



**Takata Limited v Solio Ranch Limited (Environment & Land Case  
18 of 2021) [2022] KEELC 14890 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 14890 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND CASE 18 OF 2021  
AK BOR, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**TAKATA LIMITED ..... PLAINTIFF**

**AND**

**SOLIO RANCH LIMITED ..... DEFENDANT**

**RULING**

1. Through the application dated 24/2/2022, the Plaintiff seeks to amend its claim by adding the firm of Kaplan & Stratton Advocates (Kaplan & Stratton) as the 2<sup>nd</sup> Defendant to this suit. The application was supported by the affidavit sworn by the Plaintiff's director, Engineer Michael Mwaura Kamau on 24/2/2022. He averred that the Plaintiff wished to include specific details relating to interest and a claim for general damages. He deponed that the presence of the 2<sup>nd</sup> Defendant was necessary to enable the court to effectively adjudicate upon and settle the question of why the law firm held the deposit towards the purchase price for five years yet the land the Plaintiff was purchasing had been disposed of to a third party. The Plaintiff exhibited the draft Amended Plaint to the- supporting affidavit.
2. In response to that application, the Defendant filed the preliminary objection on 27/4/2022, to the effect that firstly, Kaplan & Stratton was not privy to the sale agreement and that any remedy which the Plaintiff may pursue arising from the agreement could only lie against the Defendant; secondly, that the law firm was barred by Section 134 of the *Evidence Act* from disclosing any information regarding the sale agreement. Further, that the addition of the firm to the suit would be an affront to the Defendant's right of privacy under Article 31 of *the Constitution*. It was also contended that no suit can lie against an agent where the principal was disclosed.
3. The background to this case is that the Plaintiff and the Defendant entered into a sale agreement dated October 10, 2014 *vide* which the Plaintiff agreed to purchase land reference number 11571/42 measuring approximately 200 acres ("the suit property") from the Defendant at the agreed consideration of Kshs. 63,000,000/=. In accordance with the terms of the sale agreement, the Plaintiff



- paid a deposit of Kshs. 6,300,000/= being 10% of the purchase price to the vendor's advocates, Kaplan & Stratton to hold pending registration of the transfer in favour of the purchaser or for a period of 30 days from the completion date, whichever one was earlier. The Plaintiff averred that on November 26, 2014 the Defendant duly obtained the Land Control Board consent to transfer the suit property to the Plaintiff. On 26/1/2015 the Plaintiff executed the transfer in triplicate and sent it together with other necessary documents to the Defendant's Advocates for execution by the Defendant.
4. It is the Plaintiff's case that for over five years the Defendant failed to return the executed transfer forms together with the completion documents despite being sent several reminders by the Plaintiff's advocate. The Plaintiff averred that the Defendant's failure to honour the terms of the sale agreement while retaining the deposit the Plaintiff paid for more than five years was in breach of contract and was fraudulent misrepresentation to the detriment of the Plaintiff. It brought this suit seeking an order of specific performance directing the Defendant to complete the transaction in accordance with the sale agreement, exemplary damages and mesne profits together with interest.
  5. The Plaintiff's application and the Defendant's preliminary objection were both canvassed through written submissions. The Plaintiff filed submissions dated 13/4/2022 in which it urged that the general rule was that amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and that there was no injustice if the other party could be compensated by costs. The Plaintiff cited *Abdul Karim Khan v Mohamed Rosban* (1965) EA 289 and *Eastern Bakery v Castelino* (1958) EA 461 at page 462 which was buttressed by Bramwell LJ in *Tildesley v Harper* (1878), 10 Ch. D at page 296.
  6. The Plaintiff submitted that the principles upon which a court may grant leave to amend pleadings were given in [\*Ochieng & others v First National Bank of Chicago\*](#) Civil Appeal No. 147 of 1991. They include: the application should be made timeously, the power to amend may be exercised by the court at any stage of the proceedings and the amendments should not deprive the Defendant of his right to rely on the [\*Limitation of Actions Act\*](#). The Plaintiff claims that it seeks to include the prayers it left out of the plaint because it would be prejudiced if specific performance were not granted.
  7. Regarding the preliminary objection, the Plaintiff submitted that its complaint against Kaplan & Stratton was premised on the fact that the suit property was sold to Homes and Commercial Buildings Limited and title issued to this company on 7/8/2015 yet Kaplan & Stratton continued to hold the deposit the Plaintiff paid for the land until late 2020. Further, that according to the witness statement of Wanja G. Wambugu, Advocate who handled the sale transaction on behalf of the purchaser, Dr. Fred Ojiambo Senior Counsel, is the Defendant's Chairman and the law firm of Kaplan & Stratton therefore has information that will assist the court decide this dispute. On the issue of privity of contract which the Defendant took up as a preliminary objection, the Plaintiff relied on the exceptions to the rule given in [\*Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi\*](#) [1985] eKLR.
  8. The Plaintiff added that Kaplan & Stratton ought to be joined to this suit to defend itself over the accusations levelled against it and shed light on the firm's basis for holding the deposit for over five years after the land in question had been sold to a third party. It also relied on the case of [\*Aineab Liluyani Njirah v Aga Khan Health Services\*](#) [2013] eKLR on the issue of privity of contract where the contract was for the benefit of a third party.
  9. The Plaintiff cited Section 134 of the [\*Evidence Act\*](#) and the decision in [\*Mohammed Salim Balala & Another v Tor Allan Safaris Ltd\*](#) [2015] eKLR while submitting that its case was based on the conduct of Kaplan & Stratton in the sale transaction and added that the firm was not being compelled to testify against the Defendant. It contended that Kaplan & Stratton should be held liable for unjust



enrichment for retaining the deposit after the collapse of the sale transaction. It disputed the argument that joining the firm to these proceedings would be a violation of its right to privacy. The Plaintiff also cited *Nelson Mutai t/a Kandie Mutai & Co. Advocates v Benson Mbuvi Kathenge* [2019] eKLR where it contended that an advocate was found liable for retaining the deposit.

10. In response to the Defendant's contention that Kaplan & Stratton acted as an agent of a disclosed principal, the Plaintiff argued that in line with the sale agreement, the deposit was to be held by Kaplan & Stratton, which had nothing to do with the principal and therefore Kaplan & Stratton must take responsibility for its action. It contended that this firm illegally benefitted and enriched itself when it retained the deposit for over five years to the detriment of the Plaintiff.
11. The Plaintiff submitted that the test as to whether or not to join a party to a suit was given in *Kingori v Chege & 3 others* [2002] 2 KLR 243 and the test as to whether a party was necessary in a suit was given in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 where the court made a distinction between instances where a party ought to have been joined as a defendant and those where the presence of the party was necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. It submitted that not only did it have a cause of action against the proposed Defendant, Kaplan & Stratton, but that it was also a necessary party to the suit and that if it is added to this suit, it will not suffer any prejudice that cannot be compensated by costs.
12. The Plaintiff contended that Kaplan & Stratton only refunded the deposit after this suit had been filed after it had already suffered damage notwithstanding the fact that the Plaintiff had issued several notices to the law firm indicating its readiness to complete the sale transaction. It added that the Defendant failed to complete the sale and went ahead to sell the land to another party and transferred the land in 2015. The Plaintiff contended that in light of the damage it suffered, this court will be called upon to decide whether it is entitled to general damages, loss of bargain and interest on the deposit it paid. The Plaintiff urged that it would suffer prejudice if its application were not allowed by the court.
13. The Plaintiff filed supplementary submissions dated April 30, 2022 in which it contended that the preliminary objection did not raise a pure point of law since the facts in the pleadings were disputed. It cited the decision in *Mukisa Biscuit Co. Ltd v West End Distributors Ltd* [1969] E.A. 696. Further, it relied on clause 7(f) of the Law Society Conditions of Sale which states: "...without prejudice to any other rights and remedies available of him" and argued that this clause confirms that the Plaintiff is entitled to sue for all other remedies available to it including loss of bargain and general damages for breach of contract.
14. The Plaintiff reiterated that the proposed 2<sup>nd</sup> Defendant should be held liable for holding the deposit for over five years after the sale collapsed and the suit property was transferred to another party. It urged that the objective for joining the 2<sup>nd</sup> Defendant was not to disclose any information, but rather to justify its action of retaining and benefitting from the deposit.
15. The Plaintiff submitted that the issue of the proposed 2<sup>nd</sup> Defendant not being privy to the sale agreement and being statutorily barred from disclosing information and being an agent of a disclosed principal can be raised as a defence, but not as a preliminary objection which presupposes that the facts are correct.
16. The Defendant's submissions dated 25/4/2022 contended that when the sale agreement fell through the Plaintiff demanded the deposit through its advocates vide the letter dated 3/8/2020 and that Kaplan & Stratton refunded the deposit plus interest on 10/8/2020 which monies were accepted by the Plaintiff without any conditions.



17. The Defendant submitted that Kaplan & Stratton cannot be sued by virtue of the doctrine of privity of contract, which is a fundamental principle of law as the court held in [\*Aineah Liluyani Njirah v Aga Khan Health Services\*](#) Civil Application No. 194 of 2009. It argued that no rights or obligations can be imposed on Kaplan & Stratton based on the agreement of sale. Further, that this was not a case where an exemption should be accorded as the Plaintiff contended because the contract was neither made for the benefit of Kaplan & Stratton nor did the firm benefit from it. The Defendant relied on the decision in [\*Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi\*](#) [1985] eKLR on the issues of privity of contract and a contract not being enforced against a third party.
18. The Defendant contended that Kaplan & Stratton was statutorily barred from disclosing any information on the agreement to anyone other than the Defendant and relied on Section 134 of the [\*Evidence Act\*](#) and Rule 7 of the Code of Ethics & Conducts for Advocates, January 2016.
19. The Defendant contended that the relationship between advocate and client is fiduciary in nature and relied on the Court of Appeal decision in [\*King Woolen Mills Ltd \(formerly known as Manchester Outfitters Suing Division Ltd\) & Another v M/s Kaplan & Stratton Advocates\*](#) [1993] eKLR.
20. It submitted that the situations in which the advocate-client privilege can be waived were given in [\*Conlons v Conlons\*](#) (1952) 2 All ER 462 which was quoted by the High Court in [\*Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others\*](#) [2016] eKLR. The Defendant contended that from looking at paragraph 6 of the supporting affidavit of Engineer Michael Mwaura Kamau, it is apparent that the Plaintiff requires Kaplan & Stratton to discuss its role and responsibility as professionals acting for the Defendant yet the Defendant has not given consent for the lifting of the advocate-client privilege. Further, that the advocate-client privilege can only be breached where the communication is in furtherance of illegal activity or if the advocate observes that his client was using the privilege to commit a crime as held by the Court of Appeal in [\*Mohamed Salim Balala & another v Tor Allan Safaris Ltd\*](#) [2015] eKLR. It argued that in this case there was no suggestion that Kaplan & Stratton were assisting the Defendant to commit any criminal activity.
21. It was contended that the addition of Kaplan & Stratton to this suit would be an affront to the right of privacy under Article 31 of [\*the Constitution\*](#). In addition, that that firm was acting as an agent of a disclosed principal and no suit therefore ought to lie against an agent where the principal is disclosed. It was also contended that the Plaintiff would not suffer prejudice if Kaplan & Stratton were not added to the suit since any remedy arising out of the sale agreement lies against the Defendant. The Defendant relied on [\*Victor Mabachi & Another v Nurtun Bates Ltd\*](#) [2016] eKLR and [\*George Muriaini Muhoro t/a G. M. Muhoro Advocate v George Ndungu Kamiti\*](#) [2011] eKLR.
22. The Defendant argued that the case of [\*Kingori v Chege & 3 others\*](#) [2002] 2KLR 243 which the Plaintiff relied on as setting the parameters for determining whether a party is necessary to a suit actually showed that Kaplan & Stratton was not a necessary party to this suit.
23. The Defendant concluded that the entire suit was bad in law because the Plaintiff cannot claim breach of contract when it accepted the refund of the deposit plus interest upon its request thus acquiescing on the abandonment of the entire transaction.
24. After parties had filed submissions on the application and preliminary objection, the court directed parties to do more research and furnish the court additional authorities on the subject matter of the application and the role a stakeholder plays in a land transaction. The court is grateful to counsel for providing additional authorities which the court read and considered.
25. The Defendant relied on [\*Cordery's Law Relating to Solicitors\*](#), 8<sup>th</sup> Edition, page 86 on the point that when a vendor's solicitor receives a deposit upon a purchase he does not hold it as a stakeholder the



way an auctioneer would, but as the vendor's agent and must pay it on demand and that if the contract goes off the purchaser cannot sue the solicitor for the deposit. The Defendant also relied on *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Re-issue Vol 42 page 173 on the point that where a deposit has been paid to a third person as agent for the vendor and not as stakeholder, it can be recovered only from the vendor and not from the third party personally. *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Re-issue Vol 44 page 103 deals with the issue of a solicitor receiving and holding a deposit merely as an agent for the vendor but not as stakeholder. It goes on to clarify that such funds are not held in a contractual or quasi-contractual capacity. The Defendant also relied on *Ellis v Goulton and Another* [1893] 350 where Bowen L.J. stated that when a deposit is paid by a purchaser under a contract for the sale of land, and there is an agreement that the recipient will hold it as agent for both vendor and the purchaser then the person receives it as stakeholder and is liable in certain events to return the money to the person who paid it. That in the absence of such agreement, the money is not paid to the advocate as a stakeholder but is treated as if it had reached the hands of the principal.

26. What the court is called upon to determine is whether it should allow the Plaintiff to amend its plaint in the manner that it seeks to do, or whether it should uphold the Defendant's preliminary objection and dismiss the application for amendment of the plaint.
27. It is not in dispute that the Plaintiff entered into a sale agreement with the Defendant and that after this suit was filed, the Defendant refunded the deposit which the Plaintiff had paid towards the purchase of the suit property. One of the proposed amendments is to add the averment that on 11/8/2020, while this suit was pending, the Defendant refunded the Plaintiff the sum of Kshs. 7,790,963.96 being the deposit plus interest. The Plaintiff contends that as at 11/8/2020 the interest on the deposit stood at Kshs. 7,451,402/= and wishes to seek interest on the deposit from October 10, 2014 to 10/8/2020 to the tune of Kshs. 6,001,101.80/=. The Plaintiff also wishes to pursue a claim for loss of bargain and general damages for breach of contract against the Defendant.
28. In *George Muriaini Muboro t/a A.M. Muboro Advocate v George Ndungu Kamiti* [2011] eKLR whose facts are somewhat similar to this case, the court noted that a stakeholder had a duty to deliver the money or property to the owner once the right to legal possession or ownership had been established.
29. The Defendant relied on authorities which bring out the distinction between the role a stakeholder plays and that which an advocate for a vendor plays when he receives a deposit in a transaction for the sale of land. *Nelson Mutai t/a Kandie Mutai & Co. Advocates v Benson Mbuvi Kathenge* [2019] eKLR and *Ellis v Goulton and Another* [1893] 350 were suits filed against advocates seeking refund of the deposit. Those decisions are distinguishable from this case where the Plaintiff does not seek a refund of the deposit but rather, it alleges that Kaplan & Stratton unjustly enriched itself when it held the Plaintiff's deposit for five years after the land in question was sold to someone else.
30. The Defendant argued that it could not be sued for rights arising from the sale transaction due to privity of contract and that the firm was barred from disclosing any confidential information that came to its possession while it was acting for the Defendant in the sale transaction. The Defendant relied on Section 134 of the *Evidence Act* in its contention that the firm of Kaplan & Stratton is barred by the advocate client privilege from disclosing information on the sale of the suit land to another party.
31. The court understood the Defendant to be arguing that based on this legal provision it cannot be sued. In this court's view, the advocate client privilege under Section 134 of the *Evidence Act* does not bar a party from suing an advocate who represented a party or parties in a transaction. The privilege only covers the non-disclosure of communication made to the advocate by the client in the course of his employment except with the client's consent or the exceptions set out in that section. The authorities which the parties relied on had advocates or law firms as parties, which confirms that there is no bar



- to a party suing a law firm where that party is aggrieved by the conduct of the law firm or advocate in a case or other transaction.
32. At this point the court is only dealing with the application seeking leave to amend the plaint to plead more facts and the proposed addition of the firm of Kaplan & Stratton to these proceedings. What the court understands to be the Plaintiff's claim against Kaplan & Stratton is that this firm continued to hold the deposit which it had paid for more than five years after the land which the Plaintiff set out to purchase was sold to a third party.
  33. Order 1 of the *Civil Procedure Rules* deals with parties to suits. All persons against whom any right to relief in respect of, or arising out of the same act or transaction is alleged to exist may be joined as defendants to the suit. The rationale for Order 1 Rule 3 on joinder of persons is to avoid the multiplicity of suits. Order 8 deals with amendment of pleadings and the manner in which the amendments are to be undertaken. Rule 5 gives the court the general power to order any document to be amended for the purpose of determining the real question in controversy between the parties on terms as to costs or other just terms.
  34. The issue that will ultimately fall for determination in the suit is whether a firm of Advocates can be sued for damages for holding the deposit towards the purchase price after the land is sold to a third party. A determination will also be made at the trial as to whether there was concealment of facts or material non-disclosure or whether Kaplan & Stratton owed such a duty to the Plaintiff in the transaction.
  35. The grounds set out in the Defendant's preliminary objection are not strictly speaking a preliminary objection and ought in the court's view to form the defence that Kaplan & Stratton would raise to the Plaintiff's claim against it.
  36. The court allows the application dated 24/2/2022. The costs of the application will be in the cause.
  37. The Defendant's preliminary objection dated 18/3/2022 is dismissed with costs to the Plaintiff.

**DELIVERED VIRTUALLY AT NANYUKI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Joyce Kariuki for the Plaintiff

Ms. E. Onyango holding brief for Dr. F. Ojiambo, SC, for the Defendant

Ms. Stella Gakii- Court Assistant

