

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 740 of 2008

**DECAS LIMITED (*Suing as the nominees of*
Unique Distributions (K) Limited) PLAINTIFF**

VERSUS

KISEPH LIMITED DEFENDANT

RULING

1. By way of restating a brief background of this matter the Plaintiff filed this suit seeking for judgment against the Defendant for a sum of Kshs.1,869,639/=, being the purchase price the Plaintiff claims to have paid towards the purchase of **L.R. No.209/9725** from the Defendants. The Defendants filed a defence in which they have denied in *toto* the claim by the Plaintiff. In particular, they denied having requested the Plaintiff to pay for them Government Land Rent or the City Council rates.
2. The Plaintiff filed a Notice of Motion under **Order XXXV Rule 1 of the Civil Procedure Rules** seeking for summary judgment as prayed in the plaint. This is on the grounds that on/or about April, 2007, the Plaintiff and the Defendant entered into a Sale Agreement. The Plaintiff paid Government Land Rent and City Council rates which were owed by the Defendant in order to facilitate the Sale. However, the transaction was frustrated and when the Plaintiff demanded to be referred its money, it was not refunded thus they filed the present suit. It is contended by the Plaintiff that the defence does not raise any triable issues to warrant the matter proceeding for trial.
3. This application is supported by an affidavit of one Mr. Simon Mukiri sworn on 6th April, 2010. It is further contended that the sale transaction aborted because the Plaintiff came to learn that the persons they were dealing with, were not the genuine Directors of the Defendant Company. He also attached several documents to support his contention that they made the payments. The Agreement for Sale was entered into between the Plaintiff and Unique Distributors, a copy of the Title and Land Rent invoices as well as, a receipt issued by the Kenya Revenue Authority for rates payment were annexed. He also attached documents from the Company's Register which shows the Directors of the Defendant.
4. This application was opposed; the Respondent relied on the replying affidavit of Dinta Devani sworn on 24th May, 2010. The Respondents challenged the application which is brought by the Plaintiff who has described itself as suing as a nominee. This is a contested issue which should proceed for trial because the Plaintiff should have brought at least a document to show they have *locus standi*. Moreover, the prayer seeking for the purchase price is not in tandem with the pleadings contained in the body of the plaint. The plaint alleges that the Defendant withheld material information. That allegation is denied in the defence which is also a triable issue. The documents attached to the application are also suspect and require to be interrogated through a Courtroom process of discovery.
5. This application seeks for summary judgment which can be granted under the provisions of **Order XXXV** if a Plaintiff with a liquidated claim is able to show that it has a clear and plain claim that the Defendant is truly and justly indebted. The other issue to consider is whether the defence raises triable issue(s) which should entitle the Defendants to defend the case at the trial. A triable issue can be demonstrated by a Statement of Defence or a replying affidavit which should be looked at against the Plaintiff's claim and the supporting affidavit. The

Plaintiff's claim in the body of the plaint contends that there was a Sale Agreement and the Plaintiff paid the sum now claimed as Government Land Rent and City Council rates on behalf of the Defendant.

6. The receipts annexed are in the name of the defendant, there is no document to show that the plaintiff if indeed is the one paying, did so on behalf of the plaintiff. The second issue that was also raised by the respondent is the fact that this is a representative suit, the authority upon which it was instituted is challenged. The orders sought in this application especially the main prayer is not supported by the plaint which ground renders the application incompetent. For those reasons this is not an appropriate application upon which summary judgment can be granted. It is dismissed with costs to the respondent.

RULING READ AND SIGNED ON THE 17TH DAY OF SEPTEMBER, 2010

M. K. KOOME

JUDGE