



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 284 OF 2014**

**PARK PLAZA LIMITED.....PLAINTIFF**

**VERSUS**

**AFRO ASIAN BANK LIMITED.....DEFENDANT**

**RULING**

1. It has always been the Law that if a Defendant shows a bonafide Triable issue, then he must be allowed to defend a suit unconditionally. Afro Asian Bank Limited (The Defendant) has identified six issues which it sees as triable and which should defeat the plea by Park Plaza Limited (the Plaintiff) for Summary Judgement for the sum of Kshs.18,600,190.20 plus Interest thereon as sought in its Notice of Motion of 29<sup>th</sup> February 2016.
2. The Plaintiff is described as the Landlord of a Commercial Building known as Sky Park Plaza erected on LR. NO.1870/1X/167, Westlands, Nairobi. By a letter of offer dated 11<sup>th</sup> June, 2012 the Landlord agreed to lease to the Defendant certain premises. The Letter of Offer bore the Heads of Terms (also referred to as HOTs).
3. Whilst both parties agree that they executed the Letter of Offer, they take divergent positions as to the legal implication of the said letter. The Plaintiffs take the position that the Heads of Terms created legally binding obligations upon the parties there having been an offer by them which was unconditionally accepted by the Defendant. On the other hand, the Defendants' stance is that Heads of Terms was executed subject to a lease, which lease was never executed and the offer was therefore not to be binding.
4. Anyhow, it is not in dispute that after the execution of the Letter of Offer the Defendant paid Kshs.6,638,796.00 to the Plaintiff. The Plaintiff takes that payment to be quarterly rent for the period April 2013 to June 2013 (both inclusive) as well as service charge from January 2013 to June 2013. The Defendant contends that the payment was made only to reserve the space as the parties '*formulated*' the contract. In addition the Defendant says that it paid an additional sum of Kshs. 344,362.00 in respect of Legal fees. That would make the total payment a sum of Kshs.6,983,158.00.
5. In the Affidavit sworn by Morrison Wayaya on 29<sup>th</sup> February 2016 in support of the Motion, the Plaintiff avers that in breach of its obligations under the Letter of Offer the Defendant defaulted in paying

rent, Car park Licence fees, Service Charge and VAT thereon from July 2013 to March 2014 and a sum of Kshs.18,600,190.00 is due and owing.

6. On 7<sup>th</sup> November, 2013, the Plaintiff gave Notice to the Defendant to settle that outstanding amount.

7. It is the case of the Plaintiff that the breach persisted and on 3<sup>rd</sup> February 2014, through the firm of Lensinko, Njoroge and Gathogo Advocates, the Plaintiff issued a 'Determination of Tenancy' and Demand Notice upon the Defendant.

8. In asserting that the Defendant has no Defence to the claim for Kshs.18,600,190.20, the Plaintiff states that the Defendant through its Managing Director Mr. Kenneth Kinyua admitted its indebtedness in a communication dated 19<sup>th</sup> November, 2013.

9. By way of a Replying Affidavit sworn by Mr. Kinyua on 13<sup>th</sup> April, 2016, the Defendant avers that the HOTs was clear that the offer was not binding unless certain conditions were fulfilled.

10. In paragraph 6 of that Affidavit, the Deponent sets out the conditions which, it claims, were not fulfilled. These are:-

a) Clause 11 of the HOT provided for payment of three (3) month's rent as security deposit, service charge, car parking licence fees and payment of first quarter's rent. The Defendant never made any such payment.

b) Clause 18 of the HoT provided that possession was subject to the Defendant, amongst other matters, having made all requisite payments required under the HoT. The Defendant never took possession of the suit premises.

c) The HoT were subject to the Defendant providing the below listed items to the Plaintiff;

i) Certified copy of identification or other identification required by the Plaintiff's advocates.

ii) Copy of the Defendant's Memorandum and Articles of Association.

iii) Copy of the Defendant's PIN Certificate.

iv) Current search Certificate (the then Form CR 12) from the Companies Registry.

v) Provision of a Power of Attorney (POA) where any person executing the HoTs does so pursuant to a POA.

11. In addition the refundable security deposit as per clause 11 of the Head of Terms was never provided.

12. The Defendant identifies the following as the triable issues:-

a) Was there a binding and enforceable contract between the Defendant and Plaintiff?

b) Did the Defendant and Plaintiff agree on any further terms outside of the HoTs?

c) Is the Defendant indebted to the Plaintiff with respect to the provisions of the HoTs?

d) Is the Defendant in breach of any obligations arising out of the HoTs?

e) Is the Defendant entitled to a refund from the Plaintiff of the Kshs.6,638,796.00?

f) Did the Plaintiff observe its duty to mitigate losses?

13. Counsel for Plaintiff argued that there was a valid contract in force as proved by the existence of the Heads of Terms which was voluntarily executed by the parties. That there was then part performance by the Defendant when it made a payment of Kshs.6,638,796.00, acknowledged the debt and promised to make further payment. Counsel argued that it was irrelevant that a lease was not signed.

14. The duty of a Court called upon to decide a Contractual dispute is to give effect to the intention of the parties. Judge Mabeya said as follows of that duty in the case of **Eldo City Ltd Vs. Corn Products Kenya Ltd & another** [2013]eKLR,

‘It is trite law that in deciding disputes, it is the Court’s duty to give effect to the intention of the parties. The parties’ intention is discernible from the documents and conduct of the parties. However, enervous a document or contract may be, the Court’s duty is to give effect to it. In the case of Smith vs. Cook [1891] AC 297 at 3030 the court held:-

*“The duty of the Court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed”.*

15. A star document in this dispute is the Letter of Offer which contains the Heads of Terms. The position of the Defendant is that the Heads of Terms was not binding not only because it was ‘subject to contract’ but also because it was conditional upon certain unfulfilled terms.

16. The need to discern the intention of the parties is not diminished merely because the phrase ‘subject to contract’ is used during contract negotiations.

17. The Defendant attempts to extricate itself from the Letter of Offer by pointing at Term 22 of the Heads of Terms and the Tenant’s Acceptance Clause.

18. The Term 22 reads:-

“Until such time as the standard Lease has been executed and registered, all covenants, conditions and the rent agreed, shall be deemed to have been incorporated in this offer”.

19. My understanding of this Term is that once the parties had executed the Offer Letter, then all covenants, conditions and rent in the letter would constitute the contract between the two, pending the execution and delivery of a standard lease. It would not matter that the standard lease had not been executed and/or registered.

20. What however may trouble the Landlord is the Defendants Construction of the Tenants Acceptance Clause. That clause reads:-

“This offer is available for acceptance by the tenant within 7 days of the date hereof and is subject to the tenant making payments listed herein. This Letter of Offer is not binding upon the Lessor or at all until the Lessee has returned the same properly executed together with the items herein requested and the Lessor accepted the same and endorsed its consent hereto, hereinafter. Prior to obtaining possession, the Lessee shall be required to sign the Lease prepared by the Lessor’s Advocates and pay all amounts hereinbefore stated”.

A plain reading of the Clause is that the Letter of Offer would not be binding on the Lessor or at all until:-

- a) It was returned duly executed together with the items therein requested.
- b) The Lessor accepted the Letter of Offer and endorsed its consent thereon.

21. The items requested are set out in Term 23 as follows:-

- a) A certified copy of the Certificate of Incorporation or certificate of Registration of Business name, as the case may be, or other identification as may be required by the Landlord's Advocates.
- b) A copy of the Memorandum of Articles of Association (if limited liability Company).
- c) A copy of the PIN Certificate.
- d) a current Search Certificate on Form CR 12 from the companies Registry (The Companies Act Cap 486 Laws of Kenya)
- e) if any party executing this letter does so pursuant to a Power of Attorney a certified copy of the registered Power of Attorney must be provided.

The Defendant **does not** accept that these items were given to the Plaintiff. On the other hand, the Plaintiff does not furnish any proof that they indeed received the items from the Defendant. That the requested items were not given to the Plaintiff may turn out to be critical. From the Acceptance Clause, the non receipt of the items would make the Letter of Offer non binding on the Parties. I come to the conclusion that the position taken by the Defendant that the letter of offer was not binding on the parties because of the non-fulfillment of this condition precedent is not a trifle.

22. That said, the Plaintiff would still have a strong case if it proved that there was payment of rent coupled with possession. So that even if a tenancy was not created because there was no binding contract in writing it would still be created by dint of Statute. Section 57(2) and (3) of The Land Act 2012 on periodic leases provides as follows:-

*2) If the owner of land permits the exclusive occupation of land or nay part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.*

*3) The periodic tenancy contemplated in subsection (1)a shall be the period by reference to which he rent is payable.*

23. Whilst the Plaintiff maintains that the sum of Kshs.6,638,796.00 was payment of quarterly rent, car park licence fees, service charge and VAT for the months of April 2013 to June 2013 as well as Service Charge from January 2013 to March 2013, the Defendant says this of that payment:-

*“The payment of Kshs. 6,638,796.00 referred to at paragraph 9 of the Supporting Affidavit to the Plaintiff in part payment of the quarterly rent and car park licence fees for the months of April to June 2013 was only done to attempt to preserve the space even as the proposed contractual arrangement between the parties was being formulated. In fact the total amount paid by the Defendant to the Plaintiff was the sum of Kshs.6,983,158.00 which included Kshs.344,362.00 in respect of legal fees. Even with this part payment, the Plaintiff did not render possession of the property to the Defendant”.*

24. However, that position may be incompatible with the contents of the email dated 17<sup>th</sup> January 2013

attached to Mr. Kinyua's Affidavit of 13<sup>th</sup> April, 2016. The email was from Knight Frank Kenya Ltd, an agent of the Plaintiff, to Mr. Kinyua. It reads:-

*"Hi Ken,*

*Actually, I just spoke to the Landlord Sky Park. He'll accept a bank guarantee in lieu of cash for your security deposit.*

*Regards,*

*Winnie."*

25. From the contents of this email it seems that, as rent, service charge and park fees for the first quarter had been paid, the only unresolved matter upto the time of the email was the security deposit. That supports the Plaintiffs version.

26. What has caused the Court a little more anxiety is whether there is clear evidence, so far, to prove that the Plaintiff had granted possession (either actual or constructive) to the Defendant. The contention by the Defendant is that the Plaintiff did not grant it possession.

27. A term of the Heads of Terms was that,

*"Prior to offering possession, the Tenant will be required to forward a cheque in favour of Knight Frank Park Plaza Account, for the sum of Kshs.12,141,898.00(Kenya shillings Twelve million One hundred and Forty one Thousand Eight hundred and Ninety Eight only), made up as follows:-....."*

28. There is strong evidence to suggest that the Defendant paid part of the bespoke sum (inclusive of rent for the 1<sup>st</sup> quarter) leaving the security deposit unpaid. There is also evidence that for the security Deposit, the Plaintiff was willing to accept a Bank Guarantee in lieu of cash. There is, however, undisputed evidence that the Defendant never fulfilled the term on the security deposit because it neither paid the money required nor furnished a Bank Guarantee in alternative. In essence the Defendant had not fulfilled the terms that would entitle it to possession.

29. That possession was conditional upon the Defendant paying the amounts set out in the Heads of Terms and furnishing of the Security Deposit was reiterated in the email dated 16<sup>th</sup> January 2016 from the Plaintiffs agents which reads in part,

*"We are in receipt of your first quarters rent, service charge and parking charge, however, the security deposit is yet to be paid. Please note that access for fit will only be granted once all the initial moneys as prescribed in your Heads of Terms are settled. This amount needs to be received in cash".*

(The insistence on cash was waived and the Plaintiff was willing to take a Bank Guarantee in lieu (see paragraphs 24 and 25 above).

30. Given the foregoing, might there be some truth in what the Defendant is saying in respect to possession? This in the Court's view is a triable issue that will require further interrogation at Trial. The Court takes that view because, for now, it is the dry word of the Plaintiff against that of the Defendant. Neither has been subjected to cross-examination. And the Plaintiffs contention (shown by email) that the Defendant was promising to finalize payments even as late as 19<sup>th</sup> November 2013 does not tip the scales one way or other in respect to the vexing question of possession.

31. What is before Court is not the clearest of cases.

32. The Notice of Motion dated 29<sup>th</sup> February, 2016 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> day of September ,2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Nambuye for Chege for Plaintiff

Kuyo for Defendant

Alex - Court Clerk