



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 26 OF 2018

(FORMERLY ELC NO. 156 OF 2016)

SURJIT SINGH PADHAL

a.k.a. **SURJEET SINGH SAWAN SINGH.....1ST PLAINTIFF**

MALKIT SINGH PADHAL

a.k.a. **MALKIT SINGH SAWAN SINGH 2ND PLAINTIFF**

VERSUS

BANK OF BARODA KENYA LIMITED..... 1ST DEFENDANT

GENERAL EQUIPMENT CO. (1978) LTD..... 2ND DEFENDANT

RULING

The 2nd Defendant, **GENERAL EQUIPMENT COMPANY (1978) LIMITED**, has asked the court to strike out the suit against it.

1. The Applicant drew the court's attention to the fact that the claim against it was founded on a contract.
2. It is common ground that the contract between the Applicant and the Plaintiffs is dated 28th June 2011. It was a contract pursuant to which the Plaintiffs offered to sell, and the 2nd Defendant accepted to purchase three properties, being **L.R. NO. KISUMU MUNICIPALITY/BLOCK 7/11; L.R. NO. KISUMU MUNICIPALITY/BLOCK 7/64; and L.R. NO. KISUMU MUNICIPALITY/BLOCK 7/65.**
3. According to the Applicant, the Sale Agreement was completed on 14th July 2012, which date was described as being more than 6 years and 6 months prior to the date when the suit herein was instituted.
4. Pursuant to **Clause 5** of the Sale Agreement, the sale was supposed to be completed within 60 days of the date when it was executed. In effect, as conceded by the applicant, the sale ought to have been completed by 28th August 2011 unless the same was extended by the parties.
5. The Plaintiff's case was that the 2nd Defendant did not pay the full purchase price by 14th July 2012 or at all. But the 2nd Defendant asserts that the full purchase price was paid by 14th July 2012.
6. In any event, submitted the Applicant, if there had been any default in the payment of a portion of the purchase price, the Plaintiff would have become entitled to sue for such an unpaid sum.
7. The Applicant's position was that the cause of action arose on 28th August 2011, when there was a default.
8. On the other hand, the Plaintiff's position was that it was not until sometimes in September 2018 that they discovered that the Applicant had failed to remit payment of Kshs 15,000,000/=. That averment is made at paragraph 7 of the Amended Plaintiff.
9. According to the Plaintiffs, upon the realization that the 2nd Defendant had failed or refused to pay the consideration in full, they caused their advocates to issue a Demand Letter dated 6th November 2018.

10. At paragraph 7B of the Plaint the Plaintiffs have stated thus;

“The Plaintiffs have further discovered that the 2nd defendant had conspired with the 1st defendant to and did in fact fraudulently and illegally pay, sometime in December 2011 the 15M into the account at the 1st defendant of Haulmart without any instructions from the plaintiffs:-

PARTICULARS OF FRAUD BY THE 2ND DEFENDANT

7B.1. Deceptively informing the plaintiffs

orally of its remittance in 2011 of payments of consideration to the plaintiffs’ current account with the 1st defendant without providing any documentary proof, while in fact failing, neglecting and/or refusing to do so;

7B.2. Making payment of the sum of Kshs

4 million and Kshs 1 million respectively into the account of Haulmart, knowing that the Plaintiffs had no interest in the said firm and knowing it had no

dealings with Haulmart;

7B.3. Executing and registering a

transfer of lease for the three properties while knowing that the consideration had not been paid in full.

7B.4. Taking full legal ownership of

the three properties while knowing

that the consideration had not been

paid in full.”

11. It is evident that there was a valid contract between the Plaintiffs and the 1st Defendant.

12. The 1st Defendant submitted that because there existed an express contract;

“..... whose terms and conditions

have been performed”

it was not open to the Plaintiffs to plead a breach of trust.

13. I am in full agreement with the Applicant, that parties to a contract, which they have entered into voluntarily are bound by the terms and conditions of the said contract.

14. The Applicant quoted the following words from the court’s decision in **NATIONAL BANK OF KENYA LTD Vs PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER, CIVIL APPEAL NO. 95 OF 1999:**

“A court of law cannot re-write a contract

between the parties. The parties are bound

by the terms of their contract unless coercion, fraud or undue influence are

pleaded and proved.”

15. In that case, the parties had a contractual relationship, yet as the court noted, coercion, fraud and undue influence could be pleaded and proved. In effect, the existence of a valid contract does not preclude a party thereto from pleading coercion, fraud or undue influence.

16. In this case the Plaintiffs have pleaded fraud, and attributed it to both Defendants.

17. In relation to the Applicant, the Plaintiffs have sought, inter alia, the following relief in the substantive suit;

“(c) A declaration of trust in terms of

which the plaintiffs remain equitable

equitable owners of the three properties

with a share equivalent to 18.75% of

the current market value thereof.”

18. I find that the Plaintiffs have an arguable case founded upon fraud and the alleged resultant trust. I so find because if the Plaintiffs were to prove that the 2nd Defendant failed to pay Kshs 15,000,000/=, out of the agreed purchase price of Kshs 80,000,000/=, yet the 2nd Defendant is now the registered owner of the suit properties, it is possible that the trial court could presume or imply a trust, in order to give effect to the intention of the parties.

19. If the Plaintiffs proved that the suit properties were transferred to the 1st Defendant before payment of the full purchase price, it may also be possible that the court could find that the transfer was fraudulent.

20. The 1st Defendant supported the application of the 2nd Defendant: that they had every right to do.

21. However, I note that when the Plaintiffs filed an application to enjoin the 2nd Defendant to the suit, the 1st Defendant consented to the amendment of the Plaintiff.

22. Although the 1st Defendant submitted that the Plaintiffs claim was only for payment of the balance of the purchase price, it is clear from Prayer (c), (quoted above), that the Plaintiffs were also claiming that they remained part-owners of the suit properties, because the 2nd

Defendant had never paid the full purchase price.

23. At this stage of the proceedings the court is not called upon to determine the strength or otherwise of the Plaintiff's case. It is sufficient to find, as I have done, that the Plaintiff has pleaded fraud and also breach of trust. I so hold on account of **Section 20 (1)(a)** of the **Limitation of Actions Act**, which provides as follows;

“None of the period of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –
(a) In respect of fraud or fraudulent breach to which the trustee was a party or privy.”

24. I share the following view, which was stated by Mabeya J. in **MAE PROPERTIES LIMITED Vs JOSEPH KIBE & ANOTHER CIVIL CASE NO. 311 OF 2004**;

“In my view, it was not necessary that the Plaintiff should have used the specific words, ‘fraudulent breach of trust’ in the Plaintiff, for its claim to be under Section 20 (1) of the Limitation of Acts Act. To my mind, it was sufficient enough to plead the facts that will establish a special relationship between the parties and an unconscionable conduct by the 1st Defendant towards the Plaintiff.

25. In arriving at my decision I also found guidance from the decision by the Court of Appeal in **TWALIB HATAYAN & ANOTHER Vs SAID SAGGAR AHMED AL-HEIDY & 5 OTHERS, CIVIL APPEAL NO. 51 OF 2014**. In that case, the Court addressed its mind to the question as to whether or not a trust, of whichever description had arisen between the parties. This is what the Court said;

“Dealing with the first issue, according to Black’s Law Dictionary, 9th Edition, a trust is defined as
‘1. The right, enforceable solely on equity, to the beneficial enjoyment of property to which another holds

legal title; a property interest held

by one person (trustee) at the request of another (settlor) for the

benefit of a third party (beneficiary).’

Under the Trustee Act, the expressions

‘trust’ and ‘trustee’ extend to implied

and constructive trust, and cases

where the trustee has a beneficial

interest in the trust property.”

26. I hear the Plaintiffs saying that they have an equitable interest in the suit properties, which are registered in the name of the 2nd Defendant.

27. As to whether or not the said claim will succeed, is for determination by the trial court.

28. Accordingly, the application dated 1st July 2019 is dismissed with costs to the Plaintiff. The said costs will be paid by the Applicant.

DATED, SIGNED and DELIVERED at KISUMU

This 27th day of July 2020

FRED A. OCHIENG

JUDGE