



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM CASE NO. 287 OF 2020

BETWEEN

MARK PROPERTIES LIMITEDPLAINTIFF

AND

COULSON HARNEY LLP ADVOCATES DEFENDANT

RULING

1. The basic facts leading to the dispute between the Plaintiff (“the Company”) and the Defendant (“the Advocates”) are largely common cause and can be garnered from the pleadings and various depositions sworn on behalf of the parties.

2. The Company has developed a 24 storey mixed user building on Land Reference 1870/V/271, NAIROBI, in Westlands, Nairobi, commonly known as *Le’ Mac* (“the suit property”) with the intention of selling various portions of the development, namely, banking halls, restaurants, office and commercial spaces and residential apartments (“Units”) to interested purchasers. In due course, the Company was introduced to the Advocates. The Advocate—Client relationship was consummated in a letter of engagement dated 13th September 2012 wherein the Company mandated the Advocates to provide legal services in relation to the sale of Units on the suit property.

3. The Company states that the purchasers started making payments for their desired Units starting in 2013 which payments included the Company’s legal costs and estimated Stamp Duty on the registration of the Leases which were paid at the stage of execution of the contracts of sale. In the course of their engagement, the parties appear to have disagreed on a number of issues. In August 2020, the Advocates terminated the relationship and ceased to act for the Company.

4. The Company avers that in terminating retainer, the Advocates abandoned the conveyances that had been paid for and that it was incumbent upon the Advocates to surrender the Company’s legal fees and the deposits on Stamp Duty to the Company to enable it complete the process of registration of the Leases. This demand for a refund is what forms the crux of the Company’s suit and the interlocutory application.

5. The Company filed the Notice of Motion dated 11th August 2020 made under **sections 1A, 1B, 3, 3A and 63 (e)** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)*, **Order 20 rules 1, 2, 3 and 4**, **Order 40 rules 1, 2, 3, 4 and 11** and **Order 51 rule 1** of the *Civil Procedure Rules* seeking the following orders:

- 1. *Spent*
- 2. *Spent*
- 3. *Spent*
- 4. *Spent*
- 5. *Spent*

6. *THAT pending the hearing and determination of this suit, a permanent injunction be issued restraining the Defendant, its servants, agents, employees or assignees from interfering with, using, wasting, alienating, or in any manner whatsoever dealing with*

the monies paid to them on account of Stamp Duty for the registration of Leases in Land Reference 1870/V/271, NAIROBI, or related to Le' Mac building, amounting to Kshs. 101,987,912.00.

7. THAT pending the hearing and determination of this suit, a permanent injunction assignees be issued restraining the Defendant, its Servants, agents, employees or whatsoever from interfering with, using, wasting, alienating, or in any manner dealing with the monies paid to them on account of Plaintiffs'/ registration Vendor's legal costs, Government and Agents' fees & charges on transfer & registration of Leases, in Land Reference 1870/V/271, NAIROBI, or related to Le' Mac building, amounting to Kshs. 34,949,551.

8. THAT a proper account, with all necessary enquiries on accumulated interest, un-rendered /abandoned legal services and obligations, unjust and fraudulent enrichment, disservice, among other considerations, be taken on the amount of Kshs. 136,937463.00 paid to the Defendant on the account of the Plaintiff/Applicant, and all monies found to be due to the Plaintiff/Applicant for its use in fulfilling its legal obligations under the Leases in Land Reference 1870/V/271, NAIROBI, or related to Le Mac building, be forthwith paid to the Plaintiff/Applicant

9. THAT in the alternative to prayer number 4, pending hearing and determination of this suit, a mandatory injunction be issued directing and requiring the Defendant to forthwith, and in any event within 3 days of the issuance of the Order of the court, deposit the sum of Kshs. 101,987,912.00 with the court or in joint interest earning account in the names of the Defendant and the Plaintiffs/Applicant's counsel on record.

10. THAT such further or other orders as are appropriate for the effective administration of justice be issued.

11. THAT the costs of this application be met by the Defendant/ Respondent.

6. The application is supported by the affidavit of Ravi Vasta, the Managing Director of the Company, sworn on 10th August 2020. The Advocates oppose the application through the replying affidavit of its partner, Alex Githinji Njage, sworn on 15th January 2021.

7. Prior to hearing the Company's application, the Advocates filed a Notice of Motion dated 28th September 2020 seeking orders to refer the matter to mediation pursuant to **section 59B** of the **Civil Procedure Act** and for an interim order directing that the money held by the Advocates in the trust account on behalf of the purchasers of various Units on the suit property be deposited in court. This motion was compromised by a consent letter dated 6th October 2020 on the following terms:

1. THAT the following sums of money currently held in trust by the Advocates on behalf of the purchasers of apartments and commercial units in that mixed development erected on Land Reference Number 1870/V/271, Nairobi be deposited in an interest-earning bank account to be opened within the next fourteen (14) days in NCBA Bank, Upper Hill Branch, in the joint names of the parties' respective Advocates, namely Njoroge Regeru and Company Advocates for the Advocates and Chris N. Mutuku for the Plaintiff/ Respondent ("the Client"):

(a) KShs. 41,142,134.68 (Kenya Shillings forty one million, one hundred and forty two thousand, one hundred and thirty four and sixty eight cents) held on account of Stamp Duty

(b) KShs. 29,470.00 (Kenya Shillings twenty nine thousand, four hundred and seventy) held on account of Lease Registration Fees;

(c) KShs. 809,128.00 (Kenya Shillings eight hundred and nine thousand, one hundred and twenty eight) held on account of Agent's Fees;

(d) KShs. 870,075.00 (Kenya Shillings eight hundred and seventy thousand and seventy five) held on account of Service Charge Deposit;

(e) KShs. 847,725.00 (Kenya Shillings eight hundred and forty seven thousand, seven hundred and twenty five) held on account of First Quarter Service Charge;

(f) KShs. 7,870,400.00 (Kenya Shillings seven million, eight hundred and seventy thousand and four hundred) held on account of Share Premium; and

(g) KShs. 521,500.00 (Kenya Shillings five hundred and twenty one thousand and five hundred) held on account of Cost of Transferring Reversionary Interest to the Management Company.

2. THAT any of the amounts above-listed may be paid out or otherwise dealt with in such manner as the Advocates for the respective parties may direct jointly in writing.

3. THAT the Advocates shall within twenty one (21) days of recording of this Consent Order by the Court release to the Client's Advocate the files relating to the eighty five (85) transactions that the Advocates have been handling.

4. THAT the dispute herein between the Advocates and the Client be and is hereby referred to Mediation to be conducted in accordance with the provisions of Section 59B (2), (3), (4) and (5) of the Civil Procedure Act, Cap 21 Laws of Kenya.

5. THAT the process of Mediation be completed within six (6) weeks of recording of this Consent Order by the Court.

6. THAT when the Application comes up for mention on 9th October, 2020, the Court be pleased to schedule a further mention in the last week of November, 2020 for the purposes of recording any settlement reached through the Mediation or for further Directions from the Court.

7. THAT pending Mediation and/or further Orders/Directions from Court, the Client's Complaint to the Advocates Disciplinary Tribunal against Richard Harney, Advocate, Paras Shah, Advocate, Alex Njage, Advocate, and the firm of Coulson Harney Advocates initiated through the Affidavit of Complaint of Ravi Vasta sworn at Nairobi and filed in the Tribunal on 10th August, 2020 be and is hereby stayed.

8. The Advocates filed another Notice of Motion dated 26th November 2020 seeking authority to pay out certain sums from the joint account. The application was compromised by a consent letter dated 11th December 2020 on the following terms:

1. THAT the Plaintiff's and the Defendant's respective Advocates are authorized to make the following payments out of the trust funds held in Account number 4610280013 at NCBA Bank, Upper Hill Branch in the joint names of Njoroge Regeru and Company, Advocates and Chris N. Mutuku, Advocate:

a) To Chris N. Mutuku, Advocate, the respective amounts set out according to the UNIT NUMBER, NAME OF PURCHASER and AMOUNT IN KENYA SHILLINGS -----

b) To the Advocates for the respective purchasers, the respective amounts set according to the UNIT NUMBER, NAME OF PURCHASER and AMOUNT IN KENYA SHILLINGS -----

c) To the Collector of Stamp Duties, the respective amounts set out according to the UNIT NUMBER, NAME OF PURCHASER and AMOUNT IN KENYA SHILLINGS -----

d) To the Ministry of Lands and Physical Planning, the respective amounts set out according to the UNIT NUMBER. NAME OF PURCHASER and AMOUNT IN KENYA SHILLINGS -----

2. THAT the Plaintiff's and the Defendant's respective Advocates are authorized to make further payments out of the trust funds held in Account number 461****013 at NCBA Bank, Upper Hill Branch in the joint names of Njoroge Regeru and Company, Advocates and Chris N. Mutuku, Advocate in accordance with the express written instructions of the respective purchasers for whom the trust funds are held or their respective Advocates.

9. I am now called upon to resolve the Notice of Motion dated 11th August 2020. Both parties filed written submissions in favour of their respective positions. Although the parties do not agree on the reasons their relationship broke down, they are agreed that the relationship has come to an end. It is however not necessary to apportion blame at this stage as the core issue for resolution involves the money paid to and held by the Advocates and how it is to be dealt with, as an interim measure, pending the hearing and determination of the suit.

10. In summary, the Company, in prayers 6, 7, 8 and 9 of the Notice of Motion dated 11th August 2020, seeks an injunction restraining the Advocates from in any way dealing monies paid to it by the purchasers of the Units on the suit property on account of Stamp Duty, Vendor Legal costs, Government and Agents fees on transfer and registration of leases. It also seeks an account of the amount held by the Advocates. It is of course not lost to the court that part of the application was compromised by the consents that I have outlined above.

11. The Company's case is that the relationship of the parties having come to an end, the Advocates were obligated to surrender all funds received for the registration of the leases. The Company avers that the Advocates have thus far received a total of Kshs. 136,937,463.00 from the prospective purchasers broken down as follows:

a. Vendor's legal costs Kshs. 31, 645,471.00

b. Deposit on Stamp Duty Kshs. 101,987,912.00

c. Government fees & costs of transferring reversionary interest Kshs. 1,348,080.00

d. Agents' fees on registration of transfers Kshs. 1,956,000.00

12. The Advocates deny that they received Kshs. 136,937,463.00 as alleged. They have stated that they received Kshs. 93,508,049.00 excluding any portion of the purchase price processed through the Advocates and which has already been paid to the Company. They account for the money as follows:

1. Kshs. 26,142,200.00 from purchasers on account of their contribution to the vendor's legal fees, office disbursements and VAT.

2. Kshs. 3,272,011.00 from Purchasers on account of Utility Deposits.

3. Kshs. 986,006.00 on account of proportionate costs for incorporation of the Management Company.

4. Kshs. 809,128.00 on account of agent's fees on stamping and registration.

5. Kshs. 41,662,135.00 on account of Stamp Duty out of which Kshs. 520,000 has already been paid to the Government.
6. Kshs. 29,470.00 on account of Government Fees on Registration of the Lease.
7. Kshs. 521,500.00 on account of Costs of Transfer of the Reversionary interest.
8. Kshs. 7,878,000.00 on account to Share Premium
9. Kshs. 4,243,425.00 on account of Service Charge Deposit
10. Kshs. 3,971,775.00 on account of 1st Quarter Service Charge

13. The Advocates contend that the money received from purchasers on account of (a) *Legal Fees, Of?ce Disbursements and Value Added Tax — portion payable by the purchasers;*(b) *Proportionate Costs for Incorporation of the Management Company;* and (c) *Proportionate Costs for the Transfer of the Reversionary Interest* was received as compensation for services rendered or to be rendered by the Advocates to the Company and the purchasers of the various commercial and residential units. The Advocates concede that the money which they are permitted by law to hold pursuant to an advocate's right of lien do not include money that is not the property of the Company such as *Stamp Duty, Agent's fees, and Government fees payable on Registration of Leases, Share Premium* due to the Management Company, *Service Charge Deposits* and *First Quarter Service Charge*.

14. The Advocates state that they have, pursuant to the consent dated 6th October 2020, in fact deposited in a joint account the trust funds held on account of *Stamp Duty, Lease Registration Fees, Agent's Fees, Service Charge Deposit, First Quarter Service Charge, Share Premium and Cost of Transferring Reversionary interest*. They assert that they are legally entitled to hold, under an Advocate's lien, any money that they may hold on account of the Company which in this case include the Company's *legal fees and of?ce disbursements - Portion payable by the Purchasers; Proportionate Costs of Incorporation of the Management Company; and Utility Deposit*.

15. The parties consented to deposit of the trust funds in an escrow account. As the money has now been deposited prayers 6 and 7 of the application, in so far as they seek an injunction, have been overtaken and cannot be granted.

16. Prayers 8 and 9 of the application concern accounts. The Advocates have provided an account of the money they received during the time of engagement as Advocates for the Company. There is a difference of Kshs 43,429,414.00 between the figure provided by the Company and that provided by the Advocates. This figure will be resolved once the Advocates file their defence and full discovery is done prior to the hearing. At this stage, I am satisfied that the Advocates have provided a sufficient account of what they received.

17. In the written submissions, Counsel for the Company, submitted that the Advocates should refund fees for failure to complete the transactions for which they were engaged. This calls for a consideration of the retainer agreement and the nature of work done. In that regard, the Company seeks, in prayer 4 of the *Plaint*, the following relief:

4. A declaration that the remuneration of an advocate in respect of a sale or a purchase of immovable property or an interest therein under Rule 18(a) can only occur once the property passes to the purchaser upon proper execution of a valid contract of sale and until the agreed conveyance formalities which vest legal title to the purchase are completed, and therefore the Defendant has abandoned its onus midway and is required to reimburse the Plaintiff for the costs of alternative legal services for completion of the conveyances in Land Reference 1870/N/271, NAIROBI, or related to the property commonly known as Le' Mac.

18. In light of the nature of the declaration sought in the *plaint*, acceding to the Company's contention on the issue of fees would require the court to make findings on the nature of the relationship between the parties, the nature and course of transactions at this stage without the opportunity of interrogating the entirety of the evidence. The court cannot grant what amounts to an interim declaration.

19. As I have found, the Company's application has largely been compromised by the consents filed. Consequently, and for the reasons I have stated, I am constrained to dismiss the Notice of Motion dated 11th August 2020. The application is dismissed with costs to the Advocates.

DATED and DELIVERED at NAIROBI this 15TH day of MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Chris N. Mutuku, Advocate for the Plaintiff.

Mr Regeru instructed by Njoroge Regeru and Company Advocates for the Defendant.