



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC NO. 394 OF 2001

PAUL O. OGADA.....PLAINTIFF

- V E R S U S

KASSIM OWANGO.....1ST DEFENDANT

MILLIGAN & COMPANY LTD.....2ND DEFENDANT

J U D G E M E N T

By a plaint dated 10th January, 2001 and filed in court on 15th March, 2001, the plaintiff prays for judgment against the defendants for:-

- (a) the sum of Ksh.4,068,415.00, and
- (b) costs and interest.

In a nutshell, the plaintiff's case as set out in the plaint is that sometime in 1998, the first defendant approached the plaintiff with an offer to sell a prime property on Lang'ata Road, Nairobi for the sum of Ksh.4,068,415/= which property was supposedly in the hands of the second defendant. Pursuant to this offer, the plaintiff paid to the defendants the said sum of Ksh.4,068,415.00 by three instalments between October 27, 1998 and November, 1998. Thereafter, the defendants failed to transfer the agreed prime property to the plaintiff, whereupon the plaintiff now claims a refund of the sum of Ksh.4,068,415.00 paid by way of consideration.

Each of the defendants filed a different and separate defence. In his defence, the first defendant denies having approached the plaintiff in the first defendant's personal capacity or at all, and challenges the plaintiff to prove strictly the payment of Ksh.4,068,415.00 to the defendants. He also denies having received the sum of Ksh.4,068,415.00 from the defendant or any sum at all in his personal capacity or at all, and avers that the sum claimed was not paid to him but to the account of third parties and that the plaintiff's remedy is against the said third parties. Finally, the first defendant denies that the first and second defendants failed to transfer the agreed prime property on Lang'ata Road to the plaintiff in time or at all, and further denies that upon the plaintiff's repeated requests for a refund of the above sum the first defendant confirmed in writing on 27th February, 1999 of the defendant's willingness to refund the entire sum. He thereupon prays that the plaintiff's suit be dismissed with costs.

On it's part, the second defendant denies that in 1998, the first defendant approached the plaintiff with an offer to sell to the plaintiff the prime property on Langa'ta Road, Nairobi, and also denies that the plaintiff paid any monies pursuant to the alleged transaction. It also avers that if any money was paid to it by the plaintiff, then the same was for onward transmission to a third party who was to allocate land to the

plaintiff. The second defendant is therefore under no obligation to the plaintiff, nor is it under any legal duty to refund any money to the plaintiff. Lastly, the second defendant states that it is not aware of any admission of liability and avers that if such admission exists, then the same is made by an unauthorised person and without a resolution of the Board of Directors. It thereupon prays that the plaintiff's suit be dismissed with costs.

The parties hereto do not seem to have filed any agreed issues. Arising out of these pleadings, however, it seems to me that the issues between the parties may be framed as follows-

1. Did the defendants offer to sell to the plaintiff a prime property on Lang'ata Road, Nairobi?
2. If so, was the agreed price Ksh.4,068,415.00/=?
3. Did the plaintiff pay the said sum of Ksh. 4,068,415/= pursuant to the said transaction?
4. Did the defendants transfer the property to the plaintiff?
5. Did the first defendant confirm in writing the defendant's willingness to refund the entire sum?
6. Is the plaintiff entitled to the refund of Ksh.4,068,415/=?
7. Who should bear the costs of this suit?

In his evidence as P.W.I, the plaintiff informed the court that he had known the first defendant, Kassim Owango, as a businessman and as a person for more than 10 years. At the material time, the first defendant was the Managing Director of the second defendant, a limited liability company, which was selling real property. Sometime in 1998, he entered into an agreement with the defendants whereby the defendants agreed to sell to him a prime property along Langata Road. After negotiation, the price was settled at Ksh.4million, and the parties agreed to reduce the agreement into writing after the defendants had obtained the title to the property. Notwithstanding the lack of a written agreement, the plaintiff paid some money to the defendants in furtherance of the transaction. On 27th October, 1998, he applied for a banker's cheque for Ksh.1,500,000.00 payable to the second defendant. A copy of the draft issue was produced as plaintiff's exhibit 2. Then on 24th November, 1998, he paid another Ksh.1,500,000.00 by banker's cheque No.1/004785, a copy of which was produced as plaintiff's exhibit 3. And on 25th November, 1998, the plaintiff asked a friend of his to pay the sum of Ksh.1,068,415/= to the Commissioner of Lands in order to ensure that the title was obtained in the plaintiff's name. The total paid was Ksh.4,068,415/= which the plaintiff now claims from the defendants together with costs and interest.

In cross examination, the witness said that it was the first and second defendants who were selling the property to him. According to him, they were one and the same person as the first defendant was the managing director and chairman of the second defendant. However, the cheques bore the name of the second defendant but not the first defendant. The witness also confirmed that no payment was made to the first defendant as all payments were made to the second defendant with the exception of the last payment which was made to the Commissioner of Lands.

The defendants did not call any evidence. While the plaintiff's counsel opted not to make any submissions, the defendant's counsel submitted written submissions in which he stated that if first defendant received any money he did so as a director of the second defendant, and that the plaintiff had clearly stated that nearly all the monies were paid by banker's cheque to the second defendant. In the circumstances, the first defendant is not personally liable as he was only acting as a director of the second defendant who was a limited liability company. Secondly, the second defendant is also not liable since it was an agent of a disclosed third party, who was the owner of the parcel of land in question. All the monies received by the second defendant were for onward transmission to the said third party. In the alternative, counsel submitted, the plaintiff clearly indicated that he paid the last instalment of ksh.1,068,415.00 to the Commissioner of Lands, and therefore, even if the defendants were liable, they

would not be liable to refund this sum as the same ought to be refunded by the Commissioner of Lands. In any event, the plaintiff had said that the cheque for that amount was from a friend but did not show whether the same was cleared and/or the money deducted from the friend's account. He also submitted that the plaintiff's evidence was contradictory and therefore the suit should be dismissed with costs.

The only evidence we have and which we can go by is that of the plaintiff. Even though there is no written agreement produced in court, the plaintiff testified on oath that the parties had made an agreement whereby the plaintiff would buy and the defendants would sell to him a parcel of land. There is evidence that some money did change hands between the parties.

According to the plaintiff, the agreement was made on or about October, 26, 1998, and the parties agreed that the first defendant would send someone to Nakuru the following day to collect some part payment. He then produced plaintiff's exhibit No.1 as evidence.

Plaintiff's exhibit No.1 is a short, handwritten note from the desk of Mr. G. Kassim Owango, Managing Director, dated 27th October, 1998. It reads-

“Dear Paul, I have sent Peter to collect the document. I suggest that it be made out as follows: Sh.500,000/= cash, Sh.1 million bankers cheque in favour of Milligan & Co. Ltd.

Regards,

Kassim.”

This document is evidence enough that there was some transaction between the plaintiff and the defendant involving the payment of some money. The only explanation before the court is that given by the plaintiff. This is to the effect that the parties had agreed that the defendants would sell to the plaintiff a parcel of land. This evidence was not controverted in any material particular. I therefore find that there was an agreement for the sale of a parcel of land by the defendants to the plaintiff. This is fortified by the plaintiff's exhibit No.4, dated 27th February, 1999 and addressed to the plaintiff by the first defendant and to which I shall revert shortly. It reads-

“Mr. Paul O. Ogada,

P.O. Box 1554,

NAKURU.

Dear Paul,

RE: SALES OF PROPERTY IN NAIROBI ON LANGATA ROAD

Thank you for giving me the opportunity to have a meeting with you yesterday. As agreed we will endeavour to acquire the top plot but should this fail then we will recover all the monies and refund it to you.

Yours Sincerely,

G. KASSIM OWANGO, MBS

MANAGING DIRECTOR”

It seems to me clear beyond peradventure that there that there was indeed an agreement involving the sale of some property to the plaintiff by the defendants, and the property was in Nairobi along Lang'ata Road.

The next issue relates to the agreed purchase price. In paragraph 4 of the plaint, the plaintiff states that

the property was to be sold to him for Ksh.4,068,415.00. In his evidence in court, he stated that the first defendant initially asked for Ksh.5.5million, but after some bargaining, he came down to Ksh.4million. It is not clear whether the agreed price was Ksh.4million flat or Ksh.4,068,415.00. But this figure is closely related to what was actually paid. According to the evidence before the court, plaintiff's exhibit No.2 is a bankers cheque dated 27th October, 1998. It is for Ksh.1,500,000.00 payable to Milligan & Co. Ltd. on account of Paul Oganga Ogada. In the same vein is plaintiff's exhibit 3 which is another bankers cheque dated 24th November, 1998. It is also for kKsh.1,500,000.00 payable to Milligan & Co. on account of Paul. O. Ogada. Finally, plaintiff's exhibit No.5 is what looks like a note for the file. It is dated 25th November, 1998 and is in the following words-

“On behalf of Mr. Kassim Owango, I acknowledge receipt of Bankers cheque No.004078 for Ksh.1,068,415/= in favour of the Commissioner of Lands from Mr. Manish Shah of Symbol Agencies Ltd. On account of Mr. Paul Ogada.

Sgd.

Mary K. Garama.”

None of the above payments has been contested. The total sum paid directly to Milligan & Company Ltd. was Ksh.3,000,000.00. The balance of Ksh.1,068,415.00 was paid to the Commissioner of Lands through Milligan & Co. Ltd. Even though this sum was payable to the Commissioner of Lands, I find that it was paid through Milligan & Co. Ltd., and that it probably represented what Milligan & Co. Ltd. was bound to pay to the Commissioner of Lands on account of the transaction between the company and the plaintiff. I therefore find that the plaintiff paid the sum of Ksh.1,068,415.00 pursuant to the transaction.

There is no dispute that the property was never transferred to the plaintiff. Upon failure of the consideration, the plaintiff is entitled to a refund of the money paid. Indeed, vide the plaintiff's exhibit No.4, hereinabove referred to, the first defendant wrote to the plaintiff undertaking to **“... endeavour to acquire the top plot but should this fail then we will recover all the monies received and refund it to you.”** Since the endeavour to acquire the plot failed, the defendants should now make good their promise, **“recover all the monies received and refund it”** to the plaintiff. This is the least they can now do, having confirmed in writing their willingness to refund the entire sum upon the failure of the consideration. The plaintiff is clearly entitled to a refund of the moneys paid.

The penultimate issue is, who should refund the money – the first defendant, the second defendant, or both defendants? The evidence on record shows that the first defendant was the managing director of the second defendant which was a limited liability company. The landmark case of **SALOMON v. SALOMON & CO. LTD.** [1897] A.C. 22 (H.L) settled once and for all that a limited liability company is a body corporate with a legal personality of its own. It is an entity distinct alike from its shareholders and its directors. However, as a legal entity without a human body, it can only act through the agency of human beings, invariably its directors. In the circumstances of this case, to the extent that the first defendant acted at all, he acted for and on behalf of the company. Conversely, it was the company which was acting through the first defendant, its managing director, as its agent. The first defendant, therefore, cannot be held liable for the acts of the second defendant who was its principal. For these reasons, the action against the first defendant is misconceived.

The second defendant was, however, the soul of the party. It received the plaintiff money but did not perform its part of the contract by transferring to the plaintiff the property, the subject matter of the contract. Through the second defendant, the plaintiff had even paid the requisite dues to the Commissioner of Lands. The plaintiff cannot recover such dues from the Commissioner of Lands. Only the second defendant can do since it was the one who paid the moneys to the Commissioner. Otherwise, what did it do with the cheque? In any event, the plaintiff is entitled to his refund from the second defendant. In plaintiff's exhibit No.4 the defendants undertook to **“recover all the moneys received and refund it to the plaintiff”**. There was no evidence that the second defendant was acting for any principal.

In sum, I find that the plaintiff has, on a balance of probability proved his case against the second defendant. The suit against the first defendant is accordingly dismissed with costs. Judgment is also entered against the second defendant for the sum of Ksh.4,068,415/= with interest thereon at court rates from the date of the filing of the suit until payment in full. The second defendant will pay the costs of the suit against it to the plaintiff. Dated and delivered at Nairobi this 7th October day of 2004.

L NJAGI

JUDGE