



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 147 OF 2015**

**ELIZABETH WANJIRU KAMAU.....PLAINTIFF**

**VERSUS**

**REGISTERED TRUSTEES OF THE PRESBYTERIAN FOUNDATION.....DEFENDANT**

**RULING**

1. The **Notice of Motion** before Court is dated 3<sup>rd</sup> June 2015 and is filed in court on 4<sup>th</sup> June 2015 by the Plaintiff/Applicant. The application which is filed pursuant to Order 2 Rule 15 and Order 51 Rule 1 and Sections 1A, 1B and 3A of the Civil Procedure Rules and Act, respectively, seeks the following orders:
  - a. **All pleadings and documents filed herein by the Defendant and in particular the Defence dated 6<sup>th</sup> May 2015 be struck out.**
  - b. **In the result, judgement be entered for the Plaintiff against the Defendant as prayed in the Plaintiff dated 24<sup>th</sup> of March 2015.**
  - c. **The costs of the application be awarded to the Plaintiff.**
2. The application is premised on the grounds set out therein and is supported by the affidavit of **ELIZABETH WANJIRU KAMAU**, the Plaintiff herein, sworn on 3<sup>rd</sup> June 2015.
3. The brief history of the application is as follows. On or about 10<sup>th</sup> June 2013, the Defendant through its agents M/S. Myspace Properties made an offer to sell to the Plaintiff Apartment **number 07 Block B** on the development known as **Milele Luxury Apartments** that the Defendant was constructing on **L.R.NO.MN/1/11518 Bamburi Mombasa County, for Ksh.26,600,000/=**. The Plaintiff accepted the offer and paid Kshs.15,960,000/= being 60% of the purchase price with the balance of Kshs.10,640,000/= to be paid upon completion. A Sale Agreement was to be entered into between the Plaintiff and the Defendant upon the payment of the aforesaid deposit, but it appears this did not happen. However, according to the Letter of Offer, the completion date was estimated to be December 2013. That did not happen, and the Plaintiff made several inquiries as per the Plaintiff documents attached to the Plaintiff. The Defendant became evasive and only replied that they were doing everything possible to ensure that the project succeeds. However, by an advertisement on January 10<sup>th</sup> 2015, in the Daily Nation, the Defendant invited bids for the Sale of the suit property. This development was a clear manifestation by the Plaintiff that the property for which she paid Kshs.15,960,000/= was no longer available, and this caused the Plaintiff to file the suit herein and also this application for the orders being sought.
4. The application is opposed vide the replying affidavit of **SAMUEL WAWERU NJOROGE**

sworn on 13<sup>th</sup> July 2015 in which he states that the motion is misconceived and unsustainable because the defence raises serious issues among them that the Plaintiff had always known that the deposit paid by her was to be applied in the construction of the suit apartment, and that the said deposit has since been applied and is therefore not available for refund, and that in any event there is no provision for refund in the said letter of offer and that no sale agreement was ever executed between the parties, and so this application should be dismissed.

5. With the leave of court parties filed submissions to the application. I have carefully considered the said submissions. In my view the following are the issues for determination:

i. ***Whether there was an admission by the Defendant.***

ii. ***Whether the defence raises triable issues.***

iii. ***What the court is to make of the following acts;***

- a. **That even though the Plaintiff complied with payments condition in the letter of offer as per clause 5 thereof, no agreement for sale was prepared by the Vendor's Advocate for the Purchaser to execute.**
- b. **The advertisement for sale of the suit property by either the Defendant or its agents.**

6. To address all the issues together, it is clear to me that the Defendant does not deny the receipt of the deposit being Kshs.15,960,000/=. However, the Defendant clarified that the deposit was to be applied in the construction of the suit apartment and that the Defendant has since applied the deposit towards the said construction as contemplated, and that in any event there is no provision for the refund of the deposit in the letter of offer. I agree with the Defendant's submissions that although there is what may be construed as admission, the funds were for construction and as long as the construction is going on, the Plaintiff cannot complain except as to the completion date. So, the law of admission herein is not that which, alone, allows the Plaintiff the relief sought under Order 13 Rule 2 of the Civil Procedure Rules. So, does that mean that the defence herein raises triable issues? To the extent that construction is going on, then obviously, the defence raises triable issues. But if there is no construction going on, and if the date of completion is long past, the conduct of the Defendant is brought to scrutiny, and this Court has the duty to interrogate the genuineness on the part of the Defendant. The truth of the matter is that the Defendant received the deposit from the Plaintiff to do construction. If there are any challenges the Defendant is experiencing, the Defendant must discuss the same with the Plaintiff. The Defendant must show the Plaintiff what has been done and what is still outstanding, and when the same will be completed. There is no evidence that the Defendant has bothered to engage the Plaintiff in this regard. The Plaintiff has the right to demand back her deposit if the purpose for which it was given is no longer tenable.
7. The question still remains whether or not there is construction going on. To answer this question, this court has noted that the completion date was to be December 2013. That date is now two years late, and if there is any construction going on, it is already outside the duration given under the letter of offer. This alone entitles the Plaintiff to claim not only the deposit, but also penalties, if any, provided for under the letter of offer.
8. However, if there was any doubt as to whether or not any construction of the suit apartment is ongoing, the advertisement on 10<sup>th</sup> January 2015 for the sale of the suit property is clear indication that there is no ongoing construction. It also shows beyond any doubt that the Plaintiff's interest in the suit property is threatened. This is so because the Plaintiff bought a property which is now being sold to interested persons. The least the Plaintiff can ask for under the circumstances is a refund of her deposit. The Defendants cannot be heard to have any quarrel with this demand. They are already advertising for the sale of the suit property. They are no longer constructing the suit property for them to advance the view that the deposit was applied or is being applied, in the construction. The Plaintiff's interest in the suit property is already being advertised for sale to the public. On what grounds will the Defendant then hang on to the Plaintiff's deposit?
9. Finally this court has noted that despite the Plaintiff fulfilling her payment obligation under clause 5 of the letter of offer, no agreement was executed under clause 9 of the said letter. That agreement was supposed to be prepared by the Vendor's Advocates. It is therefore strange for the Vendor to put up a defence that in any event no sale agreement was ever entered into. The

Plaintiff had no role in preparing the Sale Agreement. The Plaintiff's role was to make payment obligation under clause 5 of the letter of offer, and the Plaintiff fully complied. It is an act in bad faith for the Defendant to say that "*in any event there is no agreement for sale*". The Defendant's defence is therefore frivolous and mischievous in this regard.

10. In the end, my finding is that the Plaintiff/Applicant is entitled to the refund of the deposit of Kshs.15,960,000/=. I therefore make the following orders;

- a. The Defendant's statement of Defence dated 6<sup>th</sup> May 2015 and filed herein on 7<sup>th</sup> May, 2015 is hereby struck out.
- b. Judgement is hereby entered for the Plaintiff against the Defendant in the suit herein as follows:
  - i. Kshs.15,960,000/=
  - ii. Interest on (i) above at court rates from 20<sup>th</sup> June 2013 until payment in full.
  - iii. Costs of this suit and of this application.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF DECEMBER 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s. Kiongi for the Plaintiff/Applicant

Mr. Thangei for the Defendant/Respondent

Teresia - Court Clerk