



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 254 OF 2019

LILIAN N. NABWERA.....1ST PLAINTIFF

TABITHA N. NABWERA.....2ND PLAINTIFF

JULIE L. NABWERA.....3RD PLAINTIFF

=VERSUS=

SWALAH AHMED BAJABEER.....1ST DEFENDANT

GULF AFRICAN BANK LIMITED.....2ND DEFENDANT

LEAKEY'S AUCTIONEERS.....3RD DEFENDANT

RULING

Sometimes in 2017, the plaintiffs purchased all that property known as Town House No. 4 located on L. R. No. 209/20224, Kileleshwa, Nairobi (“the suit property”) from the 1st defendant at a consideration of Kshs. 38,500,000/=. The 1st defendant had disclosed to the plaintiffs that the suit property was charged to the 2nd defendant and that all the payments for the suit property were to be made through the 1st defendant’s account with the 2nd defendant towards the discharge of the charge. The plaintiffs paid the purchase price in full to the 1st defendant and on 1st November, 2018, the 1st defendant gave them possession of the suit property. The 1st defendant informed the plaintiffs that he was following up the issue of the discharge of charge against the suit property with the 2nd defendant.

On 29th July, 2019, the 3rd defendant advertised the suit property in the newspapers for sale by public auction on behalf of the 2nd defendant. The advertisement was repeated on 5th August, 2019. The sale of the suit property was scheduled to take place on 14th August, 2019. Upon learning of the intended sale of the suit property, the plaintiffs brought this suit against the defendants to stop the intended sale and to have the charge registered against the suit property in favour of the 2nd defendant discharged and the completion documents handed over to them by the 1st defendant.

The defendants did not file a defence to the plaintiffs’ claim. On 16th November, 2020, the suit was withdrawn as against the 2nd and 3rd defendants with no order as to costs. That withdrawal left the plaintiffs and the 1st defendant as the only parties to the suit. On 13th April, 2021, the advocates for the plaintiffs and the 1st defendant informed the court that the suit had been settled by the parties and that what was outstanding was the issue as to who was liable for the costs of the suit. The court then invited the said advocates to address it on the issue so that a determination can be made by the court on the same.

The advocate for the 1st defendant submitted that each party should bear its own costs. The 1st defendant’s advocate submitted that the 1st defendant had exhibited total good faith from the time the suit was filed and did what was necessary to resolve the dispute. The 1st defendant’s advocate submitted that in the circumstances, it would be unfair to condemn the 1st defendant to pay the costs of the suit.

The plaintiffs’ advocate on his part submitted that the plaintiffs were forced to come to court as a result of the fault of the 1st defendant and that since the plaintiffs had incurred costs, the 1st defendant was liable for the same. Section 27 of the Civil Procedure Act gives the court power to determine by whom the costs of and incidental to a suit should be paid. As a general rule, costs follows the event.

In this case, the dispute was resolved amicably by the parties. There is therefore no winner or loser. That does not however mean that no one is liable for the costs of the suit. Even where a suit is compromised, the court still retains the power to determine who should pay the costs where the parties are unable to agree on the same. That is the power that this court has been called upon to exercise.

From the history of the dispute that I have set out earlier in this ruling, there is no doubt that the plaintiffs were forced to file this suit to save the suit property for which they had paid to the 1st defendant a sum of Kshs. 38,500,000/= from being sold by public auction. It was not contested that the plaintiffs had fulfilled their part of the agreement for sale with the 1st defendant. It was the fault of the 1st defendant that led to the advertisement of the suit property for sale by the 2nd defendant. I am in agreement that the plaintiffs have incurred costs in this suit. The 1st defendant has not given any convincing reason why he should not pay the plaintiffs costs in the circumstances. The reasons given by the 1st defendant are only factors to be considered by the court when assessing the cost payable. It is my finding therefore that the 1st defendant is liable to the plaintiffs for the costs of the suit.

In conclusion, I hereby mark this suit as settled as between the plaintiffs and the 1st defendant with costs to the plaintiffs assessed at Kshs.300,000/= all inclusive.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JUNE 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Webale for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi- Court Assistant