



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 102 OF 2015

ADAN BAREE MAALIM.....PLAINTIFF

-VERSUS -

DARASA INVESTMENTS LIMITED.....DEFENDANT

RULING

1. The application by the plaintiff is for the striking out of the Defence. The applicant further prays that after the defence was struck out, the court ought to grant judgement in favour of the plaintiff.
2. In the alternative, the plaintiff prays for judgement on admission.
3. The basis of the plaintiff's claims against the defendant were said to be 3 Facilitator's Agreements, which were executed by the 2 parties.
4. According to the agreements, the plaintiff was supposed to facilitate negotiations between the defendant herein and other persons who had laid claim to **L.R. No. 36/VII/586**.
5. Pursuant to the first agreement, the plaintiff was supposed to earn Kshs. 15,000,000/-.
6. And in relation to the second agreement, the plaintiff was due to earn Kshs. 10,000,000/-.
7. Finally, in relation to the third agreement, the plaintiff was scheduled to earn Kshs. 8,500,000/-.
8. The second agreement was one in which there were negotiations for extension of time within which to give effect to the first agreement dated 10th February 2011.
9. And the third agreement was one in which there were negotiations for a further extension of the time.
10. It was the plaintiff's claim that the defendant did make available to the plaintiff a total of 11 cheques, for the sum of Kshs. 8,500,000/-. However, all the eleven cheques were dishonoured when the plaintiff presented them for payment.
11. The plaintiff's total claim, arising from the 3 agreements was Kshs. 33,500,000/-.
12. As the defendant had issued cheques for Kshs. 8,500,000/-, the plaintiff submitted that the said cheques constituted an admission. It was for that reason that the plaintiff submitted that he should be

given judgement on admission, for the sum of Kshs. 8,500,000/-.

13. Meanwhile, as regards the contents of the Defence, the plaintiff submitted that the same consisted of mere general denials. The plaintiff concluded that the defendant had not responded to the very specific liquidated claims spelt out in the plaint.

14. I have given due consideration to the Defence. Paragraph 5 of the said Defence is in the following terms;

“The Defendant denies the contents of paragraph 5 of the plaint and further avers that the alleged agreement is tainted with illegality and cannot legally confer any enforceable rights and/or obligations?.

15. In my considered opinion, the said line of defence is not a mere general denial. The question as to whether or not the agreement was tainted with illegality is a serious issue of law.

16. At paragraph 6 of the Defence, the defendant put forward the following position;

“...the alleged agreement is not properly executed nor does it bear the seal of the Defendant and the same does not comply with mandatory provisions of the Stamp Duty Act, hence lacks in legality?.

17. That pleading cannot be termed a mere general denial. It actually comprises 3 distinct legal issues, which can be summarized as follows;

a. The agreement was not properly executed;

b. The agreement did not bear the defendant’s seal;

and (c) The agreement did not comply with mandatory provisions of the Stamp Duty Act.

18. At paragraph 7 of the Defence, it was pleaded thus;

“7. Without prejudice to the aforesaid, in response to paragraph 5,6 and 7 of the plaint, the Defendant avers that if any such agreement was entered into as alleged or otherwise, the plaintiff failed and/or neglected to perform his obligation under the agreement and instead misrepresented to the Defendant that the plaintiffs in ELC No. 507 of 2009 had agreed to a settlement whereas the plaintiff was well aware that there was no such agreement and that the alleged consent was procured through fraud and collusion without the involvement of the bona fide officials of the plaintiffs in ELC No. 507 of 2009”.

19. Clearly, the defendant was of the view that the plaintiff had not performed his obligation.

20. If anything, the plaintiff was alleged to have made misrepresentations to the defendant regarding a settlement of ELC No. 507 of 2009.

21. Whereas the plaintiff had intimated that there was a settlement, the defendant learnt that the consent which the plaintiff had alluded to, had been obtained through fraud and collusion.

22. The plaintiff acknowledged the fact that on 14th February 2012, Hon. Lady Justice R. Ougo delivered a Ruling in which the Judgement dated 4th March 2011 was set aside.

23. However, the plaintiff pointed out that the reason for setting aside the judgement was not misrepresentation, fraud or collusion.

24. At this point in the proceedings, I am not called upon to determine the reasons why the consent

judgement was set aside. It is not necessary for me to establish the reason, in order to be able to determine the plaintiff's current application.

25. It is sufficient to note that the consent judgement was set aside. That fact brings into focus the defendant's contention that the plaintiff failed to discharge his obligations.

26. And if there is a possibility that the plaintiff did not meet his obligations, I find that it is then arguable that the cheques issued by the defendant were issued in anticipation of the plaintiff fulfilling his part of the bargain.

27. The plaintiff submitted thus;

“The agreement was very clear that the duty of the Plaintiff/Applicant was to ensure consents are arrived at by both parties in civil case number 505 of 2009, and not in any way fulfillment of those consents”.

28. In my considered opinion, that reasoning does not engender confidence in the plaintiff's position in this case. I so hold because the consent which had allegedly been facilitated through the plaintiff's involvement was reviewed thereafter: that suggests that the work done by the plaintiff was undone, to some degree.

29. I find it difficult to appreciate the reasoning that whether or not the work which I had done, to earn my pay, became unstuck, I would nonetheless be entitled to the said pay.

30. In the result, I find that there was no merit in the plaintiff's application either for striking out the whole defence or for judgement on Admission (*for a portion of the claim*). Accordingly, the application dated 13th November 2015 is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mohamed for the Plaintiff

Miss Gacamba for Muchoki for the Defendant

Collins Odhiambo – Court clerk.