



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.631 OF 2015

REALITY VALUERS EAST AFRICA LIMITEDPLAINTIFF

VERSUS

GRACE MUTHONI GITHEGI.....1ST DEFENDANT

ANNIE GITHEGI.....2ND DEFENDANT

ANTHONY GACHERU.....3RD DEFENDANT

GLADYS NJOKI GITHEGI4TH DEFENDANT

JOSEPH NDUNGU WARUI.....5TH DEFENDANT

JUDGMENT

1. Realty Valuers East Africa Ltd (**the Plaintiff**) filed suit on 15th December, 2015 against the Defendants for the sum of Kshs.14,819,000/= said to be Professional Fees for some Valuation work. The Plaintiff seeks a quick disposal of this matter and in a Notice of Motion dated 9th April 2016 prays for Orders:-

- 1. THAT Summary Judgement be entered for the sum of Kshs. 14,819,000/= as prayed for in the Plaintiff.**
- 2. THAT in the alternative judgment on admission be entered as prayed for in the Plaintiff.**
- 3. THAT the costs of this suit be borne by the Defendants.**

The Application is said to be brought under the Provisions of Order 36 Rule 1 and order 13 Rule 1 and 2 of The Civil Procedure Rules.

2. From the Pleadings and Affidavits filed herein some facts are uncontested.

3. Admitted in paragraph 7 of the Statement of Defence is that on or about the 10th October 2015, the Defendants instructed the Plaintiff to conduct valuation on properties described as LR.12825/7, 12825/11 and 12825 Barua Estate.

4. At the material time Waweru Maina who is a Director of the Plaintiff was a duly registered Valuer

under the Provisions of the Valuers Act Cap 532 Laws of Kenya.

5. The said valuation was carried out and a Valuation Report submitted to the Defendants on or about 30th October 2015. (See the Admission on paragraph 4 of the Statement of the Defence). Annexed to the Affidavit of Mr. Maina sworn on 9th April 2016 in support of the Application now before Court is a copy of the said Valuation Report. It shows that a value of Kshs.5,100,000,000/= was returned for the properties.

6. What is in contention is the fees due to the Plaintiff on account of the work carried out.

7. The position taken by the Plaintiff is that it raised a Fee Note of Kshs.14,819,000/= based on the Valuers Act. The Fee Note is dated 11th November 2015. The Plaintiff does not think that the Defendants can contest the fees as it is regulated and that at any rate it had received assurance from the Defendants that they were working on the fees. Shown to Court was a copy of the following email,

“Dear Waweru,

I have received your invoice and am working on it. I’ll call you over the course of next week with a firm update. Have a great weekend.

Tony”)

8. The Defendant’s response is that there was an Oral Agreement that the fees would be Kshs.1,500,000/= which has since been paid in full as follows:-

Cheque No.00197Kshs.500,000/=

Cheque No.000243 ...Kshs.500,000/=

Cheque No.000244 ...Kshs.500,000/=

9. Then another angle to the dispute was introduced by Grace Muthoni Githegi (the 1st Defendant) in her Affidavit of 26th April 2016. She deponed that it is her who gave the Oral Instructions and that there was therefore no contractual relationship between the Plaintiff on one hand and the 2nd, 3rd and 4th Defendants on the other. But I must say straightaway that this assertion will not go far in view of paragraph 3 of the Defence in which all the Defendants admit the Plaintiff’s averment that they instructed it to conduct the valuation. Paragraph 3 of the Statement of Defence binds all the Defendants.

10. Whether or not the application will succeed turns on either of these two issues:-

(a) is there an express and unequivocal admission of the Plaintiffs claim by the Defendants or

(b) Is the Plaintiff’s Fees fixed by law and must therefore be paid as raised?

11. What the Plaintiff sees as an admission is the email sent by a Tony on receipt of the Fee Note of 11th November 2015 for Kshs.14,819,000/=. The email reads,

“Dear Waweru,

I have received your invoice and am working on it. I’ll call you over the course of next week with a firm update. Have a great weekend.

Tony.”

This email which is said to have been authored by the 3rd Defendant is not denied. But would it amount

to an unequivocal admission that can give rise to judgment on admission?

12. The Court must observe that it is the 5th Defendant who gave instructions to the Plaintiff. The email is by Tony (the 3rd Defendant). Without proof that he had the authority of the other 4 Defendants, his email cannot bind them. In respect to himself (the 3rd Defendant) that email would be a clear admission of the quantum of fees. In it the 3rd Defendant does not question the amount. On the contrary he promises to work on it. Is it feasible that he would say nothing of the quantum of fees if it was almost ten times what was agreed? In respect to the 3rd Defendant that email was sufficient admission to found a judgment on admission under the Provisions of Order 13 Rule of the Civil Procedure Rules which provides:-

“(1) Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

(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.” (*my emphasis*)

13. It is an uncontested fact that the Plaintiff is a firm of Valuers and Mr. Waweru Maina a Director thereof is a Registered Valuer. Also agreed is that the disputed fees is for valuation work undertaken by the Plaintiff for the Defendants.

14. The Valuers (Professional misconduct) (procedure) Rules, 1987 prescribes what amounts to Professional Misconduct of a Registered Valuer and Rule 3(1) as follows:-

“A registered Valuer shall be guilty of Professional Misconduct if he,

a. ,,,,,

b. ,,,,,

c. ,,,,,

d. ,,,,,

e. ,,,,,

f. Deviates from the schedule of fees prescribed by the Board by charging less or more than the charges laid down without notifying the Board of his intention to do so, and the reasons for and extent of such deviations and receiving the Boards Sanction thereto”.

Clearly a Registered Valuer is restricted to levy the fees prescribed by the Valuers Registration Board unless a deviation of fees is requested for and sanctioned by the Board.

15. Section 25 of the Valuers Act provides:-

“The Minister may, after consultation with the Board, make rules generally for the better carrying out of the purposes of this Act, and without prejudice to the generality of the foregoing, any such rules may:-

a. ,,,,,

b. ,,,,,

c. ,,,,,

d. ,,,,,

e. ,,,,,

f. ,,,,,

g. ,,,,,

h. ,,,,,

i. prescribe the charges which may be made for services rendered by way of practice as valuers.”

16. At the material time, the prescribed Fees was set out in Legal Notice No. 92 of 15th July 2011 published by the Minister for Lands. Although the fees are prescribed by the Minister, it would be done after consultation with the Board (see the provisions of Section 25 reproduced in part in paragraph 15 above).

17. The Defendants do not argue that the fees sought by the Plaintiff are a deviation of the prescribed fees. What they are arguing is that they had an Oral Agreement for less fees. In addition their Lawyer had submitted that the scale fees are not mandatory.

18. However as seen by the language of the Rules, Valuers are barred from deviating from the prescribed Rules and a deviation amounts to Professional Misconduct. That is a clear demonstration that the Rule on fees is mandatory. If the Valuer had negotiated fees outside the scale (which the Plaintiff denies) then the Valuer would have been misconducting himself.

19. In so far as there is an admission of retainer and that the valuation was carried out as instructed and in so far as the fees charged was in conformity with that prescribed by the Law, then the Defendants cannot have an answer to the liquidated claim by the Plaintiff.

20. Giving them credit for Kshs.1,500,000/= so far paid, this Court enters judgement against the Defendant jointly and severally for the sum of Kshs.13,319,000/= plus interest at Court rates from the date of filing suit and costs. To that extent this Court allows the Notice of Motion of 9th April 2016 with Costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Njeru for Plaintiff

Mbugua for 1st, 2nd, 3rd and 4th for Defendants

Alex - Court Clerk