



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 128 OF 2019

JOEL OGUK MULIMA BOI.....1ST PLAINTIFF

BENRD NGALA CHWEYA.....2ND PLAINTIFF

MAURICE ARIRO ORIMBO.....3RD PLAINTIFF

VERSUS

VICTOR OTIENO OLEWE T/A M/S VICTOR

OTIENO & ASSOCIATES ADVOCATES.....1ST DEFENDANT

ULTIMATE ENGINEERING.....2ND DEFENDANT

EQUITY BANK LIMITED.....INTERESTED PARTY

RULING

The plaintiffs instituted this suit by way of Originating Summons filed on 21st May, 2019. In their prayers they sought orders against the respondents to honour their professional undertaking issued on 27th August, 2018 and remit the sum of Kshs. 16,600,000/=. The grounds for seeking the said order are set out on the face of the application alongside the supporting affidavit sworn by the 1st applicant.

On the same date, the applicant filed an application by way of Notice of Motion seeking an order that the said sum be paid into court pending the hearing and determination of the summons. The suit which was first filed in the Environment and Land Court was subsequently transferred to this court for hearing and determination.

Subsequently, the applicants filed an application by way of Notice of Motion dated 28th August, 2019 seeking an order for summary judgment to be entered against the respondents. Among the orders sought were that, the grounds of opposition and replying affidavit filed by the 1st respondent be struck out and a repeat of the prayer that the said sum be deposited in court pending the hearing and determination of that application, and that upon that determination, the money be released to the applicant.

The 1st respondent had filed a replying affidavit on 22nd July, 2019 when the matter was still in the Environment and Land Court, but filed yet another replying affidavit on 9th September, 2019 following the application for summary judgment aforesaid, together with grounds of opposition. Parties have filed their respective submissions and there is a further affidavit sworn by the 1st plaintiff, the contents of which I have noted. The application for summary judgment is premised on order 13 Rule 2 of the civil procedure rules and Section 1A, 1B, 3 and 3A of the Civil Procedure Act. Section 13 Rule 2 of the Civil Procedure Rules reads as follow,

“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

The 1st applicant has alluded to paragraph 12 of the replying affidavit of the 1st respondent filed on 22nd July, 2019 which reads as follows,

“12. That upon the signing of the sale agreement, I entered into an irrevocable undertaking to pay the 1st applicant an

agency fee as stated.”

It is that statement that the 1st applicant has anchored his application to have the 1st respondent meet that professional undertaking. It is also his case that since that alleged admission the 1st respondent had remitted a total of Kshs. 9,575,000/= to the applicants.

In the submissions, the applicants have cited the case of **Choitram vs. Nazari (1984) KLR 327** where Mandan JA had this to say,

“Admissions have to be plain and obvious. As plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt. ..”

Whereas it is true the first respondent gave that undertaking, the court may not ignore the contents of paragraph 16 of the same affidavit which stated that the agency fee was subject to success completion to the prospective purchaser. It is the 1st respondent’s case that the applicants have not demonstrated their was successful completion of the transaction. The averments by both the applicants and the 1st respondent in the affidavits filed reveal salient issues that may not be resolved by way of affidavit evidence and have to be interrogated by oral evidence, subjected to cross –examination. In any case, the import of rule 13 (2) of the Civil Procedure Rules cited above is that, the court is given the discretion to enter such a judgement. In my view an admission of indebtedness must be plain, unambiguous, unequivocal and not subject to any interpretation or interrogation. I am of the view that the alleged admission on the part of the 1st respondent does not meet that threshold to entitle the applicants to summary judgment. The application is therefore dismissed with costs to the 1st respondent.

I note that directions have not been taken as required under Order 37 of the Civil Procedure Rules. This shall be done expeditiously so that the parties proceed with the hearing of the Originating Summons.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE