Kyambi t/a Lizaya Hair Studio v Safaricom Staff Pension Scheme Registered Trastees also known as The Trustees of Safaricom Staff Pension Scheme (Environment & Land Case E149 of 2022) [2023] KEELC 21041 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E149 OF 2022

MD MWANGI, J

OCTOBER 24, 2023

BETWEEN

ELIZABETH WANDII KYAMBI T/A LIZAYA HAIR STUDIO ..... PLAINTIFF

AND

SAFARICOM STAFF PENSION SCHEME REGISTERED TRASTEES ALSO KNOWN AS THE TRUSTEES OF SAFARICOM STAFF PENSION SCHEME ..... DEFENDANT

JUDGMENT

1. The Plaintiff's claim is that the Defendant through its authorized agent, Advent Valuers Limited offered her for lease, all that commercial rental space identified as 'units 85 and 86' at Crystal Rivers Mall on the Defendant's commercial development erected on L.R. No. 337/974 situated at Mavoko Municipality in Athi River Township (hereinafter referred to as the suit property) for a term of six (6) years. At the time of the offer, the commercial development had not been completed. The term of the lease offered therefore, according to the Plaintiff, would commence fourteen (14) days after issuance of the Architect's Certificate of Partial Completion in respect of the suit premises.

2. The Plaintiff's case is that the offer was communicated by way of a letter dated 21st February, 2017. She had purposed to use the premises to operate a saloon, spa and a barber shop. Pending the execution of the formal agreement and lease between the Plaintiff and the Defendant, the letter of offer was to constitute and give rise to legally binding rights and obligations between the parties.

3. The Plaintiff further alleges that the Defendant had through its authorized agent misrepresented to her that the Mall had attracted an 'anchor tenant' in the name of Naivas Supermarket, a significant retail operator and was therefore primed to attract, significant 'footfall and traffic' which would in turn translate into a thriving business for her proposed business.

4. The Plaintiff asserts that she relied and acted on the Defendant's representation thereby accepting the offer and making payments to the Defendant on account of deposit on rent and service charge, promotion fund deposit and part of quarterly rent in February, 2017 totaling Kshs 806,334.00/=. The Plaintiff alleges that she further committed substantial capital expenditure in preparation for layout designs for the intended business premises and necessary equipment and apparatus for purposes of setting up the business. The Plaintiff states that she too sought a credit facility by way of a bank loan at great expense which she had to repay.

5. The Plaintiff asserts that the Defendant did not complete the mall as agreed thereby breaching its obligations under the letter of offer and is therefore guilty of gross and unreasonable delay.

6. By reason of the Defendant's fundamental breach, the Plaintiff asserts that she was not able to utilize the prepared layout designs, deploy the equipment and apparatus acquired at substantial expense and cost. She too has had to pay interest on the bank loan facility obtained to partly fund the capitalization of the intended business. She alleges to have lost a substantial bargain and the opportunity to generate profit from the intended investment. She affirms that she suffered loss and damages as particularized at paragraph 11 of her Plaint dated 29th March, 2022, totaling to Kshs 25,434,842.00.

7. Without prejudice to the foregoing, the Plaintiff avers that on account of the breaches pleaded in her Plaintiff, the Defendant has effectively renounced the letter of offer and shown itself incapable of performing its obligations under the letter of offer. In the premises, its continued retention of the deposit of Kshs 806,334.00 paid to it by the Plaintiff is not only unjustified but constitutes unjust enrichment, and further that it is liable to the Plaintiff in damages for breach of contract.

8. The Plaintiff prays for a declaration that the transaction contemplated under the Letter of Offer stands rescinded on account of the Defendant's breach. Further, the Plaintiff prays for a refund of Kshs 806,334.00 paid as a deposit with interest at the court rates from the date of filing suit and a sum of Kshs 25,434,842.00 with interest at court rates from the date of filing suit until payment in full. Additionally, the Plaintiff claims for general damages for breach of contract with interest as well as the costs of the suit.

Response by the Defendant

9. The Defendant responded to the Plaintiff's claim by way of a Statement of Defence dated 8th June, 2022. The said Statement of Defence was filed in court on 9th June, 2022.

10. The Defendant admits being the registered owner of the suit property. The Defendant further states that the Plaintiff demonstrated interest to lease space on the suit property sometimes in the year 2016. The interest was expressed through its appointed property agents, Advent Valuers Limited. Subsequently, the Plaintiff was issued with the Letters of Offer dated 21st February, 2017 whose terms were explicit and clear as pleaded at paragraph 5 of the Statement of Defence.

11. The Defendant denies that it induced the Plaintiff to accept the letter of offer. The Defendant however, admits that its agent informed the Plaintiff that the mall was due for completion in August 2018, but it duly notified her that all the fit out works would be conducted as per the tenant criteria document guidelines and that she (the Plaintiff) was required to clear the outstanding balances so that she could be cleared for the fit out.

12. The Defendant claims that the Plaintiff did not clear the outstanding balances, neither did she carry out any fit outs on the premises. Further that the Plaintiff was at all times informed of the progress and or development of the mall.

13. Though the Defendant admits receipt of Kshs 806,334/=, it categorically states that it was not privy to the alleged capital expenditure (if at all) nor any financial arrangements in respect to acquisition of any material or equipment as alleged by the Plaintiff. The Defendant affirms that the Plaintiff failed to settle all amounts due under schedule 2 and 3 of the letter of offer which was a requirement to demonstrate acceptance of the offer. The Defendant therefore alleges that the Plaintiff has approached the Court with unclean hands.

14. The Defendant asserts that it never executed the letter of offer; neither was an agreement for lease entered into between the parties. Accordingly, the Defendant asserts that there has not been any fundamental breach as alleged by the Plaintiff. The Defendant denies the particulars of loss and damage in paragraph 11 of the Plaint.

15. In regard to the Plaintiff's claim for refund of the monies paid as deposit, the Defendant asserts that clause 38(d) of the letter of offer was categorical that all amounts paid by the Plaintiff to the Defendant upon execution of the letter of offer were non-refundable. The Defendant therefore prays for the dismissal of the Plaintiff's suit.

Evidence adduced

16. The Plaintiff testified as the first witness in her case. She reiterated the averments in her case and elaborated her claim against the Defendant. The Plaintiff further produced the documents in her list and bundle of documents as exhibits in support of her case. She called as a second witness an accountant to explain the basis of her claim for loss of bargain.

17. On its part, the Defendant called the director of Advent Valuers Ltd, the Property agent, as its sole witness. The witness explained the Defendant's position in this case as pleaded in the statement of Defence.

18. The proceedings recorded during the hearing and the witness statements adopted by the 3 witnesses form part of the record of this court and I need not replicate them here.

Issues for determination:

19. The issues in this mater are rather straight forward. I say so because, from my analysis of the pleadings, it is not in dispute that the Defendant is the registered owner of the suit premises, neither is it in dispute that the Defendant had through its property agent issued the Plaintiff the letter of offer dated 21st February, 2017. It is also not contested that the Defendant did not execute the said letter of offer. The payment of the sum of Kshs 806,334.00 by the Plaintiff to the Defendant has been acknowledged by the Defendant. All that the Defendant states in its statement of Defence is that the amount is not refundable by virtue of clause 38 of the letter of offer. The parties did not proceed to make either an agreement to lease or a lease as contemplated in the letter of offer. The only issues then for the court to determine are:

    a. Whether the letter of offer dated 21st February, 2017 constitute a contract between the Plaintiff and the Defendant.

    b. Dependent on the finding in (a) above, whether the Defendant has repudiated and or fundamentally breached the terms of the letter of offer dated 21st February, 2017.

    c. Whether the Plaintiff is entitled to compensation for loss and damages as tabulated in her plaint.

d. Whether the Plaintiff is entitled to general damages for breach of contract.

e. Whether the Plaintiff is entitled to a refund of the deposit paid to the Defendant.

f. Who should pay the costs of the suit?

Analysis and Determination

Whether the letter of offer constituted a legally binding contract.

20. The Plaintiff submits that under clause 32 of the letter of offer, until an agreement or lease was executed, the letter of offer was to give rise to legally binding right and obligations between the parties. Since no agreement or lease was signed by the parties, it is the Plaintiff's case that the letter constituted a legally enforceable contractual document by virtue of the said express provision. Further, that the letter of offer was signed on behalf of the Defendant by its authorized agent on the face of it.

21. On its part, the Defendant submits that the letter of offer issued by the it's agent, Advent Valuers Limited, at clause 38 on acceptance, expressly provided that the letter of offer 'may only be accepted upon fulfillment of the terms laid out under paragraphs (a) to (d)'. The Plaintiff was required to pay the amounts specified in schedule 2 and 3 of the letter of offer. The Plaintiff merely paid a sum of Kshs 806,334.00 leaving a balance of Kshs 920,997.00. Secondly, the Defendant submits that it also did not execute the letter of offer neither was a lease nor a lease agreement entered into as contemplated in the letter of offer.

22. The Plaintiff insists that the letter of offer was from the face of it duly executed by the Defendant's Property Agent. The Plaintiff urges the court to find that the execution by the said agent bound the Plaintiff. Further, the Plaintiff points out that the Defendant at paragraphs 4 and 5 of the Statement of Defence affirms the letter of offer as its document. Again at paragraph 16 of its Defence, the Defendant relies on a specific clause of the letter of offer in response to the claim by the Plaintiff for refund of the sums paid pursuant to the said letter. The Plaintiff therefore argues that as a matter of Law, the Defendant would not be entitled to on one hand dispute the binding nature of the letter of offer and on the other rely on the same document to set up a defence to the Plaintiff's claim.

23. In the case of *East African Fine Spinners Ltd (in receivership) & 3 others v Bedi Investment Limited* [1994] eKLR, the Court of Appeal dealt with the question of the legal tenor of a letter of offer which was formally expressed to be subject to an anticipated formal contract that never crystalized. Gicheru JA expressed himself by adopting the words of Lord Westbury LA in *Chinnock v The Marchionesa of Ely* 4 DE GJ & 5 638 at 646 as follows:

> " As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by the party to be charged or his agent, lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement in the absence of that stipulation."

24. The learned JA further adopted the words of Sir Raymond Evershed MR in *Bennet, Walden & Co. v Wood* [1950] 2 ALL ER 134 at page 137, as follows:

> " Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal

contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should be subject to a new agreement the terms of which are not expressed in details."

25. On his part, Kwach JA who was also on the bench, rendered himself in the following words:

> " The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order of specific performance or mandatory injunction."

26. Kwach JA further quoted Banker LJ's words in *Keppel v Wheeler & another* [1927] 1 KB 577, as follows;

> " I pause here to state plainly what is now well established that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged."

27. The letter of offer in this matter was on the face of it stated to be "Subject to Contract". Nonetheless clause 32 in the letter of offer seems to have varied that term. The clause provided that,

> " This letter of offer shall give rise to legally binding rights and obligations between the Lessor and the Lessee pending execution of the agreement to lease and the lease whose terms shall supersede this letter of offer."

28. The import of clause 32 was that upon the Lessee accepting the offer, and the parties executing the letter of offer, the terms of the letter of offer would be binding upon them until the agreement to lease and the lease were executed.

29. The next question then to ponder is whether the Lessee accepted the offer and whether the parties executed the letter of offer.

30. Clause 38 of the letter of offer provided for acceptance of the offer which was to be within 7 days of the letter of offer and upon fulfilment of the conditions stipulated thereunder. Clause (b) required the Lessee to return the 'duly executed letter in duplicate together with the documents listed in schedule 1 and transmission advice slips indicating remittance of the unconditional payment of the amounts specified in schedule 2 and 3' for the acceptance to become effective. The clause (b) further stipulated that if the written acceptance and the slips confirming payment of the amounts specified in schedule 2 and 3 were not received within the stipulated period, the offer would lapse.

31. From the evidence adduced before the court, it is not contested that the Lessee signed the letter of offer and further made payments of the sum of the sum of Kshs 806,334.00. She did not however, pay the entire amounts stipulated under schedule 2 and 3 of the letter of offer.

32. It therefore follows that the acceptance did not become effective in accordance with the stipulation of clause 38(b) of the Letter of offer.

33. It is also noteworthy that each party was obligated to sign the letter of offer signifying acceptance. The Lessor was to sign on page 16 of the said Letter signifying acceptance on its part. The lessor did not sign the letter of offer.

34. The suggestion by the Plaintiff that the Agent signed on behalf of the Lessor is unfounded. I see no authorization by the Lessor to its agent to execute the document on its behalf. The Trustees of

the Defendant were the ones required to sign on behalf of the Lessor and affix the Common Seal of Safaricom Staff Pension Scheme.

35. The Court's finding therefore is that the letter of offer dated 21st February, 2017 was not accepted by the Lessee. Further having not been executed by the Lessor, it did not give rise to a binding contract between the two parties.

Whether the Defendant has repudiated and or fundamentally breached the terms of the letter of offer dated 21st February, 2017.

36. Having made a finding that there was no binding contract between the parties then, it follows that there was no contract to be repudiated or breached as alleged by the Plaintiff.

Whether the Plaintiff is entitled to compensation for loss and damages as tabulated in her plaint and general damages for breach of contract.

37. The above claims by the Plaintiff were dependent on the finding whether there was a binding contract between the Plaintiff and the Defendant. Having found that none existed, these claims automatically fail. The Plaintiff was on a folly of her own since there was no binding contract between her and the Defendant. She has therefore no valid claim against the Defendant for any alleged loss or damage suffered because she acted before her contract with the Defendant crystallized. Her claim for compensation and general damages fails.

38. In regard to the claim for general damages for breach of contract, I need to add that it is well settled and as explained in the case of *Consolata Anyango auma v South Nyanza Sugar Company Ltd* (2015) eKLR, that general damages cannot be awarded in cases of breach of contract.

Whether the Plaintiff is entitled to a refund of Kshs 806,334.00.

39. The Defendant acknowledged receipt of the sum of Kshs 806,334.00 from the Plaintiff. However, to the Plaintiff's claim for refund, the Defendant goes back to the letter of offer it had renounced and states that the said amount was not refundable as provided for under clause 38(d). The Plaintiff is right when she says that the Defendant is approbating and reprobating at the same time.

40. Having found that the letter of offer did not constitute a binding contract, the said letter then is of no legal consequence. Its provisions are not binding.

41. The contract between the parties having failed to materialize, no party should seek to benefit from the situation. If that were to be, the Plaintiff would be deprived of her money without any consideration and the Defendant would have been unduly and unjustly enriched without any consideration at all.

42. I am persuaded by the decision of the High Court in the case of *Sedena Agencies v Presbyterian Foundation* (2017) eKLR where the court held that:

> " The Court must always shun the prospects of a party before it, leaving the Court unjustly enriched at the expense of its opponent. The doctrine of unjust enrichment is not new to our jurisdiction."

43. The Court in the above cited case referred to a decision by the Court of Appeal of East Africa in the case of *Salah Bin Galeb v Hussein* [1957] E.A. 55, where the court stated that:

> "So far as the allowance are concerned, this was a case of unjust enrichment leading to suffering of wrongful loss of which equity would provide a remedy."

44. My finding is that the Plaintiff is entitled and has always been entitled to a refund for the sum of Kshs 806,334.00. I award her the sum of Kshs.806,334.00 with interest at court rates from the date of filing suit.

45. I further award the plaintiff the costs of this suit.

Final Disposition

46. The Plaintiff's case against the Defendant succeeds in the following terms:

    A. The Plaintiff is awarded the sum of Kshs.806,334.00 with interest at court rates from the date of filing suit

    B. The Plaintiff too shall have the costs of this suit

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2023

M. D. MWANGI

JUDGE.