REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 334 OF 2014

FIT XPRESS LIMITED.....PLAINITFF

VERSUS

CHINA SICHUAN INTERNATIONAL TECHNO -

ECONOMIC CORPORATION (SIETCO) LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application was dated and filed on 10th September 2014. The same was amended on 29th January 2015 and filed on 2nd February 2015. It was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 (Laws of Kenya),Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It sought for orders **THAT**:-

> a. **Judgment on admission be entered against the Defendant herein for the sum of Kshs 59,727,000/= being the difference between the re sale** (sic) **and the discounted purchase price; at the admitted rate of 8% on the purchase price per unit for the 68 units re sold** (sic) **by the Plaintiff.**
>
> b. **THAT the costs of the application be provided for.**

THE PLAINTIFF'S CASE

2. The application was supported by the Affidavit of the Plaintiff's Managing Director, Karim Dhalla, that was sworn on 10th September 2014. His Supplementary Affidavit was sworn and filed on 22nd September 2014. The Plaintiff's Written Submissions were dated and filed on 3rd February 2015.

3. According to the Plaintiff, it entered into an agreement dated 15th March 2001(hereinafter referred to as "the Agreement") with the Defendant in which it was agreed that the Defendant would reserve one hundred and twenty three (123) units. The Defendant was to sell to the Plaintiff three (3) and four (4) bedroom houses in Phase 1 in the sum of the 6,700,000/= and Kshs 8,800,000/= and two (2) bedroom and three (3) bedroom units in Phase II for the sum of Kshs 5,800,000/= and Kshs 6,900,000/= respectively. The Defendant was to offer an eight (8%) per cent discount amount on the full price and would pay the Plaintiff subject to the submission of monthly reports.

4. After the sale of fifty five (55) units, the Defendant paid the Plaintiff a sum of Kshs 26,563,890/=. The Plaintiff averred that it re-sold a further fourteen (14) units and was thus entitled to the sum of Kshs 11,981,000/=. Despite its demand to the Defendant, the Defendant had refused to pay it the sum of Kshs 47,746,000/= being payment on completion of the sale of a further fifty four (54) units.

5. The Plaintiff contended that by virtue of Clause 4 of the said Agreement, both parties had intended that the discount payable was on the whole purchase price and not on the deposits as had been averred by the Defendant. It was therefore the Plaintiff's prayer that its application be allowed as prayed as the Defendant's Defence had raised no triable issues.

DEFENDANT'S CASE

6. In response to the said application, Xu Xhengquan, the Defendant's Sales Manager, swore a Replying Affidavit on behalf of the Defendant on 24th September 2014. It was filed on the same date. The Defendant's Written Submission were dated 10th February 2015 and filed on 11th February 2015.

7. The Defendant contended that the Plaintiff had misinterpreted Clause 4 of the said Agreement as it was not correct that it had agreed to offer the Plaintiff an eight (8%) per cent discount on the amount of the full purchase price. It averred that the Plaintiff's application had no factual or legal basis as there was never any agreement that any payment would be based on eight (8%) per cent on the whole of the purchase price but rather that the agreement was that the eight (8%) percent discount was on the ten (10%) per cent of the amount of the full purchase price.

8. It stated that it had overpaid the Plaintiff due to wrong calculations and that despite its demands, the Plaintiff had refused to furnish it with true and accurate accounts. It pointed out that it had not made any admissions of the payments that were demanded by the Plaintiff and that any discussions between them did not constitute an admission. It stated that the demand was based on the Plaintiff's own understanding.

9. It was the Defendant's contention that there were several triable issues that had been raised in its Defence and that the evidence of payment and other aspects were not evident from the Plaintiff's Supporting and Supplementary Affidavits necessitating the matter to go for full trial.

LEGAL ANALYSIS

10. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission provides as follows:-

> **"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 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."**

11. It was clear from the cases of **Choitram vs Nazari [1984] KLR** and **Cassam vs Sachania [1982] KLR 191** that were relied upon by the Plaintiff and the Defendant, that the judge's discretion to enter judgment on admission is limited to cases where an admission is so clear, unequivocal, obvious, plain and unambiguous.

12. Indeed, entry of such judgment would have the effect of closing an opposing party from presenting its case at full trial. Such discretion must therefore be exercised cautiously. Indeed, a party should be denied an opportunity to ventilate its case at full trial only as a last resort as such action is too draconian-**See Jackson Biegon vs Charles Too [2005] eKLR .**

13. Evidently, there was obviously a clear departure of the interpretation of Clause 4 of the said Agreement between the Plaintiff and the Defendant. The same stipulated as follows:-

"That under this Agreement the Developer shall offer <u>an 8% discount on the 10% deposit amount of the full purchase price</u> (emphasis court) **of each of the 123 units reserved by the Agent."**

14. On one hand, the Plaintiff contended that the Defendant was to offer an eight (8%) per cent discount amount on the full price. On the other hand, the Defendant averred that payments were to be based on 8% discount on the 10% amount of the full purchase price. The calculations of what was or was not payable were indicative of a non-convergence of the issue.

15. Whereas the existence or otherwise of triable issues or disclosure of a reasonable defence in law were secondary issues that should not form any consideration when a court is determining an application that has been brought pursuant to the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010, this court could not ignore the fact that the assertions by both parties herein were so divergent as to raise serious triable issues that could only be ventilated at full trial.

16. Having said so, what was a condition precedent, was whether or not there was indeed a clear and unequivocal admission by the Defendant that would persuade the court to enter judgment as had been sought by the Plaintiff. A perusal of the correspondence that was attached to the Plaintiff's Supporting Affidavit Exhibit marked "KB- 2" showed no admission by the Defendant. Neither did the Defendant's Defence and Counter-claim make any reference to an admission, remote or otherwise.

17. Clearly, once a court finds no admission on the part of a party, it must down its tools and not take any step further in analysing other documentation as it would run the risk of entertaining the merits or otherwise of a case, at an interlocutory stage. Indeed, unless a matter is so clear on the face of it, a court should be very slow and reluctant to determine a matter based on affidavit evidence.

18. It was for the foregoing reasons that, having carefully considered the pleadings, the affidavit evidence, oral and written submissions and the cases that were relied upon by the parties herein, the court found and held that the Plaintiff herein did not remotely demonstrate that the Defendant had admitted that it owed it the sum of Kshs 59,727,000/=. Notably, the filing of the Defendant's Counter-Claim was a clear indication that there was no admission on the part of the Defendant.

<u>DISPOSITION</u>

20. Accordingly, the court found that the Plaintiff's Amended Notice of Motion application dated 29th January 2015 and filed on 2nd February 2015 not to have been merited and the same is hereby dismissed with costs to the Defendant.

21. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **26th** day of **May** 2015

J. KAMAU

<u>JUDGE</u>