REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 202 OF 2013

ISAAC MWANGI WAINAINA.....PLAINTIFF

VERSUS

1. **BONFACE NJIRU(TRADING AS NJIRU BONFACE & CO. ADVOCATES)**
2. **M/S KENLINE AGENCIES LIMITED.....DEFENDANT**

RULING

1. The Plaintiff has filed the notice of motion dated 14th January, 2015 seeking the striking out the 1st and 2nd Defendants' defences filed on 15thAugust, 2013 and 10th September,2013 respectively and that judgment be entered in his favour for the sum of KShs. 6,500,000/=.
2. The origin of this dispute is a sale of land transaction between the 2nd Defendant and the Plaintiff whereby the 1st Defendant was the advocate acting for both parties in the transaction. The Plaintiff alleges that by an agreement dated 27th November, 2014, the 2nd Defendant agreed to sell to him L.R. 1160/773 located at Karen. That while discharging his duties, the 1st Defendant acknowledged receipt of the consideration of KShs. 6,500,000/= with the sole purpose of onward transmission to the 2nd Defendant on compliance of the terms of the agreement. That the 1st Defendant further received KShs. 2,500,000/= upon formal request as the nominee and advocate for the 2nd Defendant. The transaction seems to have collapsed. The Plaintiff stated that the Defendants admitted breach of the sale agreement. He particularly stated that the by a letter dated 16th August, 2011 and 13th February, 2012 the 1st Defendant acting in the capacity of the advocate for the 2nd Defendant acknowledged that parcel No. 1160/773 was not available for transfer and conveyed the 2nd Defendant's offer for alternative parcel of land. That by a letter dated 16th August, 2012 addressed to the advocates complaints commission, the 1st Defendant formally admitted that he was bound and liable for KShs. 4,000,000/= pursuant to clause 2 of the sale agreement which amount was to be held by him and not to be released until such time that the conditions therein were met. That the 2nd Defendant offered to pay him KShs. 10,000,000/= in final and full settlement of the effect of the failed sale agreement which amount included a refund of the principal amount being KShs. 6,500,000/=.
3. The 1st Defendant filed a preliminary objection in response to the application. The points were that; the motion is an abuse of court process because a similar application was filed on 20th May, 2014 and was withdrawn; that the jurisdiction of this court is wrongly invoked as there is no order 2(b) (c) and (d) of the Civil Procedure Rules and that Section 3 and 3A cannot be invoked where there is a procedure provided under the Civil Procedure Rules; that the 1st Defendant filed its defence on 15th August, 2013 and should be allowed to defend the suit; that the statement of defence is not frivolous, scandalous, vexatious or a ploy to delay the fare determination of the suit because it contains serious triable issues and the Plaintiff has not demonstrated in any manner that

the Defence does not disclose a reasonable cause of action; that the 1st Defendant is an agent of a disclosed principal and as such he cannot be sued by the Plaintiff under the common law principle that an agent of a disclosed principal is not subject to being sued in a court of law. That this suit is based on a contractual relationship between the Plaintiff and the 2nd Defendant over the sale of L.R. No. 1160/773 in which the 1st Defendant was merely acting as an agent of both parties.

4. Ephantus Muturi Maina who is the Managing Director of the 2nd Defendant filed a replying affidavit in which he denied having admitted to indebtedness to the sum of KShs. 6,500,000/= and KShs. 3,500,000/=. He contended that he was merely acting as a mediator between the Plaintiff and the 1st Defendant who had received payments in the sale agreement. He denied ever receiving any payment from the Plaintiff or the 1st Defendant. He contended that at the time of writing the letter dated 17th January, 2013 purported to be an admission, he was expecting payments in a transaction through the 1st Defendant and wanted to resolve the matter by instructing the 1st Defendant to make payments. He stated that he was not involved in the negotiations to the terms of the agreement and that he had no knowledge of the payment of KShs. 4,000,000/= . He alleged that the Plaintiff coerced him and the 2nd Defendant to admit indebtedness to him and that the 1st Defendant filed a judicial review application number 125 of 2013 against the Director of Public Prosecution and the Inspector General of police with a view to obtaining orders against his arrest, intimidation and harassment arising out of that sale transaction.
5. Due consideration has been given to the disposition of the parties and their submissions together with the authorities cited therein. The issue falling for determination is whether or not the Plaintiff has made a case for judgment on admission. Before I delve into that issue, I must deal with the points raised in the preliminary objection since one of them touches on the jurisdiction of this court. The essence of a preliminary objection was discussed **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (1969) EA 696**. At page 700 as follows:-

> "*…**a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

Sir Charles Newbold P. added as follows at page 701:

> "***A preliminary objection** is in the nature of what used to be a demurrer. It **raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion***." (Emphasis mine)

6. From the contentions raised in the preliminary objection, it is rather obvious that factual evidence shall be required and in those circumstances the said preliminary objection is unsustainable.

10. The principles of judgment on admission are found under Order 13 Rule 2 of the Civil Procedure Rules which stipulates 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."*** (Emphasis mine).

11. In **Guardian Bank Limited v. Jambo Biscuits Kenya Limited (2014) eKLR** **it was stated as follows:-**

> ***"The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of***

Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are:

Choitram v. Nazari (1984) KLE 327 that:-

'...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.' Chesoni Ag. JA went on to add that:-

'...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was'.

Cassam v Sachania (1982) KLR 191 –

'The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment'."

12. I have read letter dated 16th August, 2012 from the 1st Defendant to the Advocates Complaints Commission and it does not in my view constitute an admission to refund KShs. 4,000,000/= as alleged. The 1st Defendant merely interpreted clause 2 of the agreement and expressed his willingness to demand for a refund of the purchase price from the 2nd Defendant. The letter dated 17th January, 2013 on the other hand does constitute an admission. I do not think the 2nd Defendant would propose to make payment if indeed it did not feel indebted to the Plaintiff.
13. Looking at the other facet of this application, it is undisputed that the Plaintiff herein seeks summary judgment for a liquidated sum. In such a case, the court is called upon to consider whether or not the defences raise triable issues. **In Diamond Trust Bank (K) Ltd v. Martin Ngombo& 8 Others (2005) eKLR** Ouko J, (as he then was) held which opinion I share:-

"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence…The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out."

14. I am also fortified by the statement of Newbold P in ***Adina Zola and Another, NNO v. Ralli Brothers Limited and Another (1969)EACA 4*** where he stated:

"Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. This is clear from the words of Order XXXV, rule 2, which states:-'the court may thereupon unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly."

15. I have keenly read the defences on record, while in their defences the Defendants deny the Plaintiff's claim, they have not contended that the Plaintiff did not make full payment for the land and that the Plaintiff has not to date been given possession of the land. The 1st Defendant did not

contend receiving payments from the Plaintiff. Considering that he was acting for both parties in the transaction, he was meant to ensure that the property is transferred to the Plaintiff such was not done and he in fact remitted money to the 2nd Defendant, if at all, before the transfer was effected. The 2nd Defendant although it contended that he did not receive payment from the 1st Defendant, he expressed that he was willing to pay the sum which was colossal to settle the issue between the 1st Defendant and the Plaintiff. That explanation does not add up and in fact it in my view illuminates foul play. Additionally, in the letter dated 17th January, 2013 the 2nd Defendant made an admission of failure to make good its part of the deal.

16. In the circumstances, I find merit in the application and it is allowed. Judgement is hereby entered in favour of the Plaintiff against the Defendants in terms of the prayers in the plaint. Costs to the Plaintiff.

Dated, Signed and Delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff.

..... for the 1st Defendant.

.....for the 2nd Defendant.