. No court will lend its aid to a man who found his cause of action on immoral or on illegal act. If from the Plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such Plaintiff.”

25. The principle was further expressed in similar terms in **SCOTT VS. BROWN, DENNING & MCNAB COMPANY (3) [1892] 2QB 724** at page 728 where Lindley LJ said –

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has paraded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

16. Munene submitted that Njoroge and Beatrice are estopped from denying him the funds because both had not laid claim over that money and because he consented to the property being registered in their names.

ANALYSIS

17. Munene in 2015, without a doubt perpetrated deceit over Njoroge and Beatrice. He sold to them the suit property without disclosing of the double sale. He obtained from Njoroge Ksh 11 million and from Beatrice Ksh 10 million. The money Munene now seeks it be released to him is part of that purchase price. In seeking that that money be released to him Munene fails to take into consideration that both Njoroge and Beatrice were put into a lot of trouble due to his wrong doing, not to mention the expenses they have incurred which includes legal fees. All those expenses they have incurred may never be fully recouped. I reject Munene’s argument that Njoroge and Beatrice stand to benefit from sale of the suit property which has increased in value. That in my view is neither here nor there. Both of them were making an investment, when they offered to buy the suit property. If the property has increased in value that does not change the fact that Munene perpetrated an illegality against them.

18. Munene is not entitled to the money held in the joint account. To allow him get that money would be to allow him to unjustly be enriched from his wrong doing. A court of law will not allow that.

19. What then should be done with the funds in the joint account? I am persuaded that Justice will be met by ordering that money be released to Njoroge and Beatrice. That will go some way to recompense them of the wrong done to them.

CONCLUSION

20. The following are the orders of the court:

- a. *The Notice of Motion dated 1st April 2019 is dismissed.*
- b. *The funds held at Standard Chartered Bank Kenya Limited in a joint interest earning account No. 015248415700 shall be released to **MICHAEL MWAURA NJOROGE** and **BEATRICE KORI** in equal shares.*
- c. *The Deputy Registrar is hereby authorized to sign all the documents required by Standard Chartered Bank Kenya Limited in order to give effect to order (b) above.*
- d. *Orders accordingly.*

DATED, SIGNED and DELIVERED at **NAIROBI** this **26th** day **SEPTEMBER**, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**