REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.90 OF 2009

VERONICAH WANJIRU…….....…….PLAINTIFF

VERSUS

SAMUEL IKUMBU…….....…….....1ST DEFENDANT

HEIWA AUTO SPARES AND DISTRIBUTORS LIMITED…….....…...2ND DEFENDANT

BARCLAYS BANK OF KENYA LIMITED……...….....……3RD DEFENDANT

RULING

The applicant and the respondent entered into a contract of sale of property known as NAKURU MUNICIPALITY BLOK 4/54 (the suit property) for a consideration of Kshs.18 m. Upon execution of the contract on 5th October, 2007, the applicant paid to the respondent Kshs.3m being a deposit of the purchase price. The balance of Kshs.15m was to be settled within 90 days from the date of the agreement.

On 13th October, 2010, some three years after the execution of the sale agreement, the property was sold by Barclays Bank of Kenya Limited in the exercise of its statutory power of sale after the respondent failed to settle a loan facility. The applicant has now brought the present motion for order that judgment on admission be entered in her favour against the respondent in the sum of Kshs.3m, being the money paid to the respondent which payment the respondent has admitted.

In response, the respondent has argued that it was a term of the contract that the applicant would continue to pay rent until the payment of the balance of the purchase price; that the applicant stopped payment of rent in October, 2008 and owes the respondent Kshs.1,985,000/= in unpaid rent. The respondent has conceded that this is what he is willing to refund to the applicant within 90 days from the date of the order.

In her further affidavit, it is the applicant's contention that the respondent had leased part of the property to one James Njuguna who was paying to the respondent a monthly rent of Kshs.350,000/= even though it was a term of the agreement that she would take control of the entire plot upon execution of the agreement. The applicant has further explained that she only stopped paying rent when it became clear to her that the respondent was having problems with his bank loan and also when he failed to apply the deposit of Kshs.3m towards the loan balance. It is common ground that Kshs.3m was paid over to the respondent on 5th October, 2007 as part payment of the purchase price.

Indeed their relationship was governed by a document headed *"Agreement for sale of plot"* dated the

same date (5th October, 2007). While the applicant maintains that she is entitled to Kshs.3m received and admitted by the respondent, the latter argues that the sum owing is Kshs.1,985,000/= having deducted unpaid rent.

The application is brought under **Order 13 rule 2** of the **Civil Procedure Rules** which stipulates that:

"2. Any party may at any stage of a suit, where admission of facts have been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admission 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."

Similar provision is **Order Xll rule 6** of the revoked **Civil Procedure Rules** has been the subject of numerous opinions and the principles emerging from those opinions may be summarized thus:

i) in an application for judgment on admission, the court should examine the pleadings carefully in order for it to establish whether there are no specific denials and no definite refusal to admit allegations of fact;

ii) implied admissions are admissions which are inferred from the pleadings

iii) admission need not be on the pleading; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "*or otherwise*";

iv) an order for judgment on admission should only be made if it is plain that there are either clear express or clear implied admissions;

v) judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.

See **Choitram** V. **Nazari** (1984) KLR 327. See also **Cassam** V. **Sacharia** (1982) KLR 191.

There are contested issues regarding the question whether the applicant is entitled to the deposit of Kshs.3m or that amount less unpaid rent. The answer to this question will require the interpretation of the sale agreement, namely whether time of completion was of the essence, for what period was the applicant required to pay rent; whether she did so; whether she was in control of the entire plot and whether the respondent continued to receive rent in respect of the other leases on the plot.

The claim, although admitted, it is admitted only to a certain extent. It is not unequivocal admission of a debt. It is not plain hence no judgment can be entered as sought. The application fails and is dismissed.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 15th day of February, 2012.

W. OUKO
JUDGE