



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.E423 OF 2018

XTRANET COMMUNICATIONS LIMITED.....PLAINTIFF

VERSUS

WESTLANDS SKYE DEVELOPMENT LIMITED.....DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated 23rd November 2018 and the defendant's application dated 15th February 2019.

Background.

2. The defendant herein, a limited liability company was incorporated in 2013 as a Special Purpose Vehicle (SPV) for the development of a mixed use commercial building on LR No. 209/64/11 along Muthithi Road in Westlands – Nairobi (hereinafter “**the suit property**”). The defendant then invited private investors to invest into the development of the project which comprised of 40 units valued at Kshs 10 million each.

3. Through an agreement dated 5th June 2014, the plaintiff agreed to purchase 8 investment units from the defendant's development on the suit property.

4. The plaintiff however claims that the defendant breached the terms of their agreement thereby prompting it to file the current suit in which it seeks judgment against the defendant for the following orders:

a) An order for refund of the sum of Kenya Shillings Forty Five million (Kshs 45,000,000.00) being the principal amount paid to the defendant.

b) The sum of Kenya shillings 36,579.238 (kshs Thirty Six Thousand Five Hundred and Seventy Nine Two Hundred and Thirty Eight) on account of interests paid as at 30th October 2018.

c) An order for refund of any additional interests paid on the said amount until the date of payment in full.

d) Costs of this suit and interest thereon.

The applicant's case.

5. Concurrently with the plaint, the plaintiff also filed the application dated 23rd November 2018 seeking orders for the preservation of the sum of Kshs 81,579,238 or such lesser amount as may be held in the bank account number 7040001091 held at Rehani House Branch of Housing Finance or such other accounts of the defendant as may be held in the other banks.

6. The application is brought under Order 39 Rule 1 of the Civil Procedure Rules and is supported by the affidavit of the plaintiff's director one **Henry Chege Njoroge** sworn on 23rd November 2018.

7. The application is premised on the grounds that, in compliance with the terms of the agreement dated 5th June 2014, the plaintiff paid the investment sum of Kshs 45 million thereby entitling it to 8 units on the suit property upon the completion of the project. The applicant however contends that the defendant has, since the execution of the said agreement, continued to breach of its terms and has neither commenced nor undertaken the project despite the fact that the period of completion was projected to be between 2-3 years.

8. The plaintiff's case is that it secured the investment amount by way of loan facilities which continue to attract interest way beyond its projected timelines, thereby occasioning it substantial loss. The plaintiff states that Clause 7.2 of their agreement allowed for the rescinding of their contract and that in an effort to mitigate the losses, it rescinded the agreement and is therefore entitled to a refund of the amount already paid to the defendant together with interest.

9. The plaintiff further contends that the defendant is only an investment vehicle holding the said funds with no other known assets or income as it is not a trading company and that it might, with the filing of this case, seek to have the funds withdrawn or otherwise kept out of the court's reach thereby rendering this case an exercise in futility.

10. It is the plaintiff's case that it is necessary to preserve the funds paid in the defendant's bank account pending the hearing and determination of this suit and that such preservation will not prejudice the defendant in any way whatsoever.

11. On 11th December 2018, this court (differently constituted), issued a temporary order for preservation of the sum of kshs 81,579,238 or such lesser amount as may be held in the bank account No. 7040001091 held at Rehani House Branch of Housing Finance, or such other accounts of the defendant as may be held in other banks pending inter-partes hearing of the application.

The defendant's case

12. On 18th February 2019, the defendant filed a replying affidavit to the plaintiff's application and an application dated 15th February 2019 in which it seeks, *inter alia*, the stay of the preservation orders issued on 11th December 2018.

13. On 15th February 2019, **Joseph Irungu Kimani**, the defendant's Director, swore a replying affidavit to the plaintiff's application wherein he confirms that the defendant invited private investors into its ongoing project on the suit property which were divided into 40 units with a par value of Kshs 10 million for each unit. Investors were expected to procure the units and in return and upon completion of the project, share in the expected profits from the proceeds to be realized from the sale or lease of the completed units.

14. He further confirms that in 2014, the applicant signed a sale agreement with the defendant as an investor/developer of the mixed use building in which the plaintiff agreed to procure 8 units at the price of Kshs 80 million. He adds that in accordance with clause two (2) of the said agreement, it was agreed that the plaintiff would make two (2) part payments for the 8 units after which the plaintiff paid Kshs. 45 million and was expected to pay the balance of 35 million on or before 31st August 2014.

15. He avers that as an investor, the plaintiff was required to pay an additional sum of kshs 20,000 as consideration for 20,000 ordinary shares in the defendant as the Special Purpose Vehicle and that upon payment of kshs 45million the plaintiff automatically became the director of the respondent as confirmed by a letter of appointment as director marked "**JK2**".

16. He further avers that following the plaintiff's appointment as a director, the plaintiff became a party to any step undertaken to promote the development of the project as shown in the minutes of the board attached as annexure "**JK3**". He states that as an active member of the defendant's board, the plaintiff then contributed to the delays experienced in advancing the construction process.

17. He avers that the plaintiff has not proved that the defendant was negligent, careless, unable or unwilling to complete the project. He accuses the plaintiff of material non-disclosure especially its failure to pay the balance of Kshs 35 million that led to the issuance of the orders of 11th December 2018. He blames the plaintiff for failure to pay the outstanding balance of Kshs 35 million and states that such failure resulted in the halting of the project due to lack of funds. It is the defendant's case that their agreement did not give a specific timeline as to the completion of the project.

Application dated 15th February 2019.

18. The defendant also filed an application dated 15th February 2019 in which it sought orders for:

1. Spent.

2. That this court be pleased to stay orders for preservation of the defendant's bank account number 7040001091 held in Rehani House Branch of Housing Finance and/or any other bank account held by the defendant pending the hearing of this application and the subsequent hearing and determination of this suit.

3. That this court be pleased to grant an order for specific performance by the plaintiff for breach of agreement of Sale of Investment Units of payment of Kenya shillings thirty five million (Kshs 35,000,000/-), being balance of purchase price of ten(10) units investment units of par value of Kenya shillings ten million (Kshs 10,000,000/-) each.

4. That costs hereof be provided for.

19. The application is supported by the affidavit of the defendant's director, **Joseph Irungu Kimani** who reiterates the contents of his replying affidavit to the plaintiff's application dated 23rd November 2018 that I have already highlighted in this ruling.

20. The plaintiff opposed the application through the replying affidavit of its director **Henry Chege Njoroge** sworn on 22nd March 2019. He avers that the application is an afterthought and does not set out any justification for the orders sought.

21. He states that even though the defendant seeks the setting aside of the orders freezing the sums of money in its accounts, the defendant does not address the fact that the agreement dated 5th June 2014 has since been terminated by the defendant and the same is no longer applicable.

22. He further states that following from the said termination of the contract, the funds paid to the defendant are due for refund. He contends that the defendant has not explained why it has not refunded the sums paid to it despite the provisions of the agreement at Clause 7 which provides for the refund thereof upon termination.

23. He states that his appointment as a director of the defendant was made to him in his individual capacity and that the plaintiff never held any directorship position in the defendant company.

24. The plaintiffs deponent also swore a supplementary affidavit in response to the defendants replying affidavit to the application dated 23rd November 2018 wherein he reiterates that the defendant has not addressed the fact that the agreement dated 5th June 2014 has been terminated/rescinded thereby entitling the plaintiff to a refund of the money it had paid to the defendant. It is the plaintiff's case that the terms of the agreement were not to be *ad infinitum* as the agreement provided that time was of essence.

25. Parties filed written submissions to both applications which I have carefully considered.

Determination

26. I have considered the pleadings filed herein, the parties submissions together with the authorities that were cited. The twin issues for determination are:

a) Whether the plaintiff had made out a case for the preservation of the sum of Kshs 81,579,238 held in the defendant's bank account No. 7040001091 at Rehani House Branch of Housing Finance Company.

b) Whether this court should stay its orders of 11th December 2018 for the preservation of the defendant's bank account.

27. Having regard to the above issues for determination, one can say that the determination of one will have a bearing on the other. This is to say that for example, allowing the plaintiff's application will mean a negative outcome for the defendants application Order 39 Rule 1 of the Civil Procedure Rules, under which the plaintiff's application was filed stipulates as follows;

“Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance: Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.”

28. It was not disputed that on 5th June 2014 the parties herein entered into an agreement in which the plaintiff was to purchase 8 units from the defendant's development. It was further not disputed that the plaintiff paid the sum of Kshs 45 million towards the actualization of their said agreement. The parties did not dispute that at some point, their agreement was terminated even though they blamed each other for breach of contract and for the failure to complete the project.

29. This court is of the humble view that the issue of which party was to blame for the collapse of the deal or whether the defendant is entitled to an order for specific performance can only be determined after the substantive hearing of the main suit.

30. At this interlocutory stage, this court has been called upon to determine if the plaintiff has made out a case for the preservation of the sum of Kshs 81,579,238 that is held in the defendant's bank account pending the hearing and determination of the suit.

31. I find that the answer to the above question is to the positive. The plaintiff has not only demonstrated that it paid the sum of Kshs 45 million to the defendant but that the defendant had not delivered on its part of the bargain as at the time of the institution of this suit in 2018, 4 years after their agreement was executed. The plaintiff also expressed its apprehension on the ability of the defendant, as Special Purpose Vehicle, to satisfy the decree that may be entered against it should the suit be determined in the plaintiffs favour.

32. I find that considering the plaintiff's apprehension, the defendant was expected to allay the said fears by furnishing this court with its financial records or statement of means to show that it will be capable of satisfying the court's decree in the event that the plaintiff ultimately wins the case. This was not done by the defendant and I am therefore satisfied that the plaintiff has made out a case for granting of the orders of preservation of the funds held in the defendant's account pending the outcome of this suit.

33. As I have already noted in this ruling, Makau J on 11th December 2018 already granted temporary orders of preservation of the funds held in the defendant's bank account pending the inter partes hearing of the plaintiff's application. I find no reason to interfere with the orders issued by Makau J on 11th December 2018.

34. Consequently, I decline to grant the prayers sought in the defendant's application dated 15th February 2019 which I hereby dismiss. I however allow the plaintiff's application dated 23rd November 2018.

35. The costs of both applications shall abide by the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 24th day of October 2019.

W. A. OKWANY

JUDGE

In the presence of

Miss Amwanjo for Maondo for the plaintiff

Mr. Chengo for Waweru for the defendant.

Court Assistant – Sylvia