



**Rocca v Delta Connections Limited & 2 others (Environment & Land Case 205 of 2020) [2023] KEELC 15693 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15693 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 205 OF 2020  
NA MATHEKA, J  
FEBRUARY 21, 2023**

**BETWEEN**

**PAOLO ROCCA ..... PLAINTIFF**

**AND**

**DELTA CONNECTIONS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOSES WAWERU NDUNG’U ..... 2<sup>ND</sup> DEFENDANT**

**JASPER ODUOR OMONDI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. It is the Plaintiff’s case that at all material times, the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants were advocates of the High Court of Kenya and partners in the firm of Omondi Waweru & Company, Advocates and the Plaintiff was a client of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. On diverse dates in the period between the year 2012 and 2016 the Plaintiff paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants a sum of Kshs. 108,940,000.00 as his advocates and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were to hold the said monies as stakeholders for the purchase of a property for the Plaintiff from the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the advocates acting both for the Plaintiff and the 1<sup>st</sup> Defendant in the transaction. On 20<sup>th</sup> April, 2012 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants drew a Sale Agreement between the 1<sup>st</sup> Defendant and the Plaintiff in which the 1<sup>st</sup> Defendant was to sell to the Plaintiff five (5) acres of land at a price of Kshs.75,000,000.00 to be excised from a property known as Subdivision Number 463 Section III Mainland North. On 17<sup>th</sup> September, 2013 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants drew another Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant in which the 1<sup>st</sup> Defendant was to sell to the Plaintiff five (5) more acres of land at a price of Kshs. 80, 000,000.00 to be excised again from the property Subdivision Number 463 Section [II Mainland North. \* The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants expressly and unequivocally admitted in their \* letter dated 17<sup>th</sup> September, 2013, 10<sup>th</sup> June, 2014 and 7<sup>th</sup> February, 2017 addressed to the Plaintiff that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had checked their record of payments and confirmed that the Plaintiff had paid



to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants a sum of Kshs. 108,940,000.00. The Plaintiff avers that he paid the sum of Kshs. 108,940,000.00 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as his advocates and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were to hold the said monies as stakeholders pending completion of the purchase of the properties. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not to release the said monies to any other person without the consent and/or authority of the Plaintiff.

2. Despite having paid the said sum of Kshs. 108,940,000.00 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not acquire the properties for the Plaintiff, and therefore, there was a total failure of consideration. The sale of the properties did not take place because the 1<sup>st</sup> Defendant was not the owner of the property known as Subdivision Number 463 Section III Mainland North, and therefore, the 1<sup>st</sup> Defendant had no right or interest in the said property to sell to the Plaintiff. The Plaintiff avers that the owner of the property Subdivision Number 463 Section III Mainland North was Mr. Mohamed Ali Motha, and the said owner had charged the said property to Barclays Bank of Kenya Limited, and the bank sold the said property to Abdulrahim Ebrahim Haroon Luhar in exercise of its power of sale. The Plaintiff demanded a refund of the sum of Kshs. 108,940,000.00 from the Defendants but the Defendants did not refund the said money to the Plaintiff. The Plaintiff prays for judgment against the Defendants jointly and severally for;
  - a. Kshs. 108,940,000.00
  - b. Interest on (a) above at the rate of 15% per annum as from the date when the Plaintiff made the payments to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants until payment in full.
  - c. Costs of the suit.
  - d. Any other remedy and/or relief that the court may deem fit and just to grant.
3. The 1<sup>st</sup> Defendant states that it entered into Agreements for Sale with the Plaintiff for the sale to the Plaintiff of a property measuring in the aggregate ten (10) acres to be excised from the parcel of land known as Subdivision Number 463 Section III Mainland North for the aggregate purchase price of Kshs. 155,000,000. The 1<sup>st</sup> Defendant states that on 26<sup>th</sup> August 2015 it entered into a Memorandum with the Plaintiff which Memorandum was Supplemental to the Agreements for Sale dated 20<sup>th</sup> April 2012 and 17<sup>th</sup> September 2013. The 1<sup>st</sup> Defendant states that in the aforesaid Memorandum the 1<sup>st</sup> Defendant confirmed to the Plaintiff that it was in the process of facilitating completion of the transaction. The 1<sup>st</sup> Defendant states that it purchased the parcel of land known as Subdivision Number 463 Section III Mainland North for the sum of Kshs. 454,000,000 from Mohamed Ali Motha. The 1<sup>st</sup> Defendant states that it has instituted a suit, ELC NO. 71 of 2020 seeking specific performance of the contract against Mohamed Ali Motha. The said suit is pending in court. The 1<sup>st</sup> Defendant states that it shall honour its Agreement with the Plaintiff and ensure the parcel of land is ultimately transferred to the Plaintiff. The 1<sup>st</sup> Defendant denies owing the Plaintiff the sum of Kshs. 108,840,000 or indeed any other sum. The 1<sup>st</sup> Defendant prays that the Plaintiff's suit be dismissed with costs.
4. This court has considered the evidence and the submissions therein. The Plaintiff purchased from the Defendant 10 acres of land in two instances, the first was vide an agreement of sale dated 20<sup>th</sup> April 2012, the second is dated 17<sup>th</sup> September 2013. The first agreement of sale dated 20<sup>th</sup> April 2012 is between Delta Connections Limited as the vendor and Paolo Rocco as the purchaser (PEX-1). The agreement of sale was for 5 acres which was to be excised from Parcel No. L.R MN/III/463 measuring 51.3 acres and the purchase price was Kshs 75,000,000/=. The purchase price was paid to the vendor's advocate who held the same as stakeholders. The second agreement of sale was dated



17<sup>th</sup> September 2013 between Delta Connections Limited as the vendor and Paolo Rocco as the purchaser (PEX-2). The agreement of sale was for 5 acres which was to be excised from Parcel No. L.R MN/III/463 measuring 51.3acres and the purchase price was Kshs 80,000,000/=. The purchase price was paid to the vendor's advocate who held the same as stakeholders. The third agreement was a Memorandum between the parties herein dated 26<sup>th</sup> August 2015 combining the agreements; dated 20<sup>th</sup> April 2012 (Agreement A) and 17<sup>th</sup> September 2013 (Agreement B) (PEX-3). The land being purchased was 10 acres for a purchase price of Kshs 155,000,000/= and that the purchaser had already paid Kshs 103,640,000/=. The purpose of the Memorandum was to confirm that the purchaser had made payments towards the purchase of the 10 acres of land which were marked in the suit land Deed Plans No. 344982 and No. 345178.

5. The court has established that, at the time of the sale, the suit property was registered in the name of Mohamed Ali Motha and was charged to Barclays Bank of Kenya. Entry No. 9 of the Certificate of Title of LR 463/III/MN (PEX-19) show that the suit property was charged to Barclays Bank of Kenya on 8<sup>th</sup> October 2001. Presently the suit property is registered in the name of Abdulrahim Ebrahim Haroon Luhar as seen from the Certificate of Postal Search on Land Parcel No. 463/III/MN dated 27<sup>th</sup> January 2020 (PEX-18). The Defendant has pleaded that it bought the suit property from Mohamed Ali Motha for Kshs 454,000,000/=:, who has since sold the suit property to a third party. As a result, the Defendant instituted Mombasa ELC No. 71 of 2020 (DEX-7) Delta Connections Limited vs Mohamed Ali Motha and 5 others, where it seeks inter alia to be declared as the lawful purchaser of the suit property. On 11<sup>th</sup> February 2021 the court herein issued interlocutory injunction restraining the Defendants from dealing with LR No. 463/III/MN until the suit is heard and determined.
6. From the evidence on record and the existence of Mombasa ELC No. 71 of 2020 it is evident that at the time the Plaintiff entered into the agreements of sale, the vendor was not the registered owner of the suit property and that it was aware that the suit property had an encumbrance against its title. There is no evidence that has been placed before court that would demonstrate that the vendor entered into any agreement of sale for the suit property from Mr. Motha, and that Mr Motha had transferred the suit property to the vendor. The certificate of title indicate that Mr. Motha was the registered as the proprietor of the suit property, and had charged the same to Barclays Bank of Kenya Limited. From the evidence before court, the Defendant did not have any proprietary interest in the suit property. The vendor could not and cannot transfer or convey any valid or lawful interest in the suit property to the Plaintiff. The Defendant did not have any capacity to enter into and execute any agreement of sale in relation to the suit property, therefore the agreements dated 20<sup>th</sup> April 2012 and 17<sup>th</sup> September 2013 are void.
7. In P & T Housing Co-operative Society Ltd vs 0' Divisional Integrated Development & another (2017) eKLR, it was held that,

“What comes out in all this evidence is that, the agreement entered into between the parties was void, ab initio and could not be effected for the simple reason that the Defendant had no capacity to deal in that land. Completion cannot be affected on such a contract as the Defendant was not the vendor. The plaintiff was aware that the land was registered in the name of Josephat Musyoka Nganga; but the Defendant described himself as the vendor and that the owner had sold the land to him. That was total mis-representation in the circumstances.

My assessment of the evidence is that the contract or agreement was not capable of execution because the Defendant was not the owner and did not obtain the Land Control Board Consent. There is no doubt that the Defendant received the money from the plaintiff, and



considering the background of the transaction that payment was in respect of a parcel of land that the Defendant could not deal in.”

8. Further, the official search of the suit property indicated that the same was charged to Barclays Bank Limited now known as ABSA Bank Limited. Section 28 of the *Land Registration Act* includes a charge as an overriding interest, which means that the title to the suit property was subject to the interest of the chargor. Therefore, Mr. Motha the registered owner of the suit property could not transfer any title to the Defendant without first seeking consent from Barclays Bank the registered chargor at the time the suit property was being sold to the Plaintiff. The Defendant was deceitful to purport to be in a position to transfer title of the suit property to the Plaintiff, while being fully aware that it was not in a position to sell. The Plaintiff had no reason to believe that Defendant had the right to sell the suit property to him. The Plaintiff ought to, at the time of the purchase conducted due diligence on the title of the suit property, which could have revealed to him that the Defendant did not have any title over the suit property.
9. The Plaintiff has prayed for judgement against the Defendant for Kshs 108,940,000/= which was the purchase price paid for the suit property. The Plaintiff and Defendant entered into a Memorandum dated 26<sup>th</sup> August 2015 (PEX-3), where it was indicated that the total purchase price for the 10 acres was Kshs 155,000,000/= and the Defendant confirmed that the Plaintiff had already paid Kshs 103,640,000/= as partial payment of the purchase price. The Plaintiff has demonstrated through Cash Deposit Slips and bank statement from Imperial Bank Limited (in liquidation) (PEX-8 to PEX-10, PEX-13), bank statement from transfer form from Stanbic Bank Limited (PEX-11) and receipts from Omondi Waweru & Company Advocates (PEX-12) that indeed he paid the Defendant Kshs 108,940,000/=. The firm of Omondi Waweru & Co Advocates wrote to the Plaintiff on 7<sup>th</sup> February 2017 confirming receipt of Kshs 108,940,000/= as payment towards purchase of the suit land (PEX-16).
10. DW1 was Moses Waweru the Defendant’s director. He acknowledged that the Plaintiff paid Kshs 108 million towards purchase of the suit property and insisted that the Plaintiff together with all the other purchasers were aware that the suit property was registered in the name of a different person other than the Defendant. He denied that the Defendant had breached the contract and stated that the completion of the agreement was subject to the subdivision process, which was halted by the registered owner selling the suit property to a third party. He claimed the Plaintiff too breached the contract since the purchase price was not paid within 90 days as required in the agreement. He maintained that the suit herein was premature and only when Mombasa ELC 71 of 2020 will be concluded can the Defendant refund the money it owes the Plaintiff. I find DW1 rather deceitful, he admitted to being the advocate who prepared the sale agreements between the Plaintiff and 1<sup>st</sup> Defendant, while being a director of the 1<sup>st</sup> Defendant. DW1 proceeded to receive the purchase price as Omondi Waweru & Company advocates to hold as the stakeholder of the parties therein. DW1 insisted that he informed the Plaintiff that he was the Defendant’s director at the time of executing the sale agreements, however this was a conflict of interest. However, no evidence was submitted to court to prove that indeed DW1 disclosed to the Plaintiff that he was the Director of the 1<sup>st</sup> Defendant Company while executing the sale agreement and receiving the purchase price in his capacity as an advocate. I find that DW1 as an advocate and director of the Defendant was well aware of the fact that the 1<sup>st</sup> Defendant was not the registered owner of the suit property. DW1 was also aware of the registered charge over the suit property which was an overriding interest and an encumbrance against any transfer of title to himself or any



other party such as the Plaintiff. I find that the 1st Defendant breached the agreement for sale, Black's Law Dictionary, 9<sup>th</sup> Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

11. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale vs Umon Manufacturing Co. (Ramsboltom)* (1918) L.R 1KB 592, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

12. According to the agreements on 20<sup>th</sup> April, 2012 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants drew a Sale Agreement between the 1<sup>st</sup> Defendant and the Plaintiff in which the 1<sup>st</sup> Defendant was to sell to the Plaintiff five (5) acres of land at a price of Kshs.75,000.000.00 to be excised from a property known as Subdivision Number 463 Section III Mainland North. On 17<sup>th</sup> September, 2013 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants drew another Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant in which the 1<sup>st</sup> Defendant was to sell to the Plaintiff five (5) more acres of land at a price of Kshs. 80, 000,000.00 to be excised again from the property Subdivision Number 463 Section (I) Mainland North. • The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants expressly and unequivocally admitted in their letter dated 17<sup>th</sup> September, 2013, 10<sup>th</sup> June, 2014 and 7<sup>th</sup> February, 2017 addressed to the Plaintiff that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had checked their record of payments and confirmed that the Plaintiff had paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants a sum of Kshs. 108,940,000.00. I find that to date no land is available and the Defendants have failed to perform their part of the contract and are in breach. Based on the foregoing analysis I find that the Plaintiff has established his case on a balance of probabilities and the Plaint dated 24<sup>th</sup> August 2020 is merited and I make the following orders;

1. The Defendants to refund to the Plaintiff Kshs 108,940,000/= being the partial payment received for the purchase of 10 acres within Land Parcel LR 463/III/MN with interest at court's rate from 9<sup>th</sup> November 2020 the date this suit was filed till payment in full.
2. The Plaintiff is awarded costs of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

