



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 24 OF 2008**

**DUSAN CONSTRUCTION LIMITED.....PLAINTIFF**

**VERSUS**

**S.M. MUNIKAH T/A**

**MUNIKAH & CO. ADVOCATES .....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed the Originating Summons dated 1<sup>st</sup> October, 2008 seeking to have the Defendant remit Kshs. 10 million together with interest to the Plaintiff's lawyers, M/s Mohammed and Samnakay Advocates to hold as stakeholders pending completion of the sale transaction of L.R. Numbers 209/14475 and 14476 (original number 209/10820). These parcels of land will be referred to as the "Suit Property".
2. Alternatively, the Plaintiff seeks to have the Defendant disclose the sale proceeds it received in respect of the Suit Property and to remit this to the Plaintiff's advocate with interest at the rate of 18% p.a. with effect from the date the sum was received until it is remitted. The Plaintiff also seeks to have the Defendant forward the entire file and all the documents pertaining to the sale transaction of the Suit Property in his possession to the Plaintiff's advocates and the costs of this suit.
3. The affidavit in support of the Originating Summons was sworn by Verica Cupurdija, a director of the Plaintiff Company. She depones that the Defendant practicing under the firm name of Munikah and Company Advocates acted for the Plaintiff in the transaction involving the sale of the Suit Property.
4. Under the sale agreement, the purchase price was Kshs. 10 million which the Defendant was required to hold as stakeholder until the transaction was completed. The Defendant received Kshs. 8 million in his capacity as the vendor's advocate from the purchaser in respect of the sale. The Defendant was expected to deposit this sum in an interest earning account.
5. The Plaintiff's director depones that the Defendant only admitted receipt of Kshs. 8 million and failed to disclose the status of the balance of Kshs. 2 million which should have been paid by the purchaser before the Defendant released the completion documents to the purchaser's advocates.
6. The deponent believed that since the Defendant released the transfer documents together with the title, the Defendant must have been paid the entire sum of Kshs. 10 million being the purchase price. The Defendant failed to give the Plaintiff feedback on the sale transaction for a long time as a result of which the Plaintiff instructed its current advocates to take over conduct of the matter.
7. The Plaintiff's advocates wrote several letters to the Defendant requesting the Defendant to remit the purchase price and forward to the file without any success.
8. Clause (ii) of the sale agreement reads as follows:

“Notwithstanding anything to the contrary contained in the General Conditions, if for any cause whatsoever, other than non-completion caused by the default of the Vendor, the Purchaser shall fail to pay the balance of the purchase price in accordance with the provisions of this Agreement the deposit paid by the Purchaser hereunder shall thereupon be forfeited to the vendor absolutely and the Vendor may thereupon without any notice to the Purchaser re-sell the property at such time in such manner and subject to such conditions as the Vendor may deem fit and any deficiency in price which may result and all expenses attending the abortive sale to the Purchaser and or any re-sale of the property shall be made good by and paid by the Purchaser to and recoverable by the Vendor as liquidated damages. Should the property on such re-sale fetch a higher price than as aforesaid the Purchaser shall not have any claim in respect either of such appreciation in price or of the deposit forfeited to the Vendor as aforesaid PROVIDED THAT in the event that the Vendor shall in his absolute discretion and without prejudice to the generality of the foregoing extend the period

for completion and payment then the purchaser shall pay to the Vendor interest on the balance of the purchase price at the said rate of Twenty one (21%) per centum per annum computed from the first day of expiry of the one Twenty (120) days from the date of this Agreement until the date of payment of the purchase price in full.”

9. The Defendant swore the Replying Affidavit on 7/1/2009 in opposition to the suit. He averred that Verica Cupurdija was not conversant with the facts of the case. He stated that the cause of action arose out of instructions the Plaintiff gave to his law firm to act for it in the matter of the sale of two acres being a portion of L.R. No. 209/10820. He admitted that his firm was paid the deposit of Kshs. 1 million to hold as stakeholder and that this sum was to be placed in an interest earning account. He maintained that the Plaintiff did not complete the transaction within the stipulated time for want of title.

10. The Defendant averred that his law firm had acted for the Plaintiff in many other matters for which it was entitled to fees and disbursements from the Plaintiff. The Defendant maintained that due to the unsatisfied professional fees and disbursement that the Plaintiff had not settled, his law firm had a lien on the files until his fees were settled. He sought the court’s indulgence to tax the bills of costs before the accounts could be taken and reconciled. That was on 7/1/2009.

11. The Defendant maintained that a substantial, if not all of the sum of Kshs. 8 million of the purchase price that the firm of Ndungu Njoroge and Kwach Advocates paid to his law firm had been spent for the benefit of the Plaintiff.

12. The Defendant averred that the firm of Wambua Kilonzo and Company Advocates undertook the registration of the transfer of the Suit Property. The Defendant was not aware whether the transaction had been completed and averred in the affidavit that the balance of the purchase price could be called for from the firm of Ndungu Njoroge and Kwach Advocates.

13. Verica Cupurdija swore a further affidavit on 24th August, 2009 before an Attorney at Law in Belgrade, Serbia. She deponed that she was the sole controller and owner of the Plaintiff company by virtue of the Quitclaim Bill of Sale executed in the State of California on 11<sup>th</sup> March, 2007 in which the majority of the shareholding in the Plaintiff Company was transferred to her. She deponed that her husband Dusan Cupurdija died in the year 2005. She denied that the Defendant had ever raised any fee note for work done for the Plaintiff Company. She also denied that the Plaintiff company gave the Defendant the instructions or authorised it to do the legal work it alleged it had done on behalf of the Plaintiff company.

14. This matter first came up for hearing before this court on 13<sup>th</sup> March, 2017. Mr. Gatheru Gathemia informed the court that he had just received instructions to act for the Defendant. He sought 14 days to come on record. He also submitted that the Plaintiff ought to rectify the title of the suit since the cause is marked as a miscellaneous application and not an originating summons. Mr. Mohammed advocate for the Plaintiff opposed the application for adjournment. He stated that the matter was filed in 2008 and had been adjourned on several occasions. The court allowed the adjournment and directed that the case would be heard on 6<sup>th</sup> April, 2017.

15. The case could not proceed on 6<sup>th</sup> April, 2017 after the court realised that the witness statements and documents were not on court file. The court directed the Plaintiff to prepare a bound bundle of all the pleadings, documents and witness statements for use during the trial. The court also granted parties leave to file comprehensive witness statements within 30 days. The case was set down for hearing on 14 June, 2017.

16. On 14<sup>th</sup> June, 2017, the Plaintiffs advocate informed the court that he was ready to proceed with two witnesses and that he had prepared a bundle of documents as requested by court. Mr. Gatheru Gathemia for the Defendant sought an adjournment which the court declined. The court directed that the hearing will proceed at 11.30 a.m. At 11.45 when the matter was called out Mr. Gathemia renewed his application for adjournment stating that the bundle of documents prepared by the Plaintiff had excluded some of the Defendant’s documents and that he needed to file another witness statement. The application for adjournment was opposed. Counsel for the Plaintiff urged that this was a delaying tactic and that matter should proceed for hearing.

17. The court in its short ruling stated that this was an old matter filed in 2008. Mr. Gatheru Gathemia had come on record on 13<sup>th</sup> March, 2017 and had had ample time to prepare for the hearing.

18. The Plaintiff called its first witness, Mr. Peter Fraser Scott who adopted his witness statement and produced several documents. On cross examination by Mr. Gatheru, the witness stated that he was aware that ownership of the Plaintiff Company had been transferred to Verica Cupurdija. Mr. Gathemia cross-examined the witness on the Quitclaim Bill of Sale. The witness stated that he was confident that the signatures on the Quitclaim Bill of Sale were genuine and he believed they were not a forgery since an attorney at law had authenticated them.

19. The Plaintiff’s second witness was its administration manager who confirmed that the Plaintiff Company is no longer in operation and that its shareholders and directors were dead. He stated that Verica Cupurdija, the widow of one of the directors and shareholders of the Plaintiff Company who resides in Budva, Montenegro was collecting the Plaintiff’s dues before its dissolution. He stated that she acted through the Plaintiff’s consultant, Mr. Peter Scott who had been the Plaintiff’s consultant for many years. He stated that the Plaintiff Company was transferred to Mrs. Verica Cupurdija under the Quitclaim Bill of Sale executed in the State of California, USA.

20. The witness stated that the Defendant had not taken any steps to tax its bill of costs against the Plaintiff. He stated that the Defendant had presented two bills of costs for Kshs. 1,267,736 one of which had been withdrawn while the second one remained untaxed. He also stated that from the Plaintiff’s records from the archives the Defendant was paid Kshs. 353,445.20 as fees and he had not made any other demand for outstanding fees.

21. Both witnesses urged the court to enter judgment for the Plaintiff. Mr. Gatheru Gathemia cross examined both witnesses.

22. After the Plaintiff had closed its case Mr. Gatheru Gathemia renewed his application for adjournment. The court declined that adjournment and directed that the case proceed for defence hearing.

23. The Defendant testified in court. He adopted his Replying Affidavit and produced several documents. He confirmed that he dealt with the Plaintiff in respect of the sale of L.R. No. 209/14476 being a portion of L.R. No. 209/10820 which the Plaintiff was selling to Stephen Kyalo Mulinge. He stated that the purchase price was Kshs. 10 million and that he was paid a total of Kshs. 8 million.

24. He testified that he had applied the purchase price to settle outstanding professional fees that the Plaintiff owed his firm. He also stated that he did not receive any confirmation that the sale had been completed and did not inform the Plaintiff whether the transaction had been completed.

25. He conceded that under the terms of the sale agreement the purchaser was entitled to a refund of Kshs. 1 million if the completion was not conducted in time. He maintained that instructions were withdrawn from him before he could complete the transaction. The Defendant closed his case and informed the court they were not calling any other witnesses.

26. The court directed the parties to file submissions and that the matter will be mentioned on 12<sup>th</sup> July, 2017 to highlight the submissions and take a judgment date. The Plaintiff filed its submissions on 21<sup>st</sup> June, 2017 and served the Defendant's counsel on 22<sup>nd</sup> June, 2017. The Defendant filed his submissions under protest on 25<sup>th</sup> July 2017.

27. The Defendant filed an application dated 5<sup>th</sup> July, 2017 seeking to stay further proceedings in the case pending adjudication of his application. The Defendant also sought to have the matter referred to the Presiding Judge, ELC Milimani, for orders to set aside the proceedings undertaken on 14<sup>th</sup> June, 2017 and that the case was to start *de novo* before a Judge in the Civil Division of the High Court. The Plaintiff sought an alternative prayer for the recall of the Plaintiff's witness for examination on the documents he had produced in court. The Defendant also sought to summon a document examiner from the Criminal Investigations Department to produce a report on the authenticity of the signatures on the Quitclaim Bill of Sale.

28. Further, the Defendant also sought to have the Plaintiff's advocate, Mr. Mohammed Zulfikar Ismael and all the witnesses investigated with a view to criminal action being taken against him. The Defendant sought to have the documents expunged from the records and that the claimant's entire claim be struck out with costs for gross abuse of the due process. The Defendant sought to have the Plaintiff's advocate condemned to pay the costs of the suit and the application.

29. The grounds on which the applications are made were that the Plaintiff's directors are dead and their interests should therefore not be pursued. It was also alleged that the documents relied on by the Plaintiff's witnesses were forgeries and that they will cause the Defendant harm and embarrass the court. The Defendant wished to have the dispute transferred from the Environment and Land Court as he alleges that the dispute relates to the accounting for legal fees which falls out of the province of the environment and land court.

30. The court delivered its ruling on 1<sup>st</sup> August, 2017 after considering the application dated 5<sup>th</sup> July, 2017 together with the affidavit, annexures and written submissions. The court dismissed that application and stated that the reasons would be given in this judgment.

31. Mr. Gatheru Gathemia sought leave to appeal and asked the court to recuse itself from hearing this matter. The court granted the Defendant leave to appeal and directed the Defendant to file a formal application for the disqualification of the judge. This was filed and the court has delivered a ruling on it separately.

32. The application to have the matter transferred to the Civil Division of the High Court was made after the hearing had been concluded. The Defendant is an Advocate of the High Court of forty (40) years standing. The suit was filed on 1/10/2008 at the High Court and later transferred to the Environment and Land Court. The dispute arose out of the sale of the Plaintiff's land and failure by its advocates to remit the sale proceeds or documents in respect of the sale to the Plaintiff.

33. Section 13 of the Environment and Land Court Act clothes the court with the jurisdiction to deal with disputes relating to land and the environment. The court has jurisdiction to determine this dispute since it relates to the sale of the Plaintiff's land which is the Suit Property herein. The Defendant ought to have raised any objections it had over the jurisdiction of the court early enough before the hearing started.

34. The Originating Summons is said to be brought under Order LII Rule 4 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Rules.

35. Order 52 relates to matters of the Advocates Act. Rule 4 states that where the relationship of advocate and client has existed the court may on application make an order for the delivery of a cash account, payment by the advocate of money he has in his possession and the delivery of documents to which the client is entitled. Rule 4 (2) states that applications under that rule shall be by way of Originating Summons supported by an affidavit and shall be served on the Advocate.

36. Section 3A saves the inherent powers of the court to make such orders as may be necessary for the ends of justice to be met. The duty of the court under Section 1B of the Civil Procedure Act is to further the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of civil disputes under the Act by handling all matters presented before it in a manner that attains the just determination of suits; the efficient disposal of court business; the efficient use of available judicial resources; and the timely disposal of proceedings at a cost affordable by the parties.

37. Section 63 of the Civil Procedure Act on supplemental proceedings stipulates that in order to prevent the ends of justice from being defeated, the court may make certain orders like issuing a warrant for the arrest of a Defendant; directing the Defendant to furnish security; grant a temporary injunction or make such other interlocutory orders as may appear just and convenient.

38. The Defendant sought to transfer the suit from the Environment and Land Court to the Civil Division of the High Court. The court dismissed that application. Transferring the suit to another court or division after the hearing has been concluded will not promote the overriding objective of ensuring just, expeditious, proportionate and affordable resolution of the dispute in this case.

39. The other objection raised is that the suit was not commenced in the proper manner. The Defendant contends that it was commenced as a miscellaneous application and not given the proper case number for an Originating Summons as envisaged by Order 37 of the Civil Procedure Act. Order 52 Rule 4 (2) states that applications under that rule are to be made by Originating Summons supported by affidavit and served on the Advocate. Article 159 of the Constitution enjoins the court to do substantive justice without paying undue regard to technicalities.

40. The sale agreement is dated 13<sup>th</sup> January 2000. The Defendant received the sale proceeds for the suit land in 2000. The matter was heard in 2017. Transferring the file to another division after the hearing has been concluded would not accord with the court's duty to ensure that the available judicial time is used efficiently to ensure the timely disposal of proceedings.

41. The Defendant sought to challenge the Quitclaim Bill of Sale produced by the Plaintiff after the hearing had been concluded. This should have been done earlier since the Defendant who is a senior advocate had had notice of the Plaintiff's documents since 2009. The Plaintiff's list of documents which includes the Quitclaim Bill of Sale was served on the Defendant in 2009.

42. After concluding a hearing, what the court is required to do is to deliver its judgement. The court can exercise its discretion and allow parties to reopen cases and cross examine witnesses for the ends of justice to be met. The court was not persuaded that it ought to have exercised its discretion in favour of the Defendant and recalled the Plaintiff's witnesses.

43. The Defendant sought to challenge the documents produced by the Plaintiff's witnesses in evidence and later sought to introduce a document examiner's report. When the court declined to allow the application to reopen the case, the Defendant's counsel then directed his attacks towards the Plaintiff's advocates and threatened him with arrest for uttering a false document when he filed the Plaintiff's documents in court. Not surprisingly, an application for this court to recuse itself followed when the Defendant's other machinations failed. These attempts by the Defendant were intended to derail the case and ensure that the court does not deliver its judgement in the matter and frustrate the Plaintiff and its advocate.

44. The Defendant did not produce the bills of costs that he maintained were not paid by the Plaintiff. The bills of costs have never been taxed. The court prefers the evidence of the Plaintiff's witness who testified that there were no pending bills from the Defendant over the Defendant's assertion that it was owed fees. The Defendant has never taxed the bills since 2000 when it received the sale proceeds for the sale of the Plaintiff's land.

45. The issue the court has to determine is whether the Plaintiff has proved its case on a balance of probabilities and whether the orders it seeks in the Originating Summons ought to issue.

46. The Defendant conceded that he received Kshs. 8 Million from the purchasers which he was to hold as stakeholder in an interest earning account. The Defendant stated that the balance of Kshs. 2 Million was never paid and that instructions were withdrawn from him. The Defendant nevertheless released the documents required to register the transfer of the Suit Property to the purchaser and failed to remit the sale proceeds to plaintiff. The Plaintiff's evidence was not controverted.

47. The court finds that the Plaintiff has proved its case on a balance of probabilities and directs the Defendant to forward the entire file and all the documents pertaining to the sale of the Suit Property in his possession to the Plaintiff's advocate.

48. The Defendant is ordered to remit the sum of Kshs. 8 Million being the sale proceeds he received in respect of the Suit Property to the Plaintiff's advocate with interest at the rate of 18% p.a. to be calculated from the date the sum was received until it is remitted to the Plaintiff. The Plaintiff will have the costs of this suit.

Dated and delivered at Nairobi this 11<sup>th</sup> day of October 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Momanyi for the Plaintiff

Mr. Gatheru Gathemia for the Defendant

Mr. V. Owuor- Court Assistant