REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 220 OF 2012

ZION MALL LTD .....PLAINTIFF

VS

MOHAMMED JAMA ABDI.....RESPONDENT

JUDGMENT

1. By a plaint dated 24th October, 2012, the plaintiff *Zion Mall Ltd* sued the defendant *Mohammed Jama Abdi* seeking judgment in the sum of Kshs. 20,000,000, interest thereon, costs of the suit and interest. The plaintiff further prayed for any other or further relief that the court may deem fit to grant.

2. The sum of Kshs.20,000,000 was being claimed as a refund of monies allegedly paid to the defendant by the plaintiff in part payment of the purchase price in respect of land known as Eldoret Municipality Block 7/258.The full purchase price according to the sale agreement entered into by the parties was Kshs.190,000,000. It is the plaintiff's case that the contract for the sale of the aforesaid parcel of land (the suit property) was cancelled after it was frustrated.

3. The plaintiff's claims are disputed by the defendant in his statement of defence dated 3rd December 2012. To start with, the defendant attacked the suit's competence claiming that it was fatally defective as the deponent to the verifying affidavit did not exhibit an authority under seal authorizing him to swear the affidavit on the plaintiff's behalf.

4. The defendant also averred that the sale agreement was invalid and unenforceable as it was not executed in compliance with its Articles of Association or under its seal. The defendant also denied that the contract was frustrated and contended that the sale was conditional to regularization and removal of any restriction on the title documents which had not been done; that the plaintiff's demand for completion of the transaction was premature and amounted to anticipatory breach of the contract; that therefore the defendant was entitled to repudiate the contract and retain the Kshs. 19,000,000 or any other money paid as deposit of the purchase price in accordance with the law society conditions of sale (1989) which formed part of the terms of the contract.

5. At the hearing, each of the parties called one witness. The plaintiff through its director *Barnabas Arap Kiprono* (PW1) testified that vide a sale agreement dated 31st October, 2011, it agreed to buy and the defendant agreed to sell the suit property for a consideration of Kshs. 190,000,000. Upon executing the agreement, the plaintiff paid the defendant Kshs. 19,000,000 and an additional Kshs. 1,000,000 at a later date through a bank transfer to the defendant's bank account.

6. According to the plaintiff, the balance of the purchase price amounting to Kshs. 170,000 was to be paid within 90 days on condition that the defendant removed a restriction on the property's title placed by

the Government of Kenya; that when it took too long to have the restriction removed, the plaintiff rescinded the contract and demanded a refund of the monies paid through three demand letters dated 7th September, 2012, 19th June, 2012 and 21st June, 2012.

7. In the plaintiff's view, the contract was frustrated by the defendant's failure to regularize the suit property's title within a reasonable time and it was entitled to a refund of the monies already paid pursuant to the contract. PW1 testified that the defendant had promised to remove the restriction within 90 days of execution of the contract but had not done so at the time he testified in court. This was on 8th July 2015. He further claimed that the Government of Kenya had already taken over possession of the suit property and had started construction therein.

8. On his part, the defendant in his evidence admitted having sold the suit property to the plaintiff on terms contained in the sale agreement (Pexhbt 2). He also admitted having received Kshs. 19,000,000 as part of the purchase price but denied having received an additional sum of Kshs.1,000,000 as alleged by the plaintiff.

9. Further, the defendant denied the plaintiff's claim that the contract had been frustrated and that the completion date was 90 days upon execution of the contract. It is his case that the parties did not provide for any specific timelines for completion of the sale as completion was supposed to be ninety days after removal of the aforementioned restriction; that he was still making efforts to have the said restriction removed which included writing to the National Land Commission but his efforts had been unsuccessful.

10. The defendant expressed his willingness to refund the Kshs.19,000,000 paid to him by the plaintiff but denied that the plaintiff was entitled to any interest on the same as payment of interest had not been provided for in the contract.

11. At the close of the hearing, parties filed written submissions buttressing their client's respective positions: Those by the plaintiff were filed on 22nd June, 2016 while those by the defendant were filed on 5th July, 2016. On the date scheduled for highlighting of the submissions, though defendant's counsel was duly served with a hearing notice, there was no representation for the defendant. The plaintiff's counsel attended the court and highlighted its submissions.

12. I have carefully considered the pleadings, the evidence on record in its entirety and the submissions made on behalf of the parties. I find that only five issues emerge for my determination which are the following;

(i) Whether the plaintiff's suit is competent or fatally defective,

(ii) Whether there was a valid contract between the parties,

(iii) If the answer to issues No (i) and (ii) is in the affirmative, whether the contract was frustrated.

(iv) Whether the plaintiff is entitled to the reliefs sought.

(v) What orders should be made on costs.

13. Regarding the first issue, it is the defendant's contention that the suit is incompetent and incurably defective as the plaintiff's resolution to institute the suit was not under seal and the deponent of the verifying affidavit did not exhibit the plaintiff's authority under seal authorizing him to swear the affidavit on its behalf. He prayed that the suit be struck out.

14. On its part, the plaintiff through PW1 admitted that the plaintiff's special resolution to institute the suit was not under seal. PW1 however maintained that he had been authorized by the plaintiff being its director to institute the suit and to swear the verifying affidavit on its behalf. He denied the claim that the suit was incompetent.

15. Starting with the claim that the suit was unprocedurally filed for lack of a seal in the special resolution produced as Pexhbit 1, I note that the defendant did not rely on any law or authority to support his claim that the suit was fatally defective owing to the said anomaly. The court of Appeal in ***Arthi Highway Developers Limited V West End Butchery Ltd & 6 others (2015) eKLR*** had occasion to deal with a similar situation and adopting a decision by the Uganda Supreme Court in ***United Assurance Co. Ltd V Attorney General SCCA No. 1 of 1998*** , the Court of Appeal held that a resolution authorizing the filing of a suit in a company's name was not a legal requirement and that the earlier position taken by the High Court of Uganda in ***Burgerere Coffee Growers Ltd V Sebadoka & Anor (1970) I EA 147*** requiring the passing of such a resolution before suit was commenced in the company's name was no longer good law. The court reproduced the holding of the Ugandan Supreme Court in the ***United Assurance Co. Ltd case (Supra)*** where it was held as follows;

> ***"…it was now settled, as the law, that, it does not require a board of director's, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company".***

16. In this case, PW1 maintained that he was a director of the plaintiff and although this was denied by the defendant, the defendant did not adduce any evidence to controvert that claim. It is common knowledge that companies are juristic persons and that they only act through their directors and other authorized persons. Guided by the decision of the Court of Appeal in the ***Arthi Highway Developers Limited case*** (Supra), I find that the fact that the special resolution produced as Pexhibit 1 in this case did not bear the plaintiff's seal was a mere irregularity which cannot affect the validity of the plaintiff's suit.

17. Regarding the averment that the suit was fatally defective for failure by the plaintiff to exhibit the authority given to PW1 under seal to swear a verifying affidavit on its behalf, I find that though *Order 4 Rule 1 (4)* of the *Civil Procedure Rules (CPR)* requires that where a plaintiff is a corporation, the verifying affidavit accompanying the plaint should be sworn by an officer of the company duly authorized under the company's seal to do so, the provision does not provide that such an authority should be filed in court at the commencement of the suit or when or under what circumstances the same should be exhibited in court.

18. Be that as it may, my reading of *Order 4 Rule 1 (6)* of the *Civil Procedure Rules* (the Rules) reveals that failure to comply with order 4 Rule 1(4) of the Rules does not by itself invalidate a suit. I say so because the Rule does not provide that such an omission should lead to an automatic striking out of a suit. The provision is not coached in mandatory terms. It gives the court discretion to either salvage or strike out a suit filed without complying with the aforesaid Rule. Needless to say, the discretion being a judicial one must be exercised judiciously taking into account the circumstances of each case.

19. As noted earlier, the defendant has requested the court to strike out the instant suit for non-compliance with *Order 4 Rule 1 (4)* of the *Civil Procedure Rules.* Striking out of a suit is a drastic action that has the effect of removing the affected party from the seat of justice.

For that reason, it is a remedy which courts should use very sparingly. Courts under the *Constitution of Kenya 2010* are enjoined to uphold the constitutional principles enshrined therein including the principle of access to justice and the administration of substantive justice.

20. *Article 159 2(d)* of the *Constitution* specifically demands that justice shall be administered without undue regard to procedural technicalities. In this case, PW1 swore under oath that he was a director of the plaintiff and that he had authority of the plaintiff to swear the verifying affidavit on its behalf. This claim has not been challenged by any other evidence. As the defendant could not have suffered any prejudice by the alleged non compliance with the aforementioned Rule, I am not persuaded that the defendant has made out a good case to warrant striking out of the suit. In the circumstances and in the interest of administering substantive justice, am inclined to salvage the plaintiff's suit. I thus hold that the suit is not fatally defective and that it is properly before the court.

21. Turning to the 2nd issue, it is the defendant's case that the contract between the parties was not valid as it was signed by only one director and it was not under the company's seal; that the law required that all contracts entered into by incorporated companies be executed by two directors under seal. The plaintiff maintained that its contract with the defendant was valid and enforceable.

22. I have perused the sale agreement which formed the basis of the contract between the parties. It is true that it is executed by only one director on behalf of the plaintiff company and it does not bear the company's seal. But does this fact make the contract invalid and legally unenforceable?

23. The starting point in answering the above question is a consideration of the law that governs the making of contracts on behalf of companies. As the impugned contract was executed on 31st October, 2011, the law applicable to it is the law that was in force at the time it was executed which is the *Companies Act Chapter 486* of the *Laws of Kenya* now repealed.

Section 34 of the *repealed Act* provided as follows;

> ***"Contracts on behalf of a company may be made as follows-***
>
> > ***(a) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing <u>signed by any person acting under its authority, express or implied</u> <u>[Emphasis Mine]</u>***
> >
> > ***(b) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.***
> >
> > ***(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto….."***

24. The phrase "*Parole"* used in *Section 34(1) (b)* above is defined in *Blacks Law Dictionary Eighth Edition at Page 1149* as "*oral, unwritten, … an oral statement or declaration"*.

What this means is that a contract whether written or oral which is made on behalf of a company by any person with either express or implied authority from the company is valid and legally enforceable against the company whether or not it was executed under seal in the case of written contracts.

25. In this case, PW1 who executed the contract on behalf of the plaintiff was not just any person. He was one of the plaintiff's directors. He testified that he had authority from the plaintiff to enter into the contract with the defendant. His claims have not been controverted by any evidence to the contrary.

26. There was also another argument that the contract was invalid as it did not allegedly comply with the Plaintiff's Articles of Association. But the defendant did not produce in evidence the said Articles of Association to substantiate his claim. The law is that he who alleges must prove. Without having the benefit of reading the said Articles of Association, the court is not in a position to tell what they provided with regard to execution of written contracts on the plaintiff's behalf. That argument by the defendant cannot therefore be sustained.

27. In view of the foregoing, there is no basis upon which this court can find that the contract executed by the parties herein was invalid. I have come to the conclusion that the contract was valid and enforceable as against each of the parties.

28. I will now deal with issues No. (iii), (iv) and (v) together since they are to a great extent inter related.

It is the plaintiff's case that the contract between the parties was frustrated due to the defendant's inability to remove the restriction on title to the suit property within the 90 days contemplated in the sale

agreement or in any case within a reasonable time.

29. The defendant denies this contention claiming that the contract was still alive and operational as the timelines for the removal of the restriction had not been specified in the agreement; that he was still relentlessly pursuing the issue of removal of the restriction and that he was still willing and ready to abide by his obligations under the contract.

30. In his evidence under cross examination, the defendant admitted that the intention of the parties was that soon after receiving the purchase price, he would deliver vacant possession of the suit property to the plaintiff which he would be unable to do if the restriction remained in place.

31. Black's Law Dictionary defines frustration as ***" the prevention or hindering of the attainment of a goal, such as contractual performance …an excuse for a party's non-performance because of some enforceable and uncontrollable circumstance…."***

The essential ingredients of the doctrine of frustration are well captured in *Halsbury's Laws of England 3rd Edition volume 8 page 185 at paragraph 320* where it is stated as follows;

"The doctrine of frustration operates to excuse further performance where;

> ***(1) It appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (2) before breach, performance becomes impossible, or only possible in a very different way to that contemplated, without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration. The application of the doctrine of frustration does not depend upon the intention of the parties, or their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure".***

32. The Court of Appeal in ***Lucy Njeri Njoroge V Kaiyahe Njoroge Civil appeal No. 161 of 2002 [2015] eKLR*** cited with approval the case of ***Davis Contractors Ltd V Farehum U.D.C [1956] AC 696*** which sought to provide guidance on when a contract could be said to have been frustrated. In that case, Lord Radcliff stated thus:

> ***" ….frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract.*** *"Non haec is foederi veni"* ***It was not what I promised to do... There ... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for".***

33. The Court of Appeal proceeded to lay down three factors which must be considered before a court could hold that a contract had been frustrated: Those factors are the following;

> **(a)** Whether the frustration was caused by the party seeking to rely on it, that is, whether it was self-induced.
>
> **(b)** Whether the event causing the frustration was unforeseeable.
>
> **(c)** Whether the intervening event resulted in something so radically different from that originally contemplated by the parties.

34. Applying the above principles to the instant case, a reading of clause 2 of the sale agreement reveals

that the sale of the suit property did not have any specific completion date. The completion date was pegged upon the payment of the outstanding balance of the purchase price which was to be paid within three months of regularization of the suit property's title by removal of the Government restriction. The sale agreement was silent on the deadline for removal of the restriction.

35. It therefore follows that the defendant's argument that the removal of the government restriction had no timelines is correct. But from the terms of the sale agreement, it is apparent that when executing the contract, the parties did not envisage a situation where the regularization of the title would take an unduly long time running into several years. That is why they kept on referring to the completion date and made provision for penalties to be levied on any party failing to complete its side of the bargain. In any event, contractual terms are expected to be performed within a reasonable time where no specific time frame is stipulated by the parties.

36. From the evidence, it is clear that despite his efforts to have title to the suit property regularized which included making a request to the National Land Commission to that effect, the defendant's efforts had not borne any fruit by the time he testified in court on 10th May, 2016 over four years since the execution of the agreement. PW1 stated in his evidence that as a matter of fact, the Government had since taken over the suit property and started construction on it. This means that the party's intention to complete the sale and have the plaintiff enjoy vacant possession of the property had evaporated in thin air and was not going to materialize at any time in the future. These were unforeseeable intervening events which cannot be blamed on any of the parties.

37. For the foregoing reasons, I am satisfied that the factors pre-requisite to the application of the doctrine of frustration exists in this case. It is consequently my finding that the contract between the parties herein was frustrated by the defendant's inability to regularize his title to the suit property.

38. The effect of the application of the doctrine of frustration is to terminate the contract and have parties revert to the positions they occupied prior to execution of the contract.

It is not contested that the defendant received a sum of Kshs.19,000,000 being part of the purchase price for the suit property upon execution of the contract. The plaintiff's claim that it

paid the defendant an additional Kshs.1,000,000 through an inter-bank transfer was strongly denied by the defendant. The plaintiff did not adduce any documentary evidence to prove its aforesaid claim.

39. In the absence of such evidence, it is my finding that the plaintiff has only managed to prove payment of Kshs.19,000,000 to the defendant and not Kshs. 20,000,000 claimed in the plaint. The plaintiff is therefore entitled to a refund of Kshs. 19,000,000 by the defendant.

40. In its prayers in the plaint, the plaintiff prayed to be awarded interest on the sums claimed. As correctly submitted by the defendant, the sale agreement is silent on the payment of interest on monies paid to the defendant. It is however, important to note that under *Section 26* of the *Civil Procedure Act*, an award of interest on a decree for the payment of money is at the discretion of the court. However, considering that in this case the contract failed to materialize not because of any breach on the part of the defendant but because it was frustrated by circumstances beyond his control, I find that it would be unjust to penalize him by requiring him to pay

interest on the amounts paid pursuant to the contract. I therefore decline to award interest to the plaintiff as prayed.

41. In the end, I find that the plaintiff has proved on a balance of probabilities that it is entitled to a refund of Kshs.19,000,000.

I consequently enter judgment for the plaintiff against the defendant in the sum of Kshs.19,000,000.

42. As costs follow the event, the plaintiff is also awarded costs of the suit.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of June 2017.

In the presence of:-

Mr. Langat holding brief for Ms. Maseno for the defendant

Mr. Lobolia Court Clerk

No appearance for the defendant