

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 11 OF 2018

BESTLADY COSMETICS SHOP LTD.....PLAINTIFF

VERSUS

KENYA AFRICAN NATIONAL UNION.....1ST DEFENDANT

TITUS KOCEYO T/A KOCEYO & CO. ADVOCATES.....2ND DEFENDANT

RULING

The plaintiff and the 1st defendant entered into a sale agreement for the purchase of land described as Land Reference Number 2787/322 situated within Nanyuki municipality and registered in the name of the 1st defendant. Thus, the latter is appropriately described in the sale agreement dated 4 October 2017 as the vendor while the plaintiff has assumed the description of the purchaser.

According to this agreement, the agreed purchase price was Kshs. 100,000,000/= out of which the plaintiff paid a sum of Kshs. 10,000,000/= equivalent to 10% of the purchase price as deposit upon execution of the agreement. This money was deposited in the 2nd defendant's firm of advocates' bank account on 6 October 2017; the 2nd defendant's firm of advocates, under whose name he trades, is described in that agreement as being the vendor's advocates in the sale transaction.

The completion date was prescribed as being ninety days from the date of execution of the agreement which, as noted, was 4 October 2017. The sale was, however, never completed because of what the plaintiff alleges to be a disagreement between the chairman and secretary general of the 1st defendant. In the wake of this agreement and principally because the 1st defendant breached the agreement, the plaintiff has sued for a refund of his Kshs. 10,000,000/= together with interest calculated at 20%, apparently per annum, from October, 2017 till payment in full. He has also sued for damages for breach of contract and damages for negligence and breach of trust. He also wants costs of the suit. These prayers have been sought against the defendants jointly and severally. His suit is encapsulated in a plaint dated 3 May 2018 and filed in this honourable court on 30 May 2018.

In its statement of defence dated 5 June 2018, the 1st defendant has admitted that indeed there was an agreement executed between it and the plaintiff for sale and purchase of the Land Reference Number 2787/322 and further, it has admitted having received from the plaintiff the sum of Kshs. 10,000,000/= deposit. It has, however, denied that there are any wrangles in the party that could have led to the failure of the contract. As a matter of fact, it has denied that the sale agreement has aborted as suggested by the plaintiff.

Similarly, the 2nd defendant who incidentally is on record for the 1st defendant, has also admitted, in his statement of defence dated 5 June 2018 that indeed there was a sale agreement between the plaintiff and the 1st defendant. He also admitted having received the sum Kshs. 10,000,000/= as deposit of the purchase on behalf of the 1st defendant. However, so he has contended, there was nothing in the agreement that precluded him from paying the 1st defendant the sum received; according to him, nowhere in the sale agreement was it stated he was holding the funds on a professional undertaking and neither was it indicated that he was a stakeholder.

Against this background of pleadings, parties have filed applications of one sort or the other in support of or in opposition to the staunch positions they have adopted. On his part, the plaintiff has filed a motion dated 30 July, 2018 seeking orders to strike out the defendants' statements of defence and for judgment to be entered against them. In the alternative, he seeks for summary judgment. It is his position that the statements of defence are scandalous, frivolous and vexatious only intended to prejudice, embarrass and delay the trial of the suit. He also contends that the defendants have admitted the plaintiff's claim.

The 2nd defendant, on the other hand, has not only opposed the plaintiff's motion but he has filed his own motion dated 15 August 2018 in which he has prayed for the striking out of the plaintiff's suit against him on the primary ground that he is an agent of a disclosed principal and therefore he cannot be sued in his personal capacity. Accordingly, he has urged that the suit against him discloses no reasonable action but rather it is scandalous, frivolous, vexatious and an abuse of the due process of court. Together with his motion he has filed a notice of preliminary objection against the suit dated 15 August 2018 opposing the hearing of the suit on the ground that this Honourable Court has no jurisdiction to entertain it and that the proper forum to determine the plaintiff's complaint against him is the Advocates Disciplinary Tribunal in accordance with the Advocates Act.

These two applications and the preliminary objection are the subject of this ruling.

I have read the pleadings, the applications and the affidavits in support together with the exhibits attached thereto. I have considered the submissions filed in support of and in opposition to the preliminary objection and the respective notices of motion. For reasons that I will give in my judgment after the full hearing of this case, I hold that neither of the motions nor the preliminary objection has any merit. They

are accordingly dismissed. The costs shall abide the outcome of the suit.

Having said that, this is a fast track type of suit which can and ought to be concluded at the earliest opportunity possible. I therefore direct the parties to comply with Order 11 of the Civil Procedure Rules forthwith and appear before me for pre-trial conference on 4th November 2019. On that date, directions shall be given as to the hearing of the case and such other directions or orders as may be necessary for expeditious disposal of this matter. It is so ordered.

Dated, signed and delivered in open court this 18 October 2019.

Ngaah Jairus

JUDGE