



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. CASE NO. 82 OF 2017(O.S)

TOM OBOKE NDHINE.....1ST PLAINTIFF
CRISPIN OKELLO.....2ND PLAINTIFF
JACKSON MUALUKO MULE.....3RD PLAINTIFF
JOEL MUTUA NYAMAI.....4TH PLAINTIFF
GRACE ADHIAMBO.....5TH PLAINTIFF
JUSTUS MWANZIA KIMANI.....6TH PLAINTIFF
FLORMINA NGINA MBII.....7TH PLAINTIFF
ENOCK MBAI MAILU.....8TH PLAINTIFF
KENNEDY ONDIEKI OMANGO.....9TH PLAINTIFF
BONIFACE NZUVE WAMBUA.....10TH PLAINTIFF
RUTH MUNYIKA NZUKE.....11TH PLAINTIFF
SIMON MUASYA MUSYIMI.....12TH PLAINTIFF
JOHN MUSYIMI MUTUA.....13TH PLAINTIFF
ESTHER WANJIRU KIARIE.....14TH PLAINTIFF
DORIS MUTHIGAH ITUMU.....15TH PLAINTIFF
SUSAN AKOTH OWITI.....16TH PLAINTIFF
FRED NDEGE MICHIRA.....17TH PLAINTIFF
JOHN NDIKU.....18TH PLAINTIFF
JAMES NAMBUSI MAKHULO.....19TH PLAINTIFF
THOMAS MONGARE ONGAGA.....20TH PLAINTIFF
FRANCIS GITAU KIHANYA.....21ST PLAINTIFF

VERSUS

OSORO KENNEDY OMWOYO T/A

OSORO OMWOYO & COMPANY ADVOCATES....1ST DEFENDANT

JOSEPH KARANI MUTUKU *alias*

JOSEPH KALANI MUTUKU.....2ND DEFENDANT

ROSE WANZA MATUKU.....3RD DEFENDANT

PATRICIA NTHEMBA KIMOLO.....4TH DEFENDANT

JUDGMENT

1. In the Originating Summons dated 26th September, 2016 and filed on 6th October, 2016, the Plaintiffs are seeking for the following orders:

a. That the Defendants whether by themselves, agents/servants or any one of them howsoever be restrained from making unlawful extortionist and unreasonable demands for purported survey and legal fees or engaging in such conduct as may impede conclusion of the sale contracts entered into with the Plaintiffs or in any way dealing with completion documents in their possession to the detriment of the Plaintiffs.

b. That this Honourable Court be pleased to order Joseph Karani Mutuku the Vendor in sale transactions entered into with the Plaintiffs and who has received the full purchase price from the said Plaintiffs do execute transfers in favour of the Plaintiffs within fourteen (14) days of the orders of the court.

c. That Kennedy Osoro Omwoyo advocate t/a Osoro Omwoyo & Company Advocates being the Advocates of the 2nd Defendant in sale transaction involving property known as L.R. No. 12715/235 and who gave an irrevocable professional undertaking to keep all the completion documents pending completion of the sale transactions entered into with the Plaintiffs do unconditionally release all the completion documents in his possession to the firm of Messrs. Odera-Olonde & Company Advocates within fourteen (14) days of the order of the court involving property known as L.R. No. 12715/235.

d. That in lieu of the foregoing and in the alternative, Kennedy Osoro Omwoyo t/a Osoro Omwoyo & Company Advocates be compelled by mandatory orders of the court to forthwith release unto the Plaintiffs all the completion documents in his possession and that the Deputy Registrar of the High Court be appointed to execute transfers and such other documents as may be necessary to transfer ownership of the parcels purchased by the Plaintiffs from the 2nd Defendant upon failure by the 2nd, 3rd and 4th Defendant to so meet their obligations under the contract for the sale of L.R. No. 12715/235.

2. The Originating Summons is premised on the grounds that the 1st Defendant represented the 2nd Defendant who was the Vendor in the sale transactions entered into with the Plaintiffs for the sale of L.R. No. 12715/235; that the 1st Defendant gave an irrevocable professional undertaking to keep the completion documents and that the Plaintiffs have fully paid up the agreed purchase price and met all the other terms of the contract.

3. According to the Plaintiffs, the 1st Defendant, being the custodian of the completion documents, is making unreasonable demands for payment of non-existent survey and legal fees in the sum of Kshs. 3,500,000 and that he has refused to release the completion documents to the Plaintiffs' advocates.

4. The case against the 3rd and 4th Defendants is that they have failed to discharge their mandate under the Sale Agreement to ensure compliance with the warranty given to facilitate the due performance of the agreements.

5. The Plaintiffs have deponed that the 2nd Defendant appointed the 1st Defendant as his agents for purpose of receiving the purchase monies; that all the agreements provided for the appointment of the surveyor and handing over of all the completion documents to the purchasers' advocates and that the surveyor's fees was agreed at Kshs. 460,000.

6. After paying the agreed surveyor's fees, the Plaintiffs deponed that the 1st Defendant started making unreasonable demands for the legal and survey fees.

7. In response, the 1st Defendant filed a Replying Affidavit in which he deponed that some of the Plaintiffs visited him in his office and informed him that some of the money they had contributed for the surveyor's fees had been misappropriated; that they agreed to pay him legal fees of Kshs. 100,000 per head for the purpose of sub-dividing the suit land; that along on those instructions, he appointed a surveyor, M/S Martin Kyalo Maingi, to carry out the sub-division of the land at a fee of Kshs. 460,000 and that the surveyor increased his fees from Kshs. 460,000 to Kshs. 1,280,000.

8. The 1st Defendant deponed that he informed the Plaintiffs to pay Kshs. 175,000 each to defray legal fees, surveyor's fees, land rates and other sub-division charges; that the Plaintiffs evaded paying his fees and started dealing directly with the surveyor and that he received Kshs. 468,065 from the firm of Odera-Olonde and Company Advocates being part payment of Kshs. 3,618,712.

9. According to the 1st Defendant, he renegotiated his legal fees on a without prejudice basis at Kshs. 200,000 and that he rejected the ex-gratia payments because it was contrary to the services he offered of appointing the surveyor.

10. It is the 1st Defendant's case that the orders being sought cannot be granted because he is exercising his right of lien over all completion documents including the Title Deeds until his legal fees and other costs in regard to sub-division of land parcel number 12715/235 are paid up.

11. The 1st Defendant deponed that the dispute herein is all about legal fees and other costs emanating from sub-division of the suit land; that the purchase price is not in dispute and that he is willing to discharge his professional undertaking as documented upon payment of his legal fees and other costs which arose as a result of sub-dividing the suit land.

12. In support of the 1st Defendant, the 2nd Defendant deponed that the 1st Defendant agreed to take up the sub-division of the suit land into twenty (20) equal portions as instructed by the Plaintiffs; that after the said sub-division, the Plaintiffs refused to pay the 1st Defendant his legal fees hence necessitating the 1st Defendant to exercise his right of lien and that the 17th Plaintiff is unknown to him and any agreement made thereof is a forgery.

13. The 4th Defendant deponed that the issue for determination is not about breaching or violating any of the terms of the various agreements but the costs of sub-dividing L.R. No. 12715/235; that the Plaintiffs voluntarily elected to appoint the 1st Defendant to do the sub-division and that the sub-division cost is not among the items he wanted in the various agreements.

14. The Plaintiffs' advocate submitted that at no time has 1st Defendant's firm represented the Plaintiffs in the sale transactions; that it is the Plaintiffs who paid the rates and rent and were issued with the clearance certificates and that the survey fees was agreed at Kshs. 460,000 and that the Plaintiffs reimbursed the 1st Defendant for the survey fees he had paid.

15. Counsel submitted that the 1st Defendant is not entitled to any legal fees from the Plaintiffs and that there being no advocate client relationship, the right of lien over the completion documents cannot arise.

16. The 1st Defendant submitted that the dispute herein is in regard of a retainer and legal fees of the 1st Defendant; that he was appointed by the Plaintiffs to undertake the sub-division work; that the retainer need not be in writing but can be implied by the conduct of the parties and that the Plaintiffs instructed the 1st Defendant to carry out sub-division work.

17. The 1st Defendant submitted that he should exercise the right of lien over completion documents until full payment of legal fees has been paid.

18. The 1st Defendant finally submitted that the Supporting Affidavit by the Plaintiffs is fatally defective because it does not conform to the provisions of Order 19 Rule 5 of the Civil Procedure Rules; that the Plaintiffs ought to have filed a Bill of Costs for Taxation and that the 1st Defendant's brief was restricted to sub-division of land parcel number 12715/235 only.

19. It is not in dispute that the Plaintiffs entered into Sale Agreement with the 2nd Defendant for the purchase of L.R. No. 12715/235. Each of the Plaintiffs purchased a ¼ acre of land in the suit land.

20. The terms of all the Sale Agreements were similar. Clause 6 of the Agreements provided that the 1st Defendant was to act for the 2nd Defendant in the transaction while the firm of Odero-Olonde Advocates acted for the Plaintiffs. Indeed, the 1st Defendant has admitted that it received the full purchase price of the suit property from each of the Plaintiffs.

21. The only issue before me is whether despite the Plaintiffs paying the full purchase for their respective sub-divisions, the 1st Defendant can continue holding the completion documents until he is paid "legal fees" which arose from the sub-division of the suit land.

22. Clause 14 of the Agreements that the Plaintiffs signed with the 2nd Defendant provides that each party shall bear its own advocates costs. While the Vendor (*the 2nd Defendant*) had the responsibility of meeting the costs of obtaining the completion documents, it was the obligation of the purchasers (*the Plaintiffs*) to meet the costs of sub-division, rates, land rent, stamp duty and registration costs on the Transfer. Clause 15 further provided as follows:

"15 (i) as the land is being sub-divided and transferred to several transferees, the transferees shall determine by consensus or majority role:-

a. (and with the consent of the Vendor) the surveyor to conduct the sub-division; and-

23. It is clear from the above clause that it is the purchasers, with the consent of the Vendor, who were mandated to determine the person who was to sub-divide the land. Indeed, it is not in dispute that the fees payable to the surveyor was to be paid by the Plaintiffs and not the Defendants.

24. It would appear that when the process of engaging a surveyor began, some of the Plaintiffs engaged the 1st Defendant directly. This, in my view, is not surprising considering that the agreement stipulated that the Vendor had to consent to the person who was to be appointed as a surveyor. In his letter dated 16th May, 2014, the 1st Defendant informed the Plaintiffs' advocates that "to expedite the process, the

purchasers have unanimously appointed our law firm to carry out sub-division work of which instructions we have gladly accepted.”

25. The 1st Defendant went ahead and appointed Mr. Martin Kyalo Maingi to sub-divide the suit land vide his letter dated 2nd July, 2014. In the said letter, the 1st Defendant informed the surveyor that his fee was Kshs. 460,000, of which the 1st Defendant paid him a deposit of Kshs. 250,000 which he acknowledged. The deposit which the 1st Defendant paid to the surveyor has since been refunded to him. The surveyor has confirmed by way of an Affidavit that he was paid the balance of his fees by the Plaintiffs, and that he is not owed any fees.

26. The Deed Plans that were generated by the surveyor were sent to the 1st Defendant vide a letter dated 9th November, 2015.

27. After receiving the Deed Plans from the surveyor, the 1st Defendant demanded from the Plaintiffs, through their advocates, “*Scheme plan preparation costs, approval costs, surveying costs, beacon costs, Deed Plans preparation costs, legal costs and other related miscellaneous costs.*” The 1st Defendant stated in his letter that to cover for the said costs, each purchaser should pay Kshs. 175,000 per plot. This is the amount of money that the 1st Defendant is demanding from each of the Plaintiffs before he can release to them the completion documents, including the original Deed Plans, for registration and transfer of the suit land.

28. In his subsequent letter, the 1st Defendant informed the Plaintiffs’ advocate that the surveyor’s fee was Kshs. 1,280,000 and not the purported amount of Kshs. 460,000.

29. The evidence before me shows that the 1st Defendant was reimbursed for the deposit he paid to the surveyor and the amount he paid for the rates. The surveyor has confirmed that his entire fees have since been paid by the Plaintiffs. The 1st Defendant cannot therefore claim for what he calls fees for sub-division of the suit land.

30. Being not a surveyor, or having not sub-divided the suit land, the 1st Defendant is not entitled to the sub-division fees under the Sale Agreements that the Plaintiffs entered into with the 2nd Defendant or at all. It does not matter that the 1st Defendant went out of his way to look for a surveyor and negotiated with him about his fees. What matters is that the Plaintiffs paid the fees that was demanded by the surveyor.

31. In any event, if indeed the 1st Defendant went out of his way to engage a surveyor, he can only charge the 2nd Defendant for such work because he was the 2nd Defendant’s advocate and not the Plaintiffs. The Plaintiffs’ obligation was to pay the actual fees that was demanded by the surveyor and not any “*legal fees*” to the 1st Defendant.

32. As correctly submitted by the Plaintiffs’ advocate, a general lien or the right to retain papers, money or other chattels by an advocate can only arise in the context of an advocate-client relationship and not otherwise. There was no evidence before me to show that the 1st Defendant was ever retained by the Plaintiffs to offer to them legal services. Indeed a retainer only arises when an advocate has express or implied instructions from his client to offer him legal services in a particular matter or generally. There is no evidence to show that by instructing the surveyor to sub-divide the suit land, the 1st Defendant did offer to the Plaintiffs “*legal services*”. The 1st Defendant was all along acting for the 2nd Defendant who was required to give his consent before any survey work could work. He should therefore seek his legal fees, if at all, from the 2nd Defendant.

33. Considering that the 1st Defendant gave an irrevocable undertaking to the Plaintiffs’ advocates not to use or release the title document to any person save for the purpose of performance and conclusion of the transactions to the Plaintiffs, he cannot continue holding the completion documents on the basis that the Plaintiffs owe him sub-division fees and legal fees. He should release the said documents to the Plaintiffs’ advocate forthwith for the finalization of the sale transaction.

34. The Affidavit in support of the Originating Summons having been sworn by the deponents is not defective as submitted by the 1st Defendant. The filing of the Affidavit separately by the two Plaintiffs would not make any difference considering that the depositions will still be the same.

35. I therefore find that the Plaintiffs have proved on a balance of probabilities that they are entitled to the completion documents being held by the 1st Defendant.

36. For those reasons, I allow the Originating Summons dated 26th September, 2016 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE