



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 17 OF 2017(O.S)

1. SAMUEL GITHUKA NJENGA

2. MONICA WAITHERA MBURU

3. DANIEL MUCAU MBURU.....APPLICANTS

VERSUS

1. NALEYE ENTERPRISES LIMITED

2.YUNIS MOHAMED &

ASSOCIATES ADVOCATES.....RESPONDENTS

JUDGMENT

On 3rd June, 2016, the applicants who were the trustees of KANU Mathare Ward entered into an agreement of sale with the 1st respondent in respect of all those parcels of land known as L.R No. 219/167-173(hereinafter referred to as “the suit properties”). The 2nd respondent acted for the 1st respondent while the firm of P.K. Kamau & Co. Advocates acted for the applicants in the transaction. Under that agreement, the applicants agreed to sell to the 1st respondent the suit properties at a consideration of Kshs. 50,000,000/- on terms and conditions that were set out in the said agreement.

The suit properties were sold to the 1st respondent in vacant possession. As at the date of the agreement of sale, the suit properties were occupied by squatters a fact that was acknowledged by both parties. The agreement

provided that a sum of Kshs. 25,000,000/- was to be paid by the 1st respondent to KANU Head Office while the remaining Kshs. 25,000,000/- was to be paid to the applicants for facilitating the transaction and delivering vacant possession of the suit properties to the 1st respondent. Clause 2.2 of the agreement provided that on the execution of the agreement, the 1st respondent was to pay to the applicants Kshs. 3,000,000/- out of the said sum of Kshs. 25,000,000/- that was payable to them. A further sum of Kshs. 2,000,000/- was to be paid to applicants upon proof that there was a possibility of the applicants removing the squatters from the suit properties. The balance in the sum of Kshs. 20,000,000/- was to be paid to the applicants upon the applicants delivering the suit properties in vacant possession.

Clause (a) of the Special Conditions of the agreement provided that in the event that the squatters would not have vacated the suit property by the completion date which was 90 days from the date of the agreement, the 1st respondent was to give the applicants a grace period of 21 days to remove the said squatters upon the lapse of which period the 1st respondent was to be at liberty to remove the said squatters from the suit property and account to the applicants (emphasis added) for the cost of that exercise. Clause (b) of the Special Conditions of the agreement provided that upon successful removal of the squatters from the suit property, the 1st respondent was to deduct the expenses reasonably incurred by it in the eviction of the squatters from the balance of the purchase price that was payable to the applicants and was to pay the remainder thereof to the applicants. It is common ground that the applicants were unable to remove the squatters from the suit properties even after they were given grace period of 21 days after the completion date to do so and that the exercise was undertaken by the 1st respondent.

The applicants brought this suit by way of Originating Summons (Summons) dated 11th January, 2017, seeking the following orders;

1. That the respondents be compelled to render an account to the applicants of how they spent the monies that were payable to the applicants under the agreement of sale dated 3rd June, 2016.
2. That the respondents do pay to the applicants all the monies due to them under the agreement of sale dated 3rd June, 2016 after

the initial first instalment.

3. That the costs of the application be provided for.

The Summons was supported by an affidavit of the 1st applicant, Samuel Githuka Njenga sworn on 11th January, 2017. In the affidavit, the 1st applicant reiterated the terms of the agreement between the applicants and the 1st respondent dated 3rd June, 2016 and the fact that they were unable to deliver vacant possession of the suit properties to the 1st respondent. The 1st applicant stated that the respondents had colluded to misapply the balance of the purchase price in the sum of Kshs. 21,700,000/- that was due to the applicants by making payment to non-existent squatters. The 1st applicant stated that the applicants had sought from the 2nd respondent an account of the monies held by it on behalf of the applicants. The 1st applicant stated that the response received from the 2nd respondent was that all the money had been used to evict the squatters from the suit property and that the only amount remaining was Kshs. 2,300,000/- which the applicants had to share with KANU Mathare Ward officials. The 1st applicant averred that under the said agreement of sale dated 3rd June, 2016, the applicants were entitled to receive an account of how the balance of the purchase price in the sum of Kshs. 21,700,000/- that was payable to them under the said agreement was spent and the immediate payment of the amount found due to them.

The Originating Summons was opposed by the respondents through a replying affidavit sworn by Shoode Xaaji Cisman on 22nd July, 2019. The respondents admitted that the applicants were to be paid Kshs. 25,000,000/- and that they were paid Kshs. 3,000,000/- and a further sum of Kshs. 300,000/- leaving a balance of Kshs. 21,700,000/-. The respondents contended that the applicants had concealed material facts to the court. The respondents contended that the applicants had failed to disclose to the court the fact that the accounts that they were seeking had already been supplied to them by the respondents. The respondents contended further that the applicants had failed to disclose that they had filed an earlier suit against the 1st respondent over the same subject matter namely, ELC No. 1316 of 2016 which suit was compromised by the payment of Kshs. 1,650,000/- to the applicants. The respondents averred that upon receipt of that payment, the applicants were supposed to withdraw that suit and the present suit which they had not done. The respondents urged the court to dismiss the applicants' Originating Summons with costs.

On 29th July, 2019, the court gave directions that the Originating Summons shall be heard by way of written submissions and gave timelines within which each party was to file its submission. When the matter came up on 12th February, 2020 for the court to confirm the filing of submissions by the parties and for fixing a judgment date, none of the parties had filed submissions. The advocate for the respondents who was the only one in attendance told the court that the respondents did not wish to file submissions and that they wished to rely entirely on their replying affidavit in opposition to the application.

I have considered the Originating Summons together with the supporting affidavit. I have also considered the affidavit filed in opposition thereto. The following is my view on the matter. The Summons was brought under Order 37 rules 3 of the Civil Procedure Rules which provides as follows:

[Order 37, rule 3.] Summons by vendor or purchaser of land.

3. A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

Special Condition (a) of the agreement of sale between the parties dated 3rd June, 2016 provided as follows:

“In the event the property shall not have fallen vacant on the completion date, the Purchaser may give the trustees a grace period of 21 days to remove the occupants and upon lapse of such period granted, the Purchaser may evict the squatters and account (emphasis added) for the cost of doing the eviction.”

It is clear from the foregoing Special Condition that the 1st respondent had an obligation under the agreement of sale dated 3rd June, 2016 to render an account in respect of the expenses incurred in evicting squatters from the suit properties that was to be deducted from the sum of Kshs. 25,000,000/- that was payable to the applicants. It is common ground that from the said sum of Kshs. 25,000,000/-, the 1st respondent has paid to the applicants a sum of Kshs. 3,300,000/- only. The 1st respondent has a duty to account for the balance of Kshs. 21,700,000/-. I am not satisfied from the respondents' replying affidavit that the 1st respondent has rendered an account to the applicants of the expenses that it incurred in evicting the squatters from the suit properties and the amount if any due to the applicants. I am satisfied that the applicants have made out a case for the accounts sought.

Due to the foregoing, it is my finding that the applicants have proved their case against the 1st respondent on a balance of probabilities. It is not clear to me why the 2nd respondent was joined in the suit. The 2nd respondent acted merely as an advocate for the 1st respondent. The 2nd respondent was not a party to the agreement of sale between the parties and as such was not bound by the same. The 2nd respondent had no duty in the circumstances to render an account to the applicants save where it was instructed by the 1st respondent to do so. Due to the foregoing, a case has not been made out against the 2nd respondent.

In conclusion, I hereby enter judgment for the applicants against the 1st respondent on the following terms;

1. The 1st respondent shall within 30 days from the date hereof furnish the applicants with a detailed statement of account with the necessary particulars of how they spent the sum of Kshs. 21,700,000/- that was payable by the 1st respondent to the applicants after

payment of Kshs. 3,300,000/- receipt of which has been acknowledged.

2. The 1st respondent shall pay to the applicants any amount found due to the applicants after the furnishing of the said accounts.

3. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 1st Day of October 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

N/A for the 1st Applicant

N/A for the 2nd and 3rd Applicants

Ms. Kamende for the Respondents

Ms. C. Nyokabi-Court Assistant