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

Civil Suit 602 of 2008

WHITE HORSE INVESTMENTS LIMITED…………………..…PLAINTIFF

VERSUS

NELSON HAVI T/A HAVI COMPANY ADVOCATES…..…………………..……..… DEFENDANT

R U L I N G

The application before me is the one dated 17th November 2008 filed by the Defendant. It is brought under Order VI Rule 13(1) (a) and in the alternative under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules. It seeks to have the plaint struck out and the suit dismissed either for disclosing no reasonable cause of action or in the alternative for being scandalous, frivolous and vexatious and for being otherwise an abuse of the court process.

The ground on which the application is made in regard to the alternative prayer are on the face of the application and in the supporting affidavit of even date sworn by the Defendant. The Plaintiff has opposed the application and has filed a replying affidavit sworn by P. Salva the Managing Director of the Plaintiff.

The brief background of the suit itself is that the Plaintiff company entered into an agreement of sale of property with Caroget Investments Limited where the Plaintiff company was the Purchaser and Caroget Company the Vendor.

It was agreed between them that a deposit of 10% of the purchase price, being Kshs. 20 million was to be paid to the Vendor’s advocate to hold as stakeholders. Pursuant to that Agreement the sum of Kshs. 20 million, was paid to the firm of Kiiru, Wainaina & Co. Advocates (hereinafter referred to as KW Advocate) by a cheque dated 6th June, 2007. KW Advocate acknowledged receipt of the cheque by a letter dated 21st June, 2007.

On the 16th July, 2007, the Plaintiff’s advocate Vishnu Sharma & Co. Advocates (hereinafter VS Advocate) duly instructed KW Advocate to release the sum of Kshs. 5 million to the Vendor, leaving a balance of Kshs. 15 million to be held by the firm of KW Advocate as stakeholders.

By a letter dated 31st August, 2007 the firm of Havi & Co. Advocates (hereinafter the Defendant) wrote to the firm of VS Advocates advising it that it had taken over the matter from KW Advocate and that all the original documents for the transaction as well as Kshs. 15 million held by KW Advocates, were to be transferred to his firm. The Defendant requested for a further sum of Kshs. 10 million to be wired to his

firm's account in exchange of the completion documents, and the money was wired on 4th September, 2007.

The transaction failed as the Chief Lands Registrar declared in writing that the lease held by the Vendor was invalid and void ab initio. The consideration for the transaction therefore failed.

The Plaintiff has filed this suit seeking a refund of the sum of Kshs. 25 million paid as deposit towards the purchase price, which money the Defendant was holding as stake holder.

The Defendant filed an elaborate defence in which it denies receiving the initial deposit of Kshs. 20 million from KW Advocate and pleads that KW Advocate remained agents of the Plaintiff and the Vendor in respect of that sum. It is further pleaded that a meeting was held on 31st August, 2007 between the representatives of the Plaintiff and Vendor and that of Joseph M. Mugweru, an Agent of the Vendor, and the partners in the firms of VS Advocates, KW Advocates and Defendant Advocate. It is pleaded that in that meeting it was agreed that the deposit held by KW Advocate as stakeholder should remain with that firm to cater for the commission due to the Agent, the fees due to KW Advocate and any other incidentals.

The defence filed herein has also introduced a new aspect to the case. It is pleaded that there was a Finance Agreement made on 1st March, 2007 and entered into between the Vendor, Caroget Investments Limited, and the Financier, Acres and Houses Limited, in which it was agreed that the Financier would finance the registration of the lease of land (the property in issue) in the name of the Vendor and retain the original documents in respect of the property as security for the refund of the finance costs and expenses and payment of the financier's remuneration. That it was also agreed that upon the Vendor entering into a sale Agreement with a purchaser, the Financier would release the lease and original documents of the property to the Purchaser in exchange of payment of the finance costs, expenses and remuneration.

It is further pleaded that on or about 14th March, 2007, the Vendor instructed Josensan Properties Limited, the Agent, to sell the property on its behalf, at a commission of 5%.

It is pleaded that it was in order to safe guard the interest of the Financier that the Vendor, on 27th August, 2007 instructed its Advocates, KW Advocate that it had appointed the Defendant to take over the conduct of the transaction and that the deposit and documents held by the former be released to the latter Advocates. It is pleaded that KW Advocate only released part and not all the documents and that the money deposit was never released to it.

Mr. A.B. Shah appearing with Mr. Mubea for the Defendant and Mr. Issa for the Plaintiff each filed submissions and highlighted them before me.

The plaint has been attacked on three grounds.

1.That it discloses no reasonable cause of action and should be struck out under Order VI rule 13(1) (a) of Civil Procedure Rules.

2.Alternatively that it is scandalous, frivolous and vexatious, and;

3. Is otherwise an abuse of the court process and should be struck out under Order VI rule 13(1) (b) and (d) of Civil Procedure Rules.

The court's power to strike out a pleading is drastic and implies a summary procedure and should only be exercised in plain and obvious cases, where the case cannot succeed or it is unarguable or where it is clearly an abuse of the process of the court. In the case of D.T. DOBIE & CO. (K) LTD. VS. MUCHINA [1982] KLR 1 the Court of Appeal in an Obiter dicta by Madan, JA, as he then was, expressed the view:

"The power to strike out should be exercised only after the court has considered all facts but must not embark on the merits of the case itself as this is only reserved for the trial judge…. the court should aim at sustaining rather than terminating a suit… a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment and that as long as a suit can be injected with life by amendment, it should not be struck out."

From the same case, Mandan JA. stated, at page 9 thus:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way…"

Does the Plaint disclose a reasonable cause of Action?

The Defendant contends that no reasonable cause of action is disclosed as it is obvious from the plaint that there is no privity of contract between the Plaintiff and the Defendant, over the deposit paid under the Agreement in the sum of Kshs. 15 million, and secondly, that the Defendant is not a stakeholder under the Agreement and/or an assignee of KW Advocate or an agent, a bailee, fiduciary and/or a trustee of the Plaintiff under the contract. The Defendant contends that it is trite law that no action lies against an agent of a disclosed principal, against a party not privy to a contract, and that estoppel is a defence not a cause of action.

Mr. Shah relied on the case of Meru Farmers Co-operative Union vs. Abdul Aziz Suleiman 1966 EA 4326 for the preposition that a suit against an Agent of a disclosed principal cannot be sustained. Mr. Shah submitted that since the Defendant had been sued as agent of a disclosed principle, i.e. the Vendor and Financier, then the case should fail. For same reason Mr. Shah submitted that the Defendant was not a proper party in the suit. Counsel placed reliance on the Court of Appeal case of Desai v. Patel t/a Sandpapers Constructions & Civil Engineering Services & 13 Others CA No. 178 of 2000 for preposition that a suit against a wrong party should be struck out at any stage the court discovers that, in order not to allow a Plaintiff vex an innocent party.

Mr. Issa for the Plaintiff submitted that the Plaintiff's case disclosed a reasonable cause of action. Counsel submitted that the cause of action is for 'money had and received' and not 'estoppel'. Counsel submitted that estoppel was pleaded in the plaint as provided under section 120 of the Evidence Act to buttress and aid the cause of action. Mr. Issa submitted that the consideration for the Sale Agreement between the Plaintiff and the Vendor totally failed and the Defendant is obligated to refund the money he received towards the purchase price which he is holding as a stakeholder. Counsel submitted that the Defendant made a representation to the Plaintiff indicating that he received the deposit paid by the Plaintiff. Mr. Issa contended that there is no correspondence where the Defendant denies holding the said sum. Counsel relied on an extract from section 72 Bullen & Leake & Jacobs 13th edition thus:

"There are numerous circumstances in which the law will compel a person who has received moneys which in equity belong to another to pay them over to that other. The doctrine rests on the fiction of a promise implied in law. At one time it looked as though this form of action for 'money had and received' might be extended to all cases where the court thought it equitable that money should be paid over….

Money paid by the plaintiff for consideration that has wholly failed may be recovered as money had and received to his use, e.g. money given for forged railway scrip, a forged bank note or worthless cheque; for a forged bill or bank note; money given for a bill of exchange that has been avoided by a material alteration; money given for bonds sold as valid bonds, but which proved defective and worthless' money paid as deposit on a contract of sale which has been rescinded otherwise than for default of the purchaser, or which the vendor could not complete, or which has been defeated by a condition not fulfilled, money paid as deposit on scrip for shares in a railway or mining scheme which turned out abortive,..."

Mr. Issa further submitted that the consideration between the Plaintiff and Vendor totally failed as the lease between City Council of Nairobi and Caroget Investment Limited was cancelled by the Registrar of Titles, for being void ab initio, and consequently that the deposit paid became due and payable immediately. Counsel relied on the case of Kahia v Ng'ang'a [2004] 1 EA 74 where the court held that where a land transaction failed due to absence of a consent by the Land Control Board, any money or consideration paid in the course of the transactions became recoverable as a debt by the person to whom it was paid.

The Defendant has cited Bullen and Leake and Jacobs Precedents of Pleadings 12th edition which sets out the circumstances in which the remedy of striking out is available on grounds no reasonable cause of action is disclosed. The text provides:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered.

Thus, in an action on contract, if it appears clearly that there is no contract between the Plaintiff and the defendant or no contract valid in law or an illegal contract, or if the relief be asked on a ground which is no ground for such relief, the statement of claim will be struck out and dismissed… Again, where it is clear that the action must fail, or the pleading discloses a case which the court is satisfied will not succeed, or that no relief can be granted at the trial, the action will be stayed or dismissed."

I have considered submissions by both counsel and the cases and texts relied upon on this question of whether the plaint discloses a reasonable cause of action. I have warned myself that at this stage any findings I make cannot be final as they will be tested fully and exhaustively at the trial, if this suit is sustained and the application dismissed. The Defendant's contention is that he has been sued as an agent of disclosed principals and as such he is not a correct party in the suit. The Defendant contends that he has been sued as a stakeholder when in fact he was not such stakeholder under the Agreement. The Plaintiff on the other hand contends that the cause of action is 'for money had and received' compromised of two payments. The sum of Kshs. 15 million which the Defendant took over from KW Advocate when the Vendor instructed his firm to take over the matter from KW Advocate on 31st August, 2007, and the sum of Kshs. 10 million paid to it on 4th September 2007.

There is enough correspondence exchanged by the parties in its suit to show that there were two payments made. The first payment of Kshs. 20 million was paid to KW Advocate by the Purchaser's Advocate as 10% of the purchase prices. Out of that sum Kshs. 5 million was paid to other parties on instructions of the purchaser's Advocate.

The balance is what the Plaintiff alleges was taken over by the Defendant when it was instructed to take over the matter from KW Advocate. This is a contentious issue, whether the sum of Kshs. 15 million was in fact paid to the Defendant by KW Advocate. There is however no dispute in regard to the Kshs. 10 million, which was wired to the Defendant by the purchaser on 4th September 2007. Even if the Defendant did not take over the deposit of Kshs. 15 million from KW Advocate when he was instructed to take over as Advocate for the Vendor, as he has pleaded in the defence, and was therefore not a stake holder in regard to that amount the receipt of Kshs. 10 million is not denied. I am aware that the Defendant's defence is that the Kshs. 10 million was paid to third parties. The Plaintiff's position is that if the Defendant paid out the money to third parties then he did so without authority and that in the circumstances the sum is recoverable from the Defendant. That too is a triable issue, a contentious matter that will be determined at the trial. For the purposes of this application, the Defendant cannot argue that it did not receive the Kshs. 10 million so that even if the Defendant is not a stake holder in regard to the Kshs. 15 million, he is one in regard to Kshs. 10 million.

As to issue whether he was sued as agent of a principal, it is clear to me that this suit is not brought against the Defendant as an agent. The suit lies in a claim for 'money had and received' by the Defendant as a stakeholder in a failed land sale transaction. He was to hold the money as a stakeholder. I think that it is clear that the Defendant has not been sued on behalf of a principal. Neither is the claim based on estoppel as alleged. Since the transaction failed, the amounts received by the Defendant as part of the

consideration for the transaction, if the Plaintiff proves its case, is recoverable as a debt from the Defendant. In fact I could go further and state that the sum shown to have been received by the Defendant in whatever capacity he received it in this failed transaction should be recoverable from him. As stated, the Plaintiff is yet to prove its case against the Defendant. For the purposes of this application however, I am satisfied that a reasonable cause of action is disclosed against the Defendant and that the case against him is clearly 'for money had and received' by him and therefore I find that the plaint is sustainable.

Having made the above conclusion, it would be an academic exercise to consider the other two grounds upon which the application is made. I will however mention them in passing.

Mr. Shah faulted the plaint for being scandalous, frivolous and vexatious, and otherwise an abuse of the court process, on grounds that an Advocate as agent is not personally liable for the debts of his client; a disclosed principal and that there was no privity of contract between the Plaintiff and Defendant over the sums claimed. Counsel relies on Bullen, and Leake and Jacobs Precedents of Pleadings 12th edition where the terms scandalous, frivolous and vexatious and abuse of the court process are defined and remedy for pleading found to be same is prescribed as follows:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasoned argument. Again, a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good. So it is vexatious and wrong to make solicitors parties to an action in order to obtain discovery from them"

The Defendant's arguments as to what constitutes a scandalous, frivolous and vexatious pleading are quite right and I have no quarrel with them. The only issue is that the Defendant relies on matters which are contentious as if they are admitted facts of the case, which they are not. For instance Mr. Shah submitted that the deposit or balance thereof of Kshs. 15 million was never released to the Defendant by KW Advocate and therefore he cannot be a stakeholder of the same. In regard to the Kshs. 10 million, Mr. Shah submitted that the Defendant received the sum as an agent and released to a disclosed principal, Acres and Homes Limited and/or upon instructions and that further the said sum was not part of a deposit under the Agreement nor was it held by the Defendant as stakeholder.

All these statements of facts which the Defendant relies upon, are contested facts. The Plaintiff contends that there was no mention of payment of Kshs.10 million to others as alleged in any of the correspondences between the Plaintiff and the Defendant. Further the Plaintiff contends that it had no role to play in the Advocate/Client relationship between the Vendor and the Defendant and that therefore the delegation of Agency or liability being assigned does not arise. All these facts are triable issues which should be the purview of the trial judge to determine. The point is the Plaintiff's contention is that Kshs. 15 million was received by the Defendant from KW Advocate. That Kshs. 10 million was received by the Defendant and that he had no authority to pay any part of that money to anyone. It is the duty of the trial judge to determine, after hearing this case, whether the Defendant should refund the sums received or any part of it as 'money had and received' for a consideration which totally failed.

Mr. Shah went to great lengths to demonstrate that Kshs. 15 million could not have been received by the Defendant and also that the Kshs. 10 million was paid out to third parties on instructions. With due respect to Mr. Shah, I will be usurping the role of the trial court if I engage in a protracted minute examination of documents and evidence at an interlocutory stage. As Mr. Shah appreciated and thus his great industry in delving deeply into the evidence of the case, this is not a plain and obvious case. There is clearly a fine line defining what the real cause of action in this case is; whether it is a case against an agent of a disclosed principal or whether it was against a stake holder and/or 'for money had and received'. That being the case, it would be wrong for this court to determine the matter at an

interlocutory stage.

Having carefully considered this application, it is my humble view that for the reasons I have given herein, the same should fail. The application is dismissed with costs to the Plaintiff/Respondent.

Dated at Nairobi this 3rd day of July, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Wachira holding brief Mr. Shah and Mr. Mubea for the for   the Applicant

Mr. Issa for the Defendant

Dated at Nairobi this 17th day of July 2009.

LESIIT, J.

JUDGE