



Muya (Suing through James Billy O Anunda, Meshack O Magati, John Muya) v Embakasi Developers Limited & another (Environmental and Land Originating Summons 1002 of 2015) [2024] KEELC 6378 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1002 OF 2015
LN MBUGUA, J
SEPTEMBER 26, 2024**

BETWEEN

**EMBAKASI JUA KALI HOUSING PLAINTIFF
SUING THROUGH JAMES BILLY O ANUNDA, MESHACK O MAGATI, JOHN
MUYA**

AND

**EMBAKASI DEVELOPERS LIMITED 1ST DEFENDANT
NAIROBI CITY COUNTY 2ND DEFENDANT**

RULING

1. The 1st Defendant's Notice of Motion dated 16.10.2023 is for determination where it seeks orders that a declaration be issued that it has compromised this suit with the Plaintiff in terms that every member of the Plaintiff/occupier of a plot on either former LR No. 7109/3 or former LR No. 7109/4 or former LR No. 7109/5 or former LR No. 7109/7 respectively as of the time this suit was filed in 2015 has a right to purchase the same from the 1st Defendant at the market price within the period agreed between the 2 parties.
2. That further, the 1st Defendant shall sell to the Plaintiffs the 516 plots being subdivisions of the suit parcels as per the Plaintiff's subdivision plan of August 2021, prepared for the Plaintiff by Physical planners known as Mr. Robert Onyando and Joash Ndorombori.
3. That to facilitate purchase of the 516 plots, the 1st Defendant has surrendered its certificates of title in respect of the suit properties to the Director of Land Administration, which have been replaced with leases thus this suit should be marked as settled.



4. That each buyer shall purchase their plots within the agreed completion period, failing which they shall give vacant possession to the 1st Defendant 7 days after the lapse of the completion period.
5. That the 1st Defendant hereby abandons prayers (a), (b), (c), (d) and (f) of its counterclaim dated 21.5.2018 as well as orders that each party bears their own costs.
6. The application is premised on grounds on its face and is supported by an affidavit sworn on 16.10.2023 by James Murigi, a member of the board of directors of the 1st Defendant. He avers that this is a case where a compromise should be recorded and granted as prayed as the conduct of the parties herein has given rise to a proprietary estoppel, in that the Plaintiff conceived the amalgamation, subdivision and regularization plan of the suit properties herein to enable its members to purchase plots which they were occupying.
7. He avers that the 1st Defendant is the owner of the suit properties namely; LR. NOS 7109/3, 4, 5 and 7 of which it has surrendered the certificates of titles of the said properties to the Director of Land Administration and the said properties have now been amalgamated and subdivided into 516 plots whose leases are being issued to enable those in occupation who are members of the Plaintiff herein to buy them or to vacate if they are unable /unwilling to purchase them.
8. He avers that Equity Bank Limited has offered to finance purchases for occupiers who need loans and its commitment is demonstrated by the fact that its officers jointly with representatives of the Plaintiff and their physical planner, Mr. Robert Onyando attended a meeting at which it was agreed that the Plaintiff's subdivision and regularization of development plans was to be used to enable members of the Plaintiffs to purchase the plots they were occupying as squatters.
9. That the subdivision plan of the 1st Defendant's 4 suit properties into 516 plots was prepared by Plaintiffs' members namely its 2 planners Mr. Robert Onyando and Joash Korombori in August 2021 and was approved by the 1st Defendant and the department of land administration on 22.10.2022. It was also approved by the Director of Survey on 14.10.2021.
10. That the said plan has been implemented and leases are being issued in respect of the 516 subdivisions, and that the exercise was preceded by issuance of letters of allotment in respect of the subdivided land by the Director of Land Administration.
11. He avers that the 1st Defendant is now able to sell to 516 occupiers through subleases in respect of all those 516 plots.
12. He contends that the process of reaching an agreement between the Plaintiff and the 1st Defendant began with the 1st proposal that the shareholders in the 1st Defendant sell their shares to the Plaintiff for ksh.800 million and the latter would subdivide the 4 suit parcels amongst its members. However, the Plaintiff was unable to pay the said ksh.800 million, hence the agreement was varied to the effect that the Plaintiff would continue with negotiations for a loan to enable it purchase the 4 suits parcels and get a physical planner at its costs to plan how the said parcels would be subdivided.
13. The application is opposed by the Plaintiff vide the replying affidavit sworn on 19.2.2024 by Meshack O. Magati, Secretary of the Plaintiff. He avers that in efforts to compromise this suit out of court, the Plaintiff entered into an agreement dated 11.7.2019 with the 1st Defendant in which the Plaintiff was purchasing the 1st Defendant's parcel and all its assets for Kshs.800 million whereby Equity bank was agreeable to finance the purchase, subject to being provided with individual titles for members of the Plaintiff.



14. That the said agreement was varied by the parties in writing vide letters dated 9.10.2019 of which the completion period was extended and a subdivision of the suit properties to 516 plots was to be undertaken in order for the bank to charge the individual titles and finance the members.
15. That in performance of the agreement, the Plaintiff appointed Foresight Planners to undertake the planning and subdivision of the suit parcels on their behalf, while the 1st Defendant was represented by one Robert Onyando. The Plaintiff went ahead and paid for the subdivision on 1.4.2020. However, submission of the plan was met with resistance from Mr. Patel, the Director of the 1st Defendant who failed to sign the plan and instead, he submitted a parallel scheme for 100 plots through his planner contrary to the agreement between the parties.
16. That the stalemate continued until both parties held a meeting on 13.8.2021 for purposes of persuading Mr. Patel to sign the scheme for submission and approval. That at the said meeting, Ms. Lilian Njagi who was representing Equity Bank reiterated that the bank would finance purchase of the plots only after receiving individual leases for each of the 516 members of the Plaintiff.
17. That After deliberations, Mr. Patel agreed to sign the scheme prepared by Mr. Oyando but there was no variation for the purchase price of kshs.800 million thus annexure JM7 availed by the applicant is misleading.
18. That in satisfaction of the agreement dated 11.7.2019 which has not been varied/set aside, the Plaintiff has paid the 1st Defendant ks.53 million and has received about 50 leases out of the 516 and the said delay in performance was occasioned by Mr. Patel and the Ministry of lands as the bank has to wait for leases before it releases money.
19. He avers that the 1st Defendant is unilaterally varying a valid agreement dated 11.7.2019 as varied on 9.10.2019, yet the said agreement has stipulated remedies available to parties in case of dispute.
20. The Plaintiff also opposes the application vide the replying affidavit sworn on 19.2.2024 by Robert Onyando, a physical Planner practicing under Foresight Planners Limited, which was contracted by the Plaintiff to conduct planning of the suit properties. The instructions covered preparation of plans and subdivision schemes for the suit property into 516 plots, which he did and submitted the schemes to Nairobi County for approvals.
21. He was to learn that a planner instructed by the 1st Defendant submitted a parallel scheme for 157 plots, contrary to the agreement between the Plaintiff and the 1st Defendant. He contends that he also faced difficulty in obtaining the signature of the 1st Defendant's director, Mr. Patel to authorize the schemes. Subsequently, a meeting was convened on 13.8.2021 which he attended together with a representative from Equity bank and after deliberations Mr. Patel agreed to sign the plan he had prepared and he undertook to withdraw the parallel subdivision prepared by his planner.
22. That in the said meeting, there was no variation of the purchase price nor the agreement between the parties as Annexure JM7 purports.
23. In response to the Plaintiff's replying affidavits, the 1st Defendant filed a further affidavit sworn by Rasik Patel on 29.4.2024 where he reiterates the averments set out in the supporting affidavit to their Notice of motion. He also contends that during the meeting held on 13. 8.2021, it was confirmed that the purchase price for a single buyer of the plots was ksh.4 billion which is what the 1st defendant is seeking.
24. He also avers that no evidence has been tendered by the Plaintiff of the alleged fact that its financier, Equity Bank Ltd requires the processing of the individual plot titles prior to financing the 1st Defendant's assets.



25. That the agreement between the Plaintiff and the 1st Defendant dated 11.7.2019 was for sale of the shares in the 1st Defendant at ksh.800 million at the time but due to failure by the Plaintiff to honour its obligations, the said contract is deemed to be terminated.

Submissions

26. The 1st Defendant's submissions are dated 21.5. 2024. They rely on the cases of Protus Hamisi Wambada & another v Eldoret Hospital [2020] eKLR, Super Home (Kenya) Ltd v East Africa Portland Cemenet Company Ltd [2004] eKLR as well as John Nga'ng'a Kibe v Rebeccah Muthoni Kiama & Another [2020] eKLR to submit that this court has jurisdiction to order a compromise suit. It is argued that a compromise was reached in the matter, following which the suit properties were amalgamated then subdivided to cater for each occupier who is a member of the plaintiff.
27. That the doctrine of proprietary estoppel applies as the Plaintiff secured approval of its plans on condition that it would compromise this suit, thus the plaintiff cannot be heard to be changing its position after the director of physical planning and the 1st Defendant have implemented the plans. To this end, the case of 748 Air Services Limited v Theuri Munyi [2017] eKLR as well as the case of John Mburu v Consolidated Bank of Kenya [2018] eKLR are relied upon.
28. It is submitted that the agreement dated 11.7.2019 was rescinded by the 1st Defendant vide its letters dated 26.11.2020 and 17.9.2021 when the Plaintiff failed to meet its obligation as per clause 8 (i) of the said agreement which provided that time was of the essence.
29. The case of Dhanjal Investments Limited v Shabaha Investments Limited [2022] KECA 366 is relied upon to submit that once a contract has a term that time is of essence, any party that fails to perform within the stipulated deadline would be in fundamental breach and the innocent party will be entitled to terminate the contract and claim damages.
30. It is pointed out that at the time of completion of the agreement in October 2019, the Plaintiff had only paid ksh.11 million out of ksh.800 million and has so far paid 53 million, the last payment being in June 2022 thus the plaintiff is in breach.
31. Reliance is placed on the case of City Council of Nairobi v Wilfred Kmau t/a Githua and Associates & another [2016] eKLR to submit that Equity bank, the Plaintiff's financier could not impose conditions on the 1st Defendant to facilitate funding of the purchase of the property by the Plaintiff as it is barred under the privity of contract doctrine.
32. That further, the 1st Defendant was not supplied with any agreement between Equity Bank and the Plaintiff, so that it can be said that the said bank was exempted from the doctrine of privity of contract. To this end, the case of William Muthee Muthami v Bank of Baroda [2014] eKLR is relied upon.
33. The 1st Defendant also relies on the case of Nabro Properties Ltd v Sky Structures Ltd & 2 others [2002] eKLR to urge the court to refrain from allowing the Plaintiff to take advantage of its own wrong doing to benefit its members and to the detriment of the 1st Defendant.
34. On its part, the Plaintiff filed submissions dated 27.5.2024. where it is argued that the burden of proving that this suit has been compromised lies on the 1st Defendant. To this end, the case of *Okello v Kairu Enterprises Limited (Environment and Land Case Civil Suit 617 of 2005)* [2023] KEELC 20225 (KLR) (28 September 2023) Ruling is cited.
35. The Plaintiffs contend that the 1st Defendant has not met the threshold of evidence required and that one of the elements to be proved is that there ought to be a valid offer and unequivocal acceptance by



the other party. It is submitted that there is no other agreement other than the one dated 11.7.2019 and the subsequent variations of 9.10.2010 do fulfil the requirements of formation of a contract. That further, the variations had done away with the clause making time of essence since the 1st Defendant had agreed to extend time for the performance of the contract dated 11.7.2019 which extension was no longer time bound, thus it cannot be said that the said agreement was terminated by effluxion of time.

36. It is submitted that the 1st Defendant's assertion that there is a compromise for the purchase of 516 plots by the Plaintiff's members at ksh.4 billion have not been supported by evidence. That further, the said line of argument offends Section 3 (3) of the Law of Contracts Act which requires that all contracts for sale of land must be in writing.
37. It is argued that the subdivision of the 4 suit parcels did not create any further obligations and or interests separate and distinct from the obligations created by the agreement dated 11.7.2019 as varied by the letter dated 9.10.2019 and which included the term that equity bank would finance the purchase.
38. That further, payment of ksh.800 million by the Plaintiff was pegged on the 1st Defendant submitting the 516 subleases to Equity Bank which is yet to be done.
39. The court is urged to dismiss the application with costs, while
relying on the cases of; Kenya Anti-Corruption Commission v Magut Agencies Limited & 3 others [2018] eKLR, Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR, KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others (Civil Case 445 of 2015) [2023] KEHC 24298 (KLR) Commercial & Admiralty) (24 October 2023).

Determination

40. The court will commence the discourse by reproducing the provisions of Order 25 Rule 5 (1) of the Civil Procedure Rules, where it is stipulated that;

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”
41. The 1st Defendant's case is that after lengthy negotiations with the plaintiff which took about 4 years, it has a compromise with the Plaintiff which enables the Plaintiff's members who are squatters on the 4 suit parcels herein to become owners of 516 plots which were subdivided from the 4 mother parcels by paying the 1st Defendant the market price of the said plots or to vacate them.
42. The 1st Defendant also contends that during a meeting held on 13.8.2021, it was confirmed that the purchase price for a single buyer of the plots was ksh.4 billion which is what the 1st defendant is seeking. At this juncture, it is pertinent to note that evidence relating to this alleged meeting is not annexed in the supporting affidavit to the Notice of motion filed in the electronic file (CTS Portal).
43. Be that as it may, the said agreement contemplates varying the purchase price of the suit plots, and as such it would have to be in writing and signed by the 1st Defendant and the Plaintiff. The court is limited on saying much about the said document which was referred to as 'JM7' as the court had no benefit of seeing it. Needless to say that even if the court had seen the document, it would still have



- posed a challenge for the same to be accepted by the court as a gospel truth in view of the fact that the whole issue of purchase price variation is disputed.
44. To this end, while the Plaintiff agrees that the 4 suit parcels were subdivided to 516 plots in order to accommodate its members, it denies that the plots were to be purchased at the current market price and asserts that the Plaintiff was to pay the Defendant ksh.800 million for the entire 516 plots. The Plaintiff's argument is based on an agreement dated 11.7.2019.
 45. The Plaintiff went further to demonstrate that the completion date for the said agreement was 9.10.2019, on which date the Plaintiff wrote to the 1st Defendant seeking extension of the completion date and also seeking authorization from the 1st Defendant to subdivide the 4 parcels.
 46. Vide its letter dated 9.10.2019, the 1st Defendant ceded to the Plaintiff's request and agreed that the Plaintiff should subdivide the 4 suit parcels at its own costs and in essence time was extended.
 47. In *Mwangi v Kiiru* [1987] eKLR, the court of Appeal stated as follows;

“As there was no definite provision for the payment of the balance, the appellant was entitled to be served with a notice making time of the essence...”
 48. The 1st Defendant desires to sell plots to the Plaintiff's members directly on willing buyer willing seller basis. This is the proposal that the 1st Defendant wants this court to ratify. A situation that is certainly untenable in view of the fact that there is no consent to that effect.
 49. It is a well-known principle of law that a court cannot rewrite a contract between the parties. In *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR, the Court of appeal stated that;

“Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally...”
 50. By its own admission, the 1st Defendant has told the court that leases to some of the 516 plots herein are still being issued. On the other hand, the Plaintiff contends that funding from equity bank is pegged on issuance of those leases. It follows that to enter judgment as prayed by the 1st Defendant would be tantamount to re-writing the agreement between the Plaintiff and the 1st Defendant which as stated earlier, this court cannot do.
 51. The history of the dispute herein is rather unflattering as captured in a ruling delivered way back on 10.3.2017 in this suit, where it is evident that the dispute has manifested itself in other cases, some dating as far back as the year 1999. And as recent as the beginning of year 2024, the parties were pursuing settlement. If such a settlement failed, the recourse is in prosecution of the suit to its logical conclusion and not in filing an application for the court to ratify what the 1st defendant thinks should be the compromise!
 52. In the final analysis, I find that the application dated 16.10.2023 is not merited and the same is hereby dismissed. However, in the spirit of giving the parties a chance to explore even a partial settlement, I direct that each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Otao holding brief for Esachi for Plaintiff Respondent

Nduta holding brief for Dr. Kamau for 1st Defendant

Court assistant: Joan

