



Polpane Properties Limited v Waweru & 2 others (t/a Omondi Waweru & Company Advocates) (Civil Case 32 of 2015) [2023] KEHC 22195 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 32 OF 2015
F WANGARI, J
JULY 7, 2023**

BETWEEN

POLPANE PROPERTIES LIMITED PLAINTIFF

AND

JASPER OMONDI 1ST DEFENDANT

MOSES WAWERU 2ND DEFENDANT

DALMAS OMONDI 3RD DEFENDANT

T/A OMONDI WAWERU & COMPANY ADVOCATES

RULING

1. The Plaintiff vide an originating summons dated February 27, 2015 instituted suit against the Defendants jointly for :-
 - a. An order directing the Defendants to forthwith refund to the Plaintiff Kenya Shillings 9,379,770/= paid to them as deposit for the purchase of parcels of land known as Kwale/Galu Kinondo 17, Kwale Galu Kinondo 18 and Kwale/Galu Kinondo 19 together with interest thereon at their bankers rates from January 20, 2010 till payment in full, in default, execution to issue.
 - b. An order directing the Defendant to pay interest thereon from the date of commencement of these proceedings till payment in full at curt rates, in default, execution to issue;
 - c. An order directing the Defendant to settle costs of these proceedings which costs are to be agreed on or taxed within 90 days of determination of these proceedings.
2. The suit was defended. The court having considered the suit rendered its judgement on December 6, 2017 wherein it allowed the Plaintiff's claim. The Defendant being aggrieved with the said judgement



lodged an appeal. In the meantime, the 3rd Defendant moved the court vide an application dated February 21, 2023 wherein he sought for the following orders: -

- a. Spent;
 - b. Spent;
 - c. That M/s Omondi Kinyua & Company Advocates be permitted to take over the conduct of representation of Dalmis Omondi/Applicant herein from M/s Omondi Waweru & Company Advocates as against Dalmis Omondi/the Applicant;
 - d. That judgement dated December 6, 2017, the decree issued on February 19, 2018 and all consequential orders be set aside;
 - e. That costs of this application be provided for.
3. The Defendants through the 2nd Defendant responded to the application through a replying affidavit dated March 2, 2023.
4. Directions were taken that the application be disposed off by way of written submissions. None of the parties filed submissions.

Analysis and Determination

5. I have considered the application, the response as well as the law and in my view, the following issues are for determination;
- a. Whether the application is merited;
 - b. Who bears the costs?
6. On the first issue, I note that there is no contest in terms of the relationship between the Defendants. Indeed, in their response, the Defendants appear to concede to the application. In so doing, the 2nd Defendant confirmed that the Applicant herein was not a partner in the said firm when the cause of action arose as per paragraph 5 of the response. Accordingly, I do not find it useful to waste the precious judicial time on this application as it seems to be conceded. Based on the foregoing, I find the application dated February 21, 2023 merited and it is hereby allowed.
7. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The application was not contested as much and in the circumstances, I direct that each party shall bear their own costs.
8. Following the foregone discourse, the upshot is that the following orders do hereby issue:-
- a. The application dated February 21, 2023 is merited and is hereby allowed as prayed;
 - b. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

