



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 252 OF 2017**

**CENTRE POINT SOLUTION LTD.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**GILLIANA INTERNATIONAL LTD.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**MURUGA INVESTMENT LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BEN THE AGENT CONSULTANCY LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

By a Notice of Motion application dated 6<sup>th</sup> May 2019, brought under the provision of **Section 1A, 1B, 3A, 63(e) and 94 of the Civil Procedure Act; Order 36 Rules 5 & 8(1), Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules**; and all other enabling provisions of the law. The Applicants sought orders;

- a) Summary Judgment be entered on admission for the Plaintiffs/ Applicants against the 1<sup>st</sup> Defendant/Respondent for Ksh 8,550,000/- plus interests at the prevailing commercial rates from 31<sup>st</sup> August 2018 until payment in full.
- b) Costs of this application be awarded to the Plaintiff/Applicants against the 1<sup>st</sup> Defendant/Respondent, together with interest therein.
- c) The Plaintiffs/Applicants herein be granted leave to execute forthwith the decree of the court that will result from the summary judgment sought hereby before the costs sought under prayer 'b' above are ascertained through taxation.

The Application was based on grounds;

- a) That the Plaintiffs/Applicants have by an amended Plaint dated 28<sup>th</sup> August 2019 and filed on 31<sup>st</sup> August 2018, sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for breach of contract. The breach of contract aforesaid was made manifest by the Defendants' withdrawal of the letter of Offer dated 30<sup>th</sup> November 2015 despite part performance of the Plaintiffs' obligations under the contract; and the Plaintiffs have hereunto sought for several remedies against the Defendants, including for special

damages or sums of money paid by the Plaintiffs to the Defendants.

- b) That while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied the Plaintiffs' allegations set out in the Amended Plaint dated 28<sup>th</sup> August 2019 vide their respective Statements of defence, the 1<sup>st</sup> Defendant/Respondent has made plain and obvious admissions that necessitated the present application.
- c) That the 1<sup>st</sup> Defendant/Applicant in its Statement of Defence and counterclaim dated 27<sup>th</sup> September 2018 and filed on 1<sup>st</sup> October 2018 at paragraphs 8, 9 and 10, expressly and unequivocally admitted to being truly indebted to the Plaintiffs to the tune of Ksh 8,550,000/-
- d) That it is clear from the above-mentioned paragraphs that the 1<sup>st</sup> Defendant/Respondent has admitted in no uncertain terms to having received Ksh 8,550,000/- from the Plaintiffs before it withdrew its Letters of Offer to the Plaintiffs, albeit unlawfully and unjustifiably; and the 1<sup>st</sup> Defendant/Respondent refused to indemnify the Plaintiffs/Applicants for the sums paid to it upon the Defendants' breach of contract.
- e) That the 1<sup>st</sup> Defendant/Respondent's admission aforesaid is plain and obvious and therefore judgment on admission should be entered against the 1<sup>st</sup> Defendant as prayed.
- f) That the Defendant/Respondent has no real prospects of successfully defending the Plaintiffs' claim for Ksh 8,550,000/- hence there are no compelling reasons why this matter should be disposed of at a trial.

### **REPLYING AFFIDAVIT**

The application was opposed by an affidavit dated 13<sup>th</sup> June 2019, sworn by Benson Wangura Mathenge Director of the 2<sup>nd</sup> Defendant herein. He stated that in the year 2016, the 2<sup>nd</sup> Defendant was appointed by the 1<sup>st</sup> Defendant to act as its agent with respect to the premises known as **Ciata Mall on LR. No. 5989/178**, Nairobi. In the contract entered between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant was to *inter alia*;

- i) Procure tenants on behalf of the 1<sup>st</sup> Defendant
- ii) Contract with the prospective tenants and arrange with the clients for viewing of vacant space.
- iii) Quote and offer rental rates to the tenants based on rates approved by the 1<sup>st</sup> Defendant.

He stated that the 2<sup>nd</sup> Defendant procured the Plaintiff as a tenant for the 1<sup>st</sup> Defendant and presented the Plaintiff to the 1<sup>st</sup> Defendant for the said parties to engage further and enter into a formal agreement.

That the 1<sup>st</sup> Defendant received monies directly from the Plaintiff as confirmation that a relationship had been established between the Plaintiff and the 1<sup>st</sup> Defendant.

That the 2<sup>nd</sup> Defendant cannot hence be held liable for the sums paid by the Plaintiff to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant having only acted as an agent in the transaction.

That the only sum received by the 2<sup>nd</sup> Defendant were the agency fees which it was entitled to as agent and which only amounted to Ksh 535,000/- and which were clearly spelt out as such.

### **DETERMINATION**

After consideration of the pleadings and submissions the issue for determination is whether judgment on admission may be entered by the Court against the 1<sup>st</sup> Defendant's admission.

In **CHOITRAM vs NAZARI C.A. No 8 of 1982** the Court held as follows;

***“Admissions of fact under Order XII Rule 6 need not be on the pleadings; they may be in correspondence or documents which are admitted or they even be oral as the rule uses the words ‘otherwise’ which are words of general application and are wide enough to include such other admissions.***

***An order for judgment on admission under the Civil Procedure Rules Order XII Rule 6 should only be made if it is plain that there are either clear express, or clear implied, admissions....’***

Mulla on the Code of Civil Procedure Pg 856 provides;

***‘An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal’***

The Plaintiff's claim of Ksh 8,550,000/- payment is not established and/or admitted by the 1<sup>st</sup> Defendant in his Defence & Counterclaim dated 27<sup>th</sup> September 2018 and filed on 31<sup>st</sup> October 2018. Paragraphs 8 is about payment of Ksh 2,650,000 and legal fees of Ksh 100,000/- as legal fees by Plaintiffs to 1<sup>st</sup> Defendant instead of Ksh 9,153,000 as contracted and within the agreed timelines. There is an issue of breach of contract in performance of the contract between the parties.

Paragraph 9 of the Defence, the 1<sup>st</sup> Defendant confirmed the Plaintiffs paid Ksh 1,000,000/- on 29<sup>th</sup> June 2016 way after the contract period and on 2<sup>nd</sup> March 2017 paid Ksh 1,125,000/-.

Paragraph 10 the 1<sup>st</sup> Defendant deponed that the Plaintiffs paid late payments in 1<sup>st</sup> Defendant's account without notifying the Defendants. By the time the suit was filed the Plaintiffs had arrears of Ksh 603,000/- .

The claim for refund of Ksh 8,550,000/- cannot be dealt with in isolation as there are various parties in performance of the contract other than contracting parties. It is alleged that each contracting party breached the contract due to non performance and/or performance in terms of the contract. There is a contest of whether the parties breached terms of the contract or whether the contract was rescinded. There are issues of restitution, damages or refund where parties had part performed the terms of the contract before it was rescinded and/or terminated. Finally, the 1<sup>st</sup> Defendant raised a counterclaim of Ksh 2,073,851.30/- which constitutes a separate claim against the Plaintiffs from the suit. With all these issues, there is no admission in unequivocal and crystal clear terms of receipt of Ksh 8,550,000/- that warrants/mandates refund at this stage before hearing and determination of the matter. There are various triable issues to be determined at the hearing and determination of the suit.

In **Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991**, had this to say:

***“... all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defense which raises triable issues does not mean a defense that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defense, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues.”***

## **DISPOSITION**

**1. From the above consideration of pleadings this Court finds the application of 6<sup>th</sup> May 2019 lacks merit and is dismissed with costs.**

2. The parties to pursue with Deputy Registrar Commercial Division Case Management Conference (CMC) within 60 days and thereafter obtain hearing date for *inter partes* hearing.

3. During the current corona virus pandemic lockdown there shall be no execution with regard to this suit/application until official announcement of return to normalcy.

DELIVERED SIGNED & DATED IN OPEN COURT ON 29<sup>TH</sup> MAY 2020.(VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

JK WACHIRA ASSOCIATES ADVOCATES FOR PLAINTIFF

WANYOIKE & MACHARIA ADVOCATES FOR DEFENDANT