REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 11 OF 2013

KANJI JADVA VALJI..PLAINTIFF/RESPONDENT

VERSUS

TRINITY PRIME INVESTMENT LTD ....1ST DEFENDANT

ERIC ANANDA..2ND DEFENDANT

ALICE ANANDA..3RD DEFENDANT

JUDGMENT

By way of a plaint dated 19th April, 2013, the Plaintiff sued the Defendants for the following reliefs;

(a) An order of specific performance of the Agreement compelling the Defendants to complete the sale of the suit property described as Eldoret Municipality/Block 13/225.

(b) Damages in lieu of or in addition to specific performance.

(c) In the alternative an Order for restitution in the said sum of Ksh. 6,470,000/=.

(d) Costs of the suit.

The Plaintiff avers that sometime in April, 2011, he entered into an agreement with the Defendants for the purchase of a property known as Eldoret Municipality/Block 13/225. The Defendants persuaded the Plaintiff to pay the purchase price prior to execution of a formal sale agreement as the 2nd and 3rd defendants urgently needed the funds to cater for hospital expenses for a relative.

On diverse dates as outlined here below, the Plaintiff sent to the Defendant various sums of money at the Defendant's behest.

	DATE	MODE	AMOUNT
(a)	30-4-2011	Cash Deposit	200,000
(b)	06-5-2011	Cash Deposit	250,000

(c)	26-5-2011	Cash Deposit	350,000
(d)	30-5-2011	Cash Deposit	500,000
(e)	31-5-2011	Cash Deposit	500,000
(f)	31-5-2011	Cash Deposit	499,000
(g)	03-6-2011	Cash Deposit	1,000,000
(h)	10-6-2011	via RTGS	3,000,500
(i)	On diverse dates	via M-Pesa	170,500
			6,470,000

Pursuant to the agreement, the Defendants forwarded to the Plaintiff the original Title Deed for the property but have since declined to transfer it to him or give vacant possession of the same.

In the alternative, the Plaintiff avers that the Defendants have refused to refund to him the amount of Ksh. 6,299,500/= he advanced to them for the purchase of the property aforesaid.

The Plaintiff further avers that despite several demands to the Defendants they have declined and/or refused to make good his claim.

A Memorandum of Appearance was entered on behalf of all the three Defendants on 2nd May, 2013 by the law firm of Gicheru & Company Advocates. The same law firm filed a Statement of Defence on behalf of the 1st Defendant on 16th May, 2013.

A separate statement of defence on behalf of the 2nd and 3rd Defendants was filled on the same date, 16th May, 2013.

All the Defendants denied the Plaintiff's claim.

As regards the 1st Defendant, it denied entering into any agreement with the Plaintiff relating to land parcel No. Eldoret Municipality Block 13/225 and added that the said land is not registered in its name.

It also denied having received any sums of money from the Plaintiff, and that if any money was paid to it, it was not meant to be for the purchase of the land, Eldoret/Municipality Block 13/225 but for a parcel of land the plaintiff sought to have purchased for him elsewhere. It denies therefore, that it was entitled to execute a transfer of the said land in favour of the Plaintiff and give the Plaintiff vacant possession thereof. The 1st Defendant also denies that it is bound to refund to the Plaintiff the sum of Kshs 6,299,500.00 and or the sum of Kshs 6,470,000.00 as alleged. It also denies receiving any demand of intention to sue.

The 2nd and 3rd Defendants also denied entering into an agreement with the plaintiff for the sale of the aforesaid parcel of land Eldoret Municipality Block 13/225- and that they persuaded the Plaintiff to pay the purchase price prior to execution of the sale agreement as they urgently needed funds to cater for hospital expenses of a relative. They averred that they delivered the original Title Deed to the aforesaid land to the plaintiff for save custody since the Plaintiff had been their agent all along. They thus deny that they were bound to execute a transfer of the said land in favour of the plaintiff. They also in that respect, deny they had any obligation to give vacant possession of the land to the Plaintiff.

They also aver that they are distinct and separate entity from the 1st Defendant. They deny receiving any notice of intention to sue.

All the Defendants pray that the suit be dismissed with costs.

THE EVIDENCE

One witness testified for the Plaintiff's case. That is Kanji Jadva Valji as PW1. He testified how, as averred in paragraph 8 of the plaint he advanced the 2nd Defendant the various monies first on a friendly basis and then as part-payment for the purchase of the aforesaid property. He produced banking deposit slips vide which he paid the amounts into the 1st Defendant's bank account. They were produced as P. Exhibits 1 (a) – (f).

Thereafter, on 10th June, 2011, the 2nd Defendant sought from the Plaintiff money to help him organize funeral for his father who had been ailing. In addition to the various deposits, the Plaintiff further deposited a sum of Ksh. 3,000,000/= by RTGS into the 2nd Defendant's account. The RTGS receipt was produced as P. Exhibit 2.

Other small figures were advanced by M-Pesa money transfer system. In total, the Plaintiff averred that he advanced the 2nd Defendant a total of Ksh. 6,470,000/=.

A copy of the Title Deed to the property was also produced in court as P. Exhibit 3. The Plaintiff retained the original one.

PW1 concluded by stating that he was still interested in purchasing the land, and if the Defendants did not want to continue with the deal, the court should order for the refund of all the sums paid to them.

The Defendant's did not call any witness.

SUBMISSIONS

PLAINTIFF'S SUBMISSIONS

The plaintiff's counsel relied on his written submissions dated 16th May 2014. Counsel submitted that the said advancement of monies towards the defendants was made in good faith and based on trust. He argued that the defendants ought to be held jointly and severally liable. Counsel cited the case of ***Magunga General Stores vs. Pepco General Distributors [1987] 2 KAR***, where the Court of Appeal held that a mere denial is not sufficient defence in this type of case and that there must be some reason why the defendant does not owe money. In the foregoing case the court of Appeal held further that either there was no contract or it was not carried out and failed and that it is not sufficient therefore simply to deny liability without some reason given. Counsel submitted further that defendants are indebted to the plaintiff.

Defendants Submissions

On the other hand the Defendants' counsel, *vide* his written submissions dated 3rd day of June 2014, argued that the plaintiff failed to show the existence of a contract between himself and any of the defendants or the relationship between monies paid by him to the defendants. Counsel submitted that the plaintiff has failed to proof his allegations as per the requirement of section 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya. He cited and relied on the case of ***TMAM Construction Group (Africa) vs. A.G [2000] EA 291***. The defendants counsel submitted that in line with the company law, the 2nd and the 3rd defendants are distinct from the the 1st Defendant. To this end, counsel relied on the case of ***Salmon vs.Salmom & Co. Ltd [1897] AC 22***.

Counsel further submitted that if indeed any loan was advanced to the Defendants, the Plaintiff ought to show it was advanced to the 2nd Defendant as an individual or the 1st Defendant. He argued that no documentary evidence to this effect was ever tendered before the court.

The Defendants counsel submitted further that even if any monies were loaned out by the Plaintiff, such

actions would be illegal and cannot stand the test of the law. To this end counsel cited section 3 the Banking Act (Cap 448, Laws of Kenya). Counsel submitted that there was no sale agreement of the suit property that was exhibited between the plaintiff and the 2nd defendant and that the alleged payments were only made to the 1st Defendant. Counsel argued further that in any event there was no sale agreement adduced in court with regard to the said suit property, as required by section 3 (3) of the Law of Contract Act, Cap 448, Laws of Kenya. To this end the the defendants counsel cited the cases of ***Jonathan Msuko Shoka vs. Samuel Gonal Ndoro & 2 Others [2010]eKLR*** where the court found that agreement for the sale of land must be in writing; ***Machakos District Co-Operative Union Ltd vs. Philip Nzuki Kiiru [Machakos CA No. 112 of 1997]*** where the Court of Appeal held that where a party had filed a suit seeking to enforce any right that would lead to disposition of an interest in land the party seeking such relief had to demonstrate among others that there existed a written contract and ***Metra Investments Limited vs. Gakwezi Mohammed Warrakah [Nai HC Case No. 54 of 2006] (Unreported)***, where the Court held that unless the conditions under section 3 (3) of the contract Act are met not even relief under the doctrine of part performance could be granted.

Evaluation of Evidence

The plaintiff's case is premised on the monies advanced to the 1st defendant which is according to the plaintiff is a limited liability company duly registered under the Companies Act, Chapter 486 of the Laws of Kenya. The 2nd and 3rd defendants are enjoined to this matter by virtue of being the 1st Defendant's directors. As much as the plaintiff alleges that he entered into an agreement with the 2nd defendant for the purchase for value of land parcel No. Eldoret Municipality/Block 13/225, there is no evidence to this effect. Section 3(3) of the Contract Act is very clear on the sale agreements regarding transfer of interest in land. It states as follows;

> ***"3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—***
>
> ***(a) the contract upon which the suit is founded—***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all the parties thereto; and***
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***
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> ***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust."***

In the case of ***Kenya Institute Of Management V Kenya Reinsurance Corporation [2008] eKLR, H.C at Nairobi, Civil Appeal No. 156 of 2007***, the learned judge Nambuye J. opined as follows;

"On case law the court was referred to the case of **WESTERN PUMPS LIMITED VERSUS JOSEPH WAINAINA IRAYA T/A QUEEN CHICK INN AND H.E. DANIEL ARAP MOI, NAIROBI HCCC (MILIMANI COMMERCIAL COURTS) NO 186 OF 2006**. Fred A. Ochieng J, at page 8 of the ruling set out the provisions of section 3(3) of the Law of Act Cap.23 Laws of Kenya. At line 6 from the bottom the learned judge observed thus "*pursuant to those provisions, it is my considered view that the plaintiff has failed to prove that it has a prima facie case with a probability success. It does not have any contract in writing as between itself on the one hand, and the defendants on the other hand.It would appear wholly in adequate for the plaintiff to seek to obtain an order for specific performance of a contract between the 2nd defendant and Queen chick Inn Limited. In any event, even that agreement was not attested by any witnesses secondly the plaintiff has not demonstrated that it would suffer irreparable loss or damage if no injunction is granted as prayed. He has paid a specific amount of money. If the 2nd defendant was held to have been wrong in receiving the money without giving to the plaintiff*

consideration for the same, I do not see any difficult in the plaintiff receiving reimbursement together with interest thereon.There has been no suggestion that the second defendant who the plaintiff believes should earn about Kshs 100 million from a sale of the plots curved out of the suit property, would be unable to compensate the plaintiff. Finally I hold the view that the balance of convenience tilts in favour of the defendants. The reason for that is that plaintiff has at no time had possession of the suit property".

The case of **METRA INVESTMENTS LTD VERSUS GAKWELI MOHAMED WAWAKAH NAIROBI MILIMANI HCCC NO. 54 OF 2006**. Rainsley J. as he then was at page 5 of the ruling stated thus;

> ***"As the case is presented there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by Section 3 (3) of the law of Contract Act.***
>
> ***In the absence of such agreement the section is clear that no suit shall be brought for the disposition of an interest in land.***
>
> ***The applicant does not appear therefore to have a prima facie case with a probability of success.***
>
> ***The relief formerly available under the doctrine of part performance no longer exists".***
>
> In Blacks law Dictionary Eighth Edition by Bran A. Garner page 1435, it is stated "***specific performance is an equitable remedy that was within the courts discretion to award whenever the common law remedy is insufficient either because damages would be inadequate or because the damages could not possibly be established …… In essence the remedy of specific performance enforces the execution of a contract according to its terms, and it may therefore be contrasted with the remedy of damages which is compensation for non-execution. In specific performance, execution of the contract is enforced by the power of the court to treat disobedience of its decree as contempt for which the offender may be imprisoned until he is prepared to comply with the decree… It is not strictly accurate to say that the court enforces execution of the contract according to its terms for the court will not usually intervene until default upon the contract has occurred, so that enforcement by the court is later in time then performance carried out by the person bound without than intervention of the Court***".

In view of the section 3 (3) of the Contract Act prayers (a) and (b) seeking specific performance and damages in lieu of the same ought to fail for the obvious reason, that there was no sale agreement for the sale of the subject land. That is to say, that the court cannot enforce what did not exist in the first instance.

The foregoing notwithstanding, the plaintiff has sought an alternative prayer; for restitution of the said sum of Kshs. 6,470,000/=. At the trial the plaintiff produced receipts for a sum amounting to Ksh 6,299,000/= which monies were deposited in the 1st defendant's account on different dates. They were cash deposit slips of the Guardian Bank, Biashara Street, which were marked as P. Exh.1(a) - (f) and 2. The 1st defendant despite having entered appearance and filed the defence of which it denied the claim herein, failed to call any witness to controvert the evidence produced by the plaintiff.

In the case of ***John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR, Court of Appeal at Mombasa, Civil Appeal No. 215 of 2010***, the learned Judges Githinji, Makhandia and Murgor reiterated as follows;

> ***"Of course under our legal system, he who alleges must prove his averment on balance of probabilities. … The respondent thus never endered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to***

blame for the accident."

While in the case of ***Mugunga General Stores Vs. Pepco Distributors Limited***, supra, the learned Judges Platt, Gachuhi and Apaloo reiterated as follows;

> ***"First of all a mere denial is not sufficient defence in this type of case. There must be some reason why the defendant does not owe money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made could be proved. It is not sufficient simply to deny liability without some reason given."***

The first defendant did not adduce any evidence contrary to what the plaintiff tendered in court. It is so evident as per receipts produced that indeed monies were deposited in the 1st defendant's account. The 1st Defendant then, not having controverted that evidence, ought to refund money it cannot account for in what respect it received it.

The defendants counsel has disputed the restitution claim arguing that the plaintiff did not have locus under section 3 of the Banking Act to loan the defendants money. This argument in my view does not hold water. This is so because, it is normal practice for one to borrow money from an individual purely based on binding personal agreement or contract. In the case of ***John G. Kamuyu & another v Safari 'M' Park Motors [2013] eKLR, H.C at Nairobi, Civil Case No. 1013 of 1999***, Nyamweya J. held as follows;

> "On whether the loan agreement between the Plaintiffs and Defendant was illegal, null and void, t**he Plaintiff presented two limbs of arguments on this issue. The first was that the Defendant did not have a licence to engage in money lending at interest to members of the public. The Plaintiffs relied on section 3(1)(a) of the Banking Act which restricts any person from transacting any banking business, financial business or the business of a mortgage finance company unless it is an institution which holds a valid licence. However the definition of banking business, financial business and business of a mortgage finance company as defined under the Banking Act primarily involves the taking of deposits of money from members of the public, and the utilizing of such deposits. The Act therefore does not regulate nor apply to the sole business of lending of money.**
>
> **The legal regime that comes closest to regulating moneylenders is the Microfinance Act (Cap 493D of the Laws of Kenya) which defines microfinance business as the business of—**
>
> **a) Receiving money, by way of deposits or interest on deposits which is lent to others or used to finance the business; or**
>
> **b) providing loans or other facilities to micro or small enterprises and low income households;**
>
> **The Microfinance Act distinguishes between deposit-taking microfinance business and non-deposit-taking microfinance business in which latter group money lenders would fall. The Act regulates deposit-taking microfinance business in great detail, but not non-deposit-taking microfinance business,and the regulations required by section 3(2) of the Act in this regard are yet to be gazetted. I t is thus my finding that there is thus no legal requirement at the moment requiring moneylenders to be licenced, and the Defendant was thus not engaging in any illegal business.**
>
> **The second limb of the Plaintiff's argument is that the loan agreement entered into by the parties herein is clearly unconscionable due to the usurious interest rate that was applicable, namely 30% interest compounded monthly. It is my view that in the absence of regulations regulating the business of money lending, loan agreements entered into under such an arrangement are subject to the general principles of contract law, The Law of Contract Act (Cap 23 of the Laws of Kenya) at section 2 provides in this regard that the general principles**

of common law will apply. The only requirement placed by the Law of Contract Act under section 3 is that contracts for the disposition of land must be in writing.

Under common law the parties in such agreements are left exposed to the vagaries of the doctrine of freedom of contract. Contracts for loan of money are legal under common law, and such loans can be secured by way of personal security consisting of guarantees or indemnities, or by real security consisting in rights in or over property belonging to the borrower. Interest, including compound interest, is at common law as a general rule not payable unless there is express agreement to that effect. (See Chitty on Contracts Thirtieth Edition, Volume II -Specific Contracts **at chapter 38 paragraphs 238 – 277.)"**

By custom and practice therefore, friendly advancements (loans) need not be reduced into writing. By the conduct of the parties, an implied contract is discerned. That is the scenario presented by the instant case. All through, the Plaintiff trusted the 2nd Defendant. It is the 2nd Defendant who directed him where to pay the money into – the 1st Defendant's bank account. The 2nd Defendant posed as an honest person who had deep personal problems of an ailing father. Out of ignorance, the Plaintiff accepted to retain the Title to the land (which anyway, was valueless). With that confidence, he deposited the funds into the 1st Defendant's account. It is for this reason, I think, that the 1st Defendant is obligated to restitute all the monies paid into its account, which can only be construed was loaned on friendly basis, and in the alternative, the 1st Defendant could not controvert the Plaintiff's evidence on how it landed into its bank account.

In the end, prayers (a) and (b) in the plaint fail. I order the 1st Defendant to forthwith restitute to the Plaintiff the sum of Kshs 6,299,000/=. The suit is dismissed with costs as against the 2nd and 3rd Defendants.

The 1st Defendant shall pay the Plaintiff his costs of the suit.

DATED and DELIVERED at ELDORET this 21st day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Kibet holding brief for Mabera for the Plaintiff

Mr. Rop holding brief for Aseso for Defendants