



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 781 OF 2009

JACQUELINE MUTURIPLAINTIFF

VERSUS

CARIBEAN SOLUTION FINDERS LIMITEDDEFENDANT

RULING

1. By way of restating a brief back ground of this matter, the plaintiff filed this suit against the defendant seeking for judgment for a sum of Ksh. 4,411,800. Being the monies received by the defendants who was to facilitate an investment. The defendant filed a defence in which they denied the plaintiff's claim and further alledged that if there was any agreements it was unlawful, illegal and **void ab initio** as it violates the banking act.

The plaintiff filed a notice of motion under the provisions of order 35 Rules 1 (1) (a) and 2 of the Civil Procedure Rules. The applicant seeks for summary judgment as prayed in the plaint based on the grounds that the defence is a mere denial which does not raise any triable issues. There is also conclusive and unchallenged evidence that the plaintiff and the defendant executed a contract. The application is supported by the

2. The applicant has given a chronology of how she entered into a written contract with the defendant titled "Investment Facilitation Agreement" which was to take effect on 24th September, 2008 upto 19th September, 2009. Pursuant to that agreement, the defendant was supposed to invest for the plaintiff a sum of Ksh. 750,000 in a secondary market for a duration of 360 days. The plaintiff paid the defendant through a bankers cheque which is annexed to the affidavit and was issued with a receipt. The principal sum was supposed to earn Ksh. 15,000 per month as interest which was to be ploughed back in order to run further interest. On the 17th December, 2008, the plaintiff entered into another contract to invest a further sum of 3 million for three hundred and sixty days. The plaintiff obtained a further bankers cheque which was paid to the defendant. It was acknowledged and plaintiff was issued with a receipt. The plaintiff only received interest for 5 months after which the defendant breached the contract despite demand the plaintiff has not been paid. She is now claiming the sum of Ksh. 3,750,000 and interest of Ksh. 991,800 less a sum of Ksh. 330,000 which was paid.

3. This application was opposed the respondent; reliance was placed on the replying affidavit sworn by John Wanyoike Gitau on 3rd February, 2010. The defendant contended that the defence raises triable issues which should proceed on trial to determine the legality of the contract in particular, whether the defendant was authorized by the capital market authority to receive money for investment and whether the defendant could award interest. Counsel for the defendant relying on the case of **Fintech Kenya Limited V Alliance Hotels Limited (2006) eKLR** where the court held that in a matter where there is a triable issue the same cannot be dealt with summarily.

4. This application is brought under the provisions of order 35 of the Civil Procedure Rules which basically provides that a plaintiff with a liquidated claim to which there is clearly no defence can obtain a quick summary judgment without being unnecessarily kept from what is due to her by way of delaying tactics by the defendants. The principal elements for consideration in an application for summary judgment are whether the plaintiff's case is clear and plain. The other element is whether the defence raises triable issues which should entitle the defendants to defend the case at the trial. Triable issues can be deduced by the statement of defence and also the replying affidavit which must show the defence

raises triable issues.

5. The applicant has annexed to the supporting affidavit the investment facilitation agreement dated 24th September and 23rd December, 2008. She also annexed acknowledgement receipt by the defendants for the sums of Ksh. 750,000.00 as well as 3 million. The defendant does not deny having received the said sum the only issue raised is whether the defendant could have received the sum for investment and to pay interest when they were not authorized under the banking Act or licensed by the Capital Market Authority. The so called agreement is titled Investment Facilitation Agreement. According to the plaintiff, the money was to be invested in a secondary market thus the defendant is challenging the interest claimed by the plaintiff.

6. As regards the principle sum, there is no denial that the defendant received this money, they have not paid it back and the plaintiff should be entitled to summary judgment for the principle sum of Kshs. 3,750,000/= less Kshs. 330,000/= which the plaintiff acknowledged receipt as interest. The balance of the claim can proceed for trial to determine the issue of whether interest is recoverable as per the agreement. For now, summary judgment is entered for Ksh. 3,420,000 for the plaintiff with costs and interests at court rates.

RULING READ AND DELIVERED THIS 22ND DAY OF OCTOBER, 2010

MARTHA KOOME
JUDGE