



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 466 OF 2011**

**CIBIYA WORLDWIDE LIMITED.....PLAINTIFF**

**VERSUS**

**JAMES MWANGI GACHERU.....1<sup>ST</sup> DEFENDANT**

**LILIAN ANNE HEALY AND ELIZABETH ANN G. HAYES  
(Sued as Trustees of and on behalf of the Congregation**

**of the Sisters of Charity of the Incarnate Word,**

**Houston, Texas).....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff, Cibiya Limited, entered into an agreement with the 1<sup>st</sup> Defendant sometime in February 2009 for the sale of L.R. No. 12296 measuring approximately 2.071 hectares (“the Suit Property”) at the agreed consideration of Kshs. 62,500,000/=. The Plaintiff paid to the 1<sup>st</sup> Defendant the sum of Kshs. 20 Million prior to the execution of the sale agreement dated 11/3/2009 to enable the 1<sup>st</sup> Defendant discharge the title over the Suit Property. The Plaintiff paid the Defendant the total sum of Kshs. 50,800,000/=-.
2. Completion of the sale was set for 30//4/2009, however this did not take place despite the 1<sup>st</sup> Defendant’s advocate having forwarded most of the completion documents to the Plaintiff’s advocates. The Plaintiff claims that the 1<sup>st</sup> Defendant led it to believe that he was still keen on concluding the sale transaction.
3. The Plaintiff came to learn in July 2011 that the Suit Property had been transferred to a third party without its knowledge when its directors discovered that construction was proceeding on the suit land. The Plaintiff avers that the 2<sup>nd</sup> Defendant failed to carry out due diligence before acquiring the Suit Property from the 1<sup>st</sup> Defendant and commencing construction on it. The Plaintiff claims that the 1<sup>st</sup> Defendant was estopped in law from entering into a fresh sale agreement with the 2<sup>nd</sup> Defendant or any other party after receiving the sum of Kshs. 53 Million from the Plaintiff as consideration for the sale of the Suit Property.
4. The Plaintiff in its Re-Amended Plaint filed on 23/5/2014 seeks an order to restrain the Defendants from trespassing upon, constructing, selling, dealing with or in any other way interfering with the Plaintiff’s peaceful and occupation of the Suit Property. It also seeks an order to compel the Defendants to demolish and remove the structures they have constructed on the Suit Property at their expense failing which the Plaintiff will do so at the Defendants’ cost. The Plaintiff also seeks a declaration that it is the *bona fide* purchaser for value of the Suit Property or in the alternative, the Registrar of Titles be ordered to transfer the Suit Property to the Plaintiff’s name.
5. In the event the Defendant’s insist on returning the Suit Property, the Plaintiff seeks to have the Defendants ordered to refund to the Plaintiff a sum equivalent to the market value of the Suit Property as may be assessed by the court. Further, the Plaintiff seeks damages for breach of contract, exemplary damages, costs of the suit and any other relief the court may deem just and fit to grant.
6. In his Re-Amended Defence filed in court on 9/6/2014, the 1<sup>st</sup> Defendant denied the Plaintiff’s claim. He admitted receiving some payment for the Suit Property from the Plaintiff but denied receiving the sum of Kshs. 53,000,000/=-. He also averred that the Plaintiff, through its advocates, released back to the 1<sup>st</sup> Defendant the completion documents on or about 8<sup>th</sup> June 2009. The 1<sup>st</sup> Defendant claims that he lawfully terminated the sale transaction after serving a completion notice on the Plaintiff and that it failed to complete the sale on the completion date. He states that after terminating the agreement for sale to the Plaintiff, he proceeded to sell and transfer the Suit Property to the 2<sup>nd</sup> Defendant. The transfer to the 2<sup>nd</sup> Defendant was registered on 22/10/2010. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiff’s claim which he claims had been overtaken by events.

7. In the Defence filed in court on 19/12/2011, the 2<sup>nd</sup> Defendant denied breaching the Plaintiff's rights to property and stated that it entered into an agreement with the 1<sup>st</sup> Defendant on 5/2/2010 for the sale of the Suit Property at the agreed consideration of Kshs. 80,000,000/= which it paid following which the Suit Property was transferred and registered in the 2<sup>nd</sup> Defendant's names. The 2<sup>nd</sup> Defendant averred that the registration of the transfer of the Suit Property to the 2<sup>nd</sup> Defendant was conclusive evidence that the 2<sup>nd</sup> Defendant is the absolute and indefeasible owner subject only to the encumbrances, easements, restrictions and conditions contained or endorsed on the title; and that its title cannot be challenged except on grounds of fraud or misrepresentations to which the 2<sup>nd</sup> Defendant is proved to have been a party.

8. In the alternative, the 2<sup>nd</sup> Defendant claims that even if the Plaintiff had a prior purchaser's interest in the Suit Property, the registration of the 2<sup>nd</sup> Defendant as proprietor of the suit land on 22/10/2010 took priority since the Plaintiff's interest was not registered against the land. The 2<sup>nd</sup> Defendant claims that it is the lawful owner of the Suit Property and that its certificate of title is conclusive evidence of its ownership.

9. Five witnesses gave evidence on behalf of the Plaintiff. Davis Odero Osiemo, an advocate of the High Court of Kenya who acted for the Plaintiff in the conveyance transaction testified that the Plaintiff's directors came together with Henry Karugu, Andrew Lopokoyit and Timothy Muthaura to purchase the Suit Property in the Plaintiff's name on the understanding that each would get their portion on completion of the transaction. Henry Karugu felt that the transaction was taking too long and he sought a refund of the money he had paid. He was refunded the sum of Kshs. 8,300,000/= which he had paid.

10. Sometime in 2009, the vendor's advocate, Mr. E. Wanjama requested the Plaintiff's advocates to have the original title to enable him process the discharge of charge. Mr. Davis Osiemo sent the title to him and was to learn later that the vendor sold the Suit Property to a third party despite having been paid most of the purchase price by the Plaintiff. No refund of the purchase price was sent to the Plaintiff's advocate's office. Mr. Davis Osiemo confirmed that the Plaintiff did not pay the full purchase price to the 1<sup>st</sup> Defendant and that the Plaintiff was served with a completion notice.

11. On cross examination Mr. Davis Osiemo stated that he was not aware that the defunct Kenya Anti-Corruption Commission (KACC) demanded the sums his client had paid as the purchase price for the Suit Property from the 1<sup>st</sup> Defendant. He was not privy to the payment made to KACC. The advocate confirmed that they had all the completion documents by 8/5/2009 and that the outstanding sum by then was Kshs. 20 Million. He confirmed there was an outstanding charge and that there was a reason as to why they could not lodge the documents for registration. He could not recall whether as the purchaser's advocate they had placed a caveat against the suit land.

12. Mr. Newton Omondi Osiemo, a director of the Plaintiff company gave evidence. The Plaintiff entered into an agreement with the 1<sup>st</sup> Defendant in March 2009 for the purchase of the Suit Property. The Plaintiff paid the 1<sup>st</sup> Defendant Kshs. 20 Million prior to the execution of the agreement to enable him discharge the title which was charged to Consolidated Bank of Kenya. He stated that the Plaintiff paid to the 1<sup>st</sup> Defendant the sum of Kshs. 22,500,000/= directly on 16/4/2009. According to him a further sum of Kshs 5,000,000/= was paid to the 1<sup>st</sup> Defendant on 11/7/2009 by Dr. Henry Karugu through Odero Osiemo & Company Advocates. Lastly, the Plaintiff paid Kshs. 3,300,000/= to the 1<sup>st</sup> Defendant on 17/7/2009. This sum was paid by Dr. Henry Karugu through Odero Osiemo and Company Advocates. In total, the Plaintiff paid to the 1<sup>st</sup> Defendant the sum of Kshs. 50,800,000/= towards the purchase of the Suit Property.

13. Mr. Newton Osiemo stated that as at 14/7/2009 when the 1<sup>st</sup> Defendant purported to terminate the sale agreement, the Suit Property had not been discharged. He confirmed that to date, the 1<sup>st</sup> Defendant has not refunded the purchase price he was paid by the Plaintiff. He produced copies of the sale agreement dated 11/5/2009 and the unregistered transfer which the 1<sup>st</sup> Defendant had executed; and letters dated 30/3/2009 and 3/4/2009 which forwarded part of the completion documents. He also produced copies of the bank statement showing the debits of Kshs. 300,000/= and Kshs. 22,500,000/= made on 15<sup>th</sup> and 16<sup>th</sup> April 2009 respectively. The letter dated 6/5/2009 from the 1<sup>st</sup> Defendant's advocate forwarded additional completion documents while indicating that only the consent to transfer was outstanding. The vendor's advocates letter of 8/6/2009 addressed to M/s Odero Osiemo & Company Advocates confirmed receipt of the original grant from the Plaintiff's advocates and intimated that the 1<sup>st</sup> Defendant's advocate was proceeding to lodge the discharge of charge for registration. He also produced copies of two bankers' cheques for Kshs. 5 Million and Kshs. 3,300,000/= issued in July 2009. The Plaintiff's director stated that the 1<sup>st</sup> Defendant made them believe that they would continue with the transaction and complete it.

14. The Plaintiff's advocates wrote to the 1<sup>st</sup> Defendant on 5/8/2011 expressing concern that construction on the Suit Property had begun in July 2011 without the Plaintiff's consent. The valuation report produced by the Plaintiff gave the value of the Suit Property as Kshs. 225,000,000/= as at 29/5/2017.

15. Mr. Newton Osiemo confirmed that the Plaintiff did not pay the purchase price to the 1<sup>st</sup> Defendant in full. On the issue of KACC, he stated that he had a dispute with KACC personally as Newton Osiemo but his company had no dispute with KACC. He denied ever receiving any communication from KACC addressed to him or the Plaintiff. He confirmed that no caveat or caution was placed against the Suit Property by the Plaintiff's advocates and further, that by 19/6/2009 the 1<sup>st</sup> Defendant's advocates were in possession of the completion documents.

16. He stated the 2<sup>nd</sup> Defendant failed to confirm if the Suit Property was free and available for sale and that the Defendants therefore acted in collusion. It was his position that the 1<sup>st</sup> Defendant's termination notice of 19/7/2009 was invalidated by the 1<sup>st</sup> Defendant's conduct when he accepted further payment of Kshs. 8,300,000/= towards the purchase price on 11<sup>th</sup> and 17<sup>th</sup> July 2009.

17. The witness statements of Timothy Muthaura, Andrew Lopokoyit and Henry Karugu were adopted by consent of the parties, and the need to call them to give evidence and be cross examined was dispensed with. Henry Karugu confirms in his statement that the sum of Kshs. 8,300,000/= which he had paid towards the purchase of the suit land was refunded to him. Timothy Muthaura stated that he paid Kshs. 6,500,000/= towards the purchase of the Suit Property which would entitle him to half an acre of the land. To date he has not been put into

possession of half an acre of suit land as had been agreed. Andrew Lopokoyit stated that he paid Kshs. 13,500,000/= through Newton Osiemo towards the purchase of the suit land which would have entitled him to an acre of the suit land.

18. Neither Timothy Muthaura nor Andrew Lopokoyit produced evidence of how they paid the sums of Kshs. 6,500,000/= and Kshs. 13,500,000/= through Newton Osiemo towards the purchase of the suit land.

19. The 1<sup>st</sup> Defendant gave evidence. He confirmed that he entered into the sale agreement dated 11/3/2009 with the Plaintiff at the agreed consideration of Kshs. 62,500,000/=. The Plaintiff paid him Kshs. 47,500,000/= on diverse dates. The sale was to be completed on 30/4/2009. His advocates forwarded the completion documents to the Plaintiff's advocates. When the Plaintiff's advocates took too long to lodge the discharge of charge for registration, his advocates requested to have the title and other documents back. He stated that these were freely released by the Plaintiff's advocates to his advocates on 8/6/2009.

20. His advocates served a 21 days' completion notice on the Plaintiff on 19/6/2009. When the Plaintiff failed to respond to the notice, he entered into another sale agreement on 5/2/2010 vide which he sold the Suit Property to the 2<sup>nd</sup> Defendant.

21. He also stated that he had deposited the money he received from the Plaintiff as consideration for the purchase of the Suit Property with KACC when KACC demanded that he does so while it was investigating the Plaintiff. He produced copies of the sale agreement he entered into with the 2<sup>nd</sup> Defendant on 5/2/2010 together with the transfer which was registered.

22. He also produced a copy of KACC's letter dated 1/9/2009 addressed to him which in part stated as follows:

*"Investigation being undertaken by the Commission has revealed that that you received the sum of Kshs. 50,800,000/= from Mr. Newton Osiemo as part payment of purchase price of land reference number 12296 (original number 2250/220 measuring 2.071 hectares or thereabout at Karen, within the city of Nairobi which you were selling to the said M. Newton Osiemo.*

*The said sum of money is reasonably suspected by the Commission to have been part of the money fraudulently obtained from the City Council of Nairobi as purchase price for land that was to be used as a cemetery.*

*In this regard the sum of Kshs. 50,800,000/= paid to you as part payment of purchase price by Mr. Newton Osiemo is suspected to be proceeds of crime having been unlawfully obtained from the City Council of Nairobi and ought to be restituted to the Government of the Republic of Kenya.*

*This is therefore to ask you to make arrangements to deposit the said sum of Kshs. 50,800,000/= or any other monies received from Mr. Osiemo at Commission's offices within Fourteen (14) days.*

*Take notice if no deposit is made, we will proceed to institute recovery proceedings for the aforesaid sum upon expiry of 14 days."*

23. In the letter to the 1<sup>st</sup> Defendant's Advocates dated 8/10/2009, KACC stated that the 1<sup>st</sup> Defendant was aware that the money was acquired in the course of, or as a result of corrupt conduct and urged that they consider Section 47 of the Anti-Corruption and Economic Crimes Act. KACC stated in its letter of 27/7/2010 to the 1<sup>st</sup> Defendant's advocates that KACC would request the Registrar of Lands to withdraw the caveat once the advocates deposited the sum of Kshs. 47,500,000/= with the Commission. The letter stated that KACC would hold the money in trust pending completion of investigations.

24. The 1<sup>st</sup> Defendant produced copies of the KACC letters and a copy of the request for RTGS transfer to KACC dated 18/8/2010 for Kshs. 47,500,000/=. He also produced a copy of his advocate's letter of 26/8/2010 which forwarded evidence of a further transfer of Kshs. 3,300,000/= to KACC and requested KACC to raise the caveat from the 1<sup>st</sup> Defendant's land. KACC wrote to the Commissioner of Lands on 1/10/2010 and requested the Commissioner to withdraw the caveat against the Suit Property without any conditions. The letter referred to KACC's letter dated 8/3/2010 vide which KACC had requested to have a caveat placed against the Suit Property.

25. Rose Nyambura Githura gave evidence on behalf of the 2<sup>nd</sup> Defendant. She confirmed that the 2<sup>nd</sup> Defendant purchased the Suit Property from the 1<sup>st</sup> Defendant on 5/2/2010 at the agreed price of Kshs. 80,000,000/=. The title over the Suit Property was transferred to the 2<sup>nd</sup> Defendant on 22/10/2010 as entry number 20. From the copy of title, entry number 18 was a caveat placed by the Registrar of Titles under Section 65 of the Registration of Titles Act. Entry number 19 which was registered on 22/10/2010 is the withdrawal of the caveat.

26. Parties filed submissions which the court has had the opportunity to read and consider. It is not in dispute that the Plaintiff entered into an agreement with the 1<sup>st</sup> Defendant for the sale of the Suit Property at the agreed consideration of Kshs. 62,500,000/= out of which the Plaintiff paid the sum of Kshs. 50,800,000/= to the 1<sup>st</sup> Defendant. It is also not in dispute that the sale transaction was not completed and the 1<sup>st</sup> Defendant issued a notice to the Plaintiff to complete the sale. The Plaintiff maintained that that notice was invalidated when the 1<sup>st</sup> Defendant accepted payment of Kshs. 8,300,000/=. The court notes that the payments for Kshs. 8,300,000/= were forwarded by the Plaintiff prior to the date of the completion notice even though it was in the same month of July 2009.

27. The 1<sup>st</sup> Defendant submits that it remitted the sum of Kshs. 50,800,000/= which the Plaintiff had paid for the purchase of the Suit Property to KACC following KACC's demand for the money claiming it was proceeds of crime and formed part of the money fraudulently obtained from the City Council of Nairobi being funds intended for the purchase price of land that was to be used as a cemetery. Being under serious threat of prosecution by KACC, the 1<sup>st</sup> Defendant submitted that it had to cooperate with KACC and remit the funds paid to him by the Plaintiff. The 1<sup>st</sup> Defendant submits that Mr. Newton Osiemo, the Plaintiff's director admitted during the hearing that he was under investigation by KACC.

28. The 1<sup>st</sup> Defendant contended that the Plaintiff has not pleaded any breach of contract on its part and that the Plaintiff was pursuing a refund of Kshs. 53,000,000/= it paid to the 1<sup>st</sup> Defendant as consideration for the Suit Property. The 1<sup>st</sup> Defendant urged that the Plaintiff's suit should be dismissed because the Plaintiff had failed to establish any cause of action against the 1<sup>st</sup> Defendant; and that it was only after the termination of the agreement with the Plaintiff that he entered into a second agreement and transferred the Suit Property to the 2<sup>nd</sup> Defendant.

29. The Plaintiff submitted that the 1<sup>st</sup> Defendant was in breach of the sale agreement by failing to furnish to the Plaintiff the completion documents on time after collecting the discharge of charge and the original title from the Plaintiff's advocates. Subsequently, the completion documents were never returned to the Plaintiff's advocates. Further, the Plaintiff contends that the 1<sup>st</sup> Defendant was not in a position to complete the sale since the discharge of charge was only registered on 6/10/2009 and that the 1<sup>st</sup> Defendant was in breach of the contract and did not properly rescind the sale.

30. The Plaintiff argued that it is entitled to the orders of specific performance and that it was always ready and willing to complete the sale transaction. The purchase price was agreed at Kshs. 62,500,000/= between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was only paid part of the purchase price of Kshs. 50,800,000/=. The Plaintiff did not lead any evidence to demonstrate that it was prepared to pay the balance of the purchase price or that it was ready and willing to complete the sale transaction.

31. The Plaintiff submitted that the 1<sup>st</sup> Defendant benefitted from retaining the purchase price and that the 1<sup>st</sup> Defendant acted in bad faith when he released the money paid to him by the Plaintiff to KACC without a court order requiring him to release the funds to KACC. It is not clear why the Plaintiff's Director, Mr. Newton Osiemo whom KACC suspected paid the purchase price to the 1<sup>st</sup> Defendant from funds which he fraudulently obtained from the City Council of Nairobi as funds intended for the purchase of land that was to be used as a public cemetery, did not follow up KACC to release the funds it got from the 1<sup>st</sup> Defendant in 2010. The Plaintiff's director, Mr. Newton Osiemo did not give evidence on whether the investigations by KACC against him were ever concluded or whether he ever challenged KACC's actions in court after the 1<sup>st</sup> Defendant released the sale proceeds paid by the Plaintiff for the Suit Property to KACC.

32. Having released the purchase price of Kshs. 50,800,000/= which the Plaintiff had paid to the 1<sup>st</sup> Defendant to KACC, it cannot be said that the 1<sup>st</sup> Defendant received consideration from the Plaintiff for the purchase of the Suit Property.

33. The Plaintiff's witnesses confirmed that the Plaintiff did not cause a caveat or caution to be registered against the Suit Property to protect its rights over the land. No evidence was led by the Plaintiff to show that the 2<sup>nd</sup> Defendant was aware of the Plaintiff's interest as purchaser of the Suit Property. The 2<sup>nd</sup> Defendant would not be expected to have known of the Plaintiff's interest over the Suit Property without any restriction being registered against the Suit Property. The only caveat that was lodged against the Suit Property was placed at the instance of KACC, and was lifted by the Registrar of Titles once KACC wrote and requested its removal.

34. The 2<sup>nd</sup> Defendant holds a certificate of title over the Suit Property which the court is to take as conclusive evidence that the 2<sup>nd</sup> Defendant is its absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions endorsed on it pursuant to Section 23 of the Registration of Titles Act under which the title was issued. The Plaintiff failed to prove that the 2<sup>nd</sup> Defendant had participated in fraud or misrepresentation in acquiring title over the Suit Property.

35. The Plaintiff has failed to prove its case on a balance of probabilities, it is dismissed with costs to the Defendants.

**Dated at Nairobi this 17<sup>th</sup> day of January 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. O. Opiyo for the Plaintiff

Mr. E.N. K. Wanjama for the 1<sup>st</sup> Defendant

Ms. Eddel Barasa – Court Assistant

No appearance for the 2<sup>nd</sup> Defendant