REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 275 of 2010

CHARISMA PROPERTIES LIMITED ….....……PLAINTIFF

V E R S U S

VERITY MKWACHU MNGOLA ….....……1ST DEFENDANT
ARYAN LIMITED ……..…… 2ND DEFENDANT
ATTORNEY GENERAL …..…..…..…… 3RD DEFENDANT

RULING

1) This Court is asked to determine the application dated 10th August 2012 and expressed to be brought under the provisions of Order 13 Rules 1 & 2 of The Civil Procedure Rules 2010. In it the Plaintiff seeks that judgement on admission be entered against the 1st Defendant in the sum of Kshs. 4,500,000/- plus interest thereon at Court rates from 10th August 2010.

2) The Plaintiff and the 1st Defendant entered into a sale agreement dated 17th March 2010 in which the Plaintiff agreed to sell property known as Kilifi/Mtwapa/404 to the 1st Defendant. Pursuant to the terms of that agreement the Plaintiff paid a sum of Kshs. 4,500,000/- to the 1st Defendant's advocate S. M. Gitonga & Co. Advocates as a deposit. The balance of the purchase price was to be paid in terms of Clause 4.2 of that agreement which provided that-

"Not withstanding Clause 1.1(a), it is hereby agreed by the parties hereto that within fifteen (15) days of the Vendor handing over the completion documents to the Purchaser's Advocate, the Purchaser's Advocate shall pay the balance of the Purchase Price Kshs. 40,500,000/- (Kenya Shillings Forty Million Five Hundred Thousand) to the Vendor's Advocate."

3) The purchase fell through. The Plaintiff blames the 1st Defendant for failing to provide all the completion documents and was particularly unhappy when it learnt that the 1st Defendant had sold the property to a Company by the name Aryan Limited. So on 10th August 2010 the Plaintiff brought these proceedings against the 1st Defendant, Aryan Limited (then the 2nd Defendant) and the Attorney General (then the 3rd Defendant). The proceedings as commenced was basically a claim for specific performance.

4) Time has a way of resolving matters. And it did so partly in this case. The Plaintiff and Aryan Limited got talking and settled the dispute between them in a consent dated 21st December 2011 whose terms are-

"BY CONSENT

1. The Plaintiff's suit against the 2nd Defendant be marked as settled with no orders as to costs.

2. The 2nd Defendant to pay the Plaintiff the sum of Kshs. 3,200,000/- in full and final settlement of the Plaintiff's claim against the 2nd Defendant.

3. The sum of Kshs. 3,200,000/- to be paid by the 2nd Defendant by RTGS in the Plaintiff's bank account No. 1100185070 at KCB Mortgage Centre, Mombasa on 21st December 2011."

Yours faithfully

GIKANDI & COMPANY

ADVOCATES FOR THE PLAINTIFF

A B PATEL & PATEL

ADVOCATES FOR THE 2ND DEFENDANT"

5) Following this the Plaintiff withdrew its claim against Aryan and amended its pleadings. The Plaintiff is no longer insisting on specific performance and instead seeks the following prayers-

(a) Payment to the Plaintiff by the 1st Defendant of the sum of Kshs. 5,490,000/- together with interest at Court rates from the date of this Amended Plaint to the date of full payment.

(b) Payment by the 2nd Defendants jointly and severally of the sum of Kshs. 15,000,000/- or such other sum as the court may deem fit and just to award as set out in paragraph 12(b) of this Amended Plaint.

(c) General Damages as set out in paragraph 12(c) of this Amended Plaint.

(d) Interest on (b) and (c) at court rates.

(e) Costs of the suit.

Thereafter the present application was filed.

6) The Plaintiff sees its claim for payment of the deposit as plainly due. The Plaintiff also contends that the 1st Defendant has expressly admitted being indebted to the Plaintiff in the sum of Kshs. 4,500,000/-. This was the deposit paid. That admission is said to have been made in paragraph 41(a) of the 1st Defendants affidavit sworn on 2nd September 2010 and filed in Court on 8th September 2010.

7) This court reproduces paragraph 41 in its entirety-

41. That in reference to paragraph 14 of the supporting affidavit and with advise from Ms Kitonga which I verily believe to be true I wish to respond as follows-

(a) That the deposit of Kshs. 4,500,000/- is still available to the Plaintiff and after returning it to Ms Kitonga she did not want to engage in a cat and mouse game over the deposit as my honest intention was to sell the suit property to a serious buyer who was not going to hold me at ransom as the buyer looked for finances from third parties and from the Plaintiff's conduct, it was NOT a serious buyer but a pure middleman and that is why it requested for copies of the completion documents to show a third party instead of putting its advocates into funds.

(b) That the sale agreement lapsed on 16th June 2010 and there was no extension by the parties as provided for by Clause 1.1(a) of the sale agreement exhibit WWG 1. The conduct of the Plaintiff shows clearly that it did not have any finances to complete the sale and it definitely did not inspire

me to extent the sale agreement.

(c) That as sated herein above the letter of 5th July 2010, was written without Ms Kitonga's authority and in any case the 90 days expired on 16th June 2010 and the period was not extended. The Registered Lands Act Cap 300 Laws of Kenya under which the suit property falls does not prohibit one day registration of transactions and if the Plaintiff co-operated and if indeed it had the finances to complete there was no reason on earth why the property would not have been sold to the Plaintiff.

(d) That the Land Registrar has legal powers to reject a caution and that is a matter between the Plaintiff and the relevant office. (my emphasis)

8) The 1st Defendant concedes that in her affidavit of 8th September 2012 she had no objection to having the deposit of Kshs. 4,500,000/- released back to the Plaintiff. But she has had a change of heart. She claims that, on looking at the Plaintiffs documents filed after her admission, she was vindicated in her view that the Plaintiff lacked the ability to complete the sale before the completion date and that the Plaintiff had obtained the contract through misrepresentation.

9) The provisions of Order 13 Rules 1 and 2 of The Civil Procedure Rules provide as follows-

"1. Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

2. 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."

10) There is no shortage of Judicial authority on the principles to be applied in considering an application of this nature. In **Choitram –Vs- Nazari (1982-88)1 KAR 437 Madan, JA** said-

"For the purposes of O.XIII r. 6 admissions have to be plain and obvious, as plain as a spikestaff 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. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis."

11) It is common ground, I think, that paragraph 41(a) of the 1st Defendants affidavit of 2nd September 2010 is an admission by the 1st Defendant that Kshs. 4,500,000/- is due from her to Plaintiff. What the 1st Defendant is telling the Court is that she is entitled to resile on it because of change or a clarity of circumstances. But is that so? The reasons cited for the change of position are in paragraphs 6 and 7 of her replying affidavit of 19th September, 2012. She states-

"6. That having seen the documents filed by the Plaintiff in support of its claim I am vindicated for having concluded right from the commencement of the suit that the Plaintiff was not financially capable of completing the sale transaction within ninety (90) days.

7(a) That I challenge the Plaintiff to show evidence that at any time in the course of the ninety (90) days it had informed me that it intended to borrow funds from Kenya Commercial Bank Ltd (KCB).

(b) That I am advised by Ms Kitonga the advocate who handled the transaction and my

advocates on record which advise I verily believe to be true that where a purchaser intends to borrow funds such a fact is disclosed and is incorporated into the Sale Agreement because in such situations the completion of a transaction tends to go beyond the ninety (90) days. In this case it would have stretched all the way to November, 2010."

12) When I look at the affidavit of 2nd September 2010 which contained the admission, the 1st Defendants position even then was that the Plaintiff was incapable of paying the balance of the purchase price on time. This is revealed in paragraphs 41(b) and 42 of that affidavit. Frankly, the circumstances obtaining at the time of the admission and now have not changed. Her position then as it is now is that the Plaintiff did not have the financial ability to complete the sale transaction within 90 days. The 1st Defendant has no good reason to retract the admission. She cannot shrink back from her admission.

13) I find that the admission is plain and clear and was made in the full knowledge of the circumstances surrounding the failed transaction between the Plaintiff and the 1st Defendant. For this reason I allow the application dated 10th August 2012 as prayed. Costs to the Plaintiff.

Dated and delivered at Mombasa this 5th day of December, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

No appearance for Plaintiffs

Kayatta for 1st Defendant

Court clerk - Moriasi

F. TUIYOTT
JUDGE