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

Civil Suit 1651 of 2001

SHAMAS CHARANIA…….....PLAINTIFF

VERSUS

HARIT SHETH T/A HARIT SHETH ADVOCATE……..……DEFENDANT

R U L I N G

By a notice of motion dated 24th July, 2007, the plaintiff applied under the provisions of Order XXXV Rules 1 and 8, Order XII Rule 6 and Order L Rules 1 and 3 of the Civil Procedure Rules for summary judgment to be entered in his favour against the defendant for the sum of KShs.32 million as prayed in the amended plaint. In the alternative, the plaintiff prayed for judgment to be entered against the defendant on admission as pleaded in the amended plaint. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Shamas Charania, the plaintiff.

In summary, the plaintiff contends that he paid the sum of KShs. 32 million to the defendant, who was then acting as his advocate, to hold a stakeholder in respect of a sale transaction of a property known as LR No. 2951/19 Loresho Nairobi (*hereinafter referred to as the suit property*). The purchase for consideration for the said property was KShs.70 million. The plaintiff states that the sale transaction failed to crystallize because the vendor was unable to complete his part of the bargain. It was the plaintiff's contention that since the collapse of the said agreement, the defendant had failed to refund the purchase consideration.

The plaintiff averred in his affidavit that the defendant's amended defence should be struck out as it was a sham and did not raise any reasonable defence. The plaintiff prayed for the court to enter summary judgment in his favour as the statement of defence filed by the defendant was scandalous, frivolous, vexatious and calculated to delay the fair and expeditious disposal of the suit. The plaintiff deponed that the defendant in a letter dated 9th June, 1998 had acknowledged receipt of the said sum of KShs.32 million and therefore he should be compelled to refund the same.

The defendant filed a replying affidavit in opposition to the application. He swore that he had not received any money personally from the plaintiff. He deponed that he had received the sum of KShs.7 million and 25 million respectively in his capacity as the advocate for a company known as Deltron Limited which had purchased land from a company known as Mathaga Limited. He swore that he had transmitted the said amount to Mathaga Limited so that penalty interest stipulated in the agreement could not accrue to the detriment of Deltron Limited which was at the time making arrangements to raise the balance of the purchase consideration. He denied that he had admitted owing the plaintiff personally the said sum of KShs.32 million. He swore that he had communicated to the plaintiff in his capacity as a beneficial shareholder of Deltron Limited. He denied the plaintiff's assertion that the agreement for the purchase of the suit property had failed due to the vendor's inability to complete the agreement. He

deponed that the transfer had failed due to Deltron Limited's failure to pay the balance of the purchase consideration. He swore that the shares in Deltron Limited were beneficially owned by the plaintiff and one Salim Mawani equally. He urged the court to dismiss the plaintiff's application, as in his view, the application was misconceived, bad in law and abused to the court process as the plaintiff was not a party to the agreement in respect of the suit property. The defendant further filed grounds in opposition to the application. In the said grounds, he contended that the application was an abuse of the process of the court and did not have merits.

At the hearing of the application, I heard submissions made by Mr. Nyachoti on behalf of the plaintiff. He reiterated the contents of the application and the supporting affidavit thereof. He submitted that the plaintiff had borrowed the sum of KShs.35 million from Trust Finance Limited to purchase the suit property. The plaintiff paid the said money to the defendant. He maintained that although the agreement in respect of the suit property was executed between two companies, the purchase consideration was paid by the plaintiff. He submitted that the defendant was paid the money as a stakeholder due to the fact that he was the plaintiff's advocate. He explained that the agreement in respect of the suit property failed because the plaintiff discovered that the suit property had been charged to Bullion Bank. He urged the court to enter judgment in favour of the plaintiff on admission because the defendant had admitted in a letter dated 9th June, 1998 that he owed money to the plaintiff. He submitted that the amended defence filed by the defendant was a sham as it merely denied the averments made by the plaintiff in his amended plaint. He reiterated that the plaintiff had dealt personally with the defendant and not through a company known as Deltron Ltd. He urged the court to enter summary judgment against the defendant or alternatively enter judgment in favour of the plaintiff on admission of the debt by the defendant. He submitted that the defendant's explanation that he had paid purchase consideration to Mathaga Limited to avoid the accrual of interest was not tenable because the defendant had not explained under what clause of the agreement he had paid the amount in question. Counsel for the plaintiff referred the court to several decided cases in support of this submission. This court shall refer to the said authorities cited where appropriate, later in this ruling. Mr. Nyachoti urged the court to allow the application with costs.

Mr. Nagpal for the defendant strenuously opposed the application. He submitted that the defendant had raised several triable issues which would enable this court grant unconditional leave for the defendant to defend the suit. He attacked the plaintiff's application on several fronts. He submitted that the amended plaint which is the basis upon which the plaintiff predicated his application was filed without leave of the court. He maintained that the amended plaint which filed on 23rd July, 2004 and which had no verifying affidavit, was the amended plaint which was properly on record. He submitted that the amended plaint filed on 26th July, 2004, upon which the plaintiff based his application was filed without leave of the court. He therefore submitted that the application before court was filed on the basis of an amended plaint that was a non-starter. He submitted that the defendant had not admitted having received any money from the plaintiff. He submitted that, contrary to the argument of the plaintiff that the amended defence filed by the plaintiff was a sham, the said amended defence raised triable issues which could only be ventilated in a full trial. He submitted that the defendant had stated in his amended defence that the plaintiff's suit was barred by the **Limitation of Actions Act**.

Mr. Nagpal maintained that the issue as to whether the plaintiff's suit was time barred was a triable issue. He further submitted that the defendant had denied dealing with the plaintiff in respect of the purchase of the suit property; but had rather dealt with Deltron Limited whose directors were the plaintiff and one Salim Mawani. He reiterated that the defendant admitted receiving money from Deltron Limited but not from the plaintiff. The said money was paid to the vendor, Mathaga Limited by the defendant. He maintained that the defendant had denied the allegation that he had made misrepresentation to the plaintiff or that he had acted fraudulently in the sale transaction in respect of the suit property. He submitted that the defendant had corresponded with the plaintiff in his capacity as a beneficial owner of Deltron Limited. He reiterated that the defendant had denied having any beneficial interest in Mathaga Limited. He took issue with the manner in which the plaintiff filed two amended plaints contrary to directions of the court. He maintained that the defendant had raised triable issues in his amended defence to enable this court grant unconditional leave to the defendant to defend the suit. Mr. Nagpal similarly relied on several authorities in opposition to the plaintiff's application. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival submission made by counsel for the plaintiff and counsel for the defendant. I have also read the pleadings, including the contentious amended plaints, filed by the parties in support of their respective positions. The issue for determination by this court is whether the plaintiff established a case to enable this court enter summary judgment in his favour as prayed in the amended plaint. Another issue for determination is whether, in the alternative, judgment should be entered against the defendant on admission. The principles of law applicable in respect of the two aspects of the plaintiff's application are well settled. The plaintiff and the defendant, in the authorities cited to the court, are in agreement as to the principles to be considered by this court in determining whether or not to enter summary judgment and whether or not to enter judgment on admission. In **Five Continents Ltd – vs- Mpata Investment Ltd [2003] 1EA 65** the Court of Appeal held at page 67 as follows:

"*In **Dhanjal Investments Ltd – vs – Shabaha Investments Ltd [1997] LLR 618 (CAK)**, this Court stated:*

"*The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandnlal Restaurant –vs- Devshi and Company [1952] EACA 77** and followed by the Court of Appeal for Eastern Africa in the case of **Sonza Figuerido and Company Limited – vs- Mooring Hotel Limited [1952] EA 425** that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions …".*

And in **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Ltd –vs- Kivuti [1996] LLR {CAK}**, the Court against stated:

"*In an application for summary judgment even one triable issue if bona fide; would entitle the defendant to have unconditional leave to defend".*

Lastly, in **Kenya Trade Combine Ltd –vs- Shah [1999] LLR 2847 (CAK)**, the Court said:

"*In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed".*

In the oft cited case of ***DT Dobie & Co. (K) Ltd –vs- Muchina [1982] KLR 1*** at page 9 Madan JA held that:

"*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

In **Gohil –vs – Wamai [1983] KLR 489, Chesoni JA held at page 496** as follows:

"*The basis of an application for summary judgment under **Order XXXV** is that the defendant has no defence to the claim **(Zola and Another –vs- Ralli Brothers Ltd and Another [1969] EA 691)**. **Rule 2 (1)** of **Order XXXV** requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under **Order XXXV** then the court must dismiss the application. On the other hand, if the defendant establishes what he is required to do under **Rule 2 (1)** of **Order XXXV** the court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed."*

In respect of the circumstances under which the court can enter judgment on admission, the Court of

Appeal in **Momanyi –vs- Hatimy & Another [2003] 2EA 600** at page 604, the Court of Appeal quoted with approval the case of **Choitram –vs Nazari [1984] KLR 327** where the Court of Appeal had held that:

"*Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must 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 on the language used. The admission must have no room for doubt that the parties passed out of the stage of negotiations onto a definite contract*".

Certain facts are not in dispute in this application. It is not disputed that there existed an advocate-client relationship between the plaintiff and the defendant. The plaintiff expressed interest to purchase a property at Loresho in Nairobi. The property is known as LR. 2951/19. The purchase price for the suit property was then KShs.70 million. According to the plaintiff, he borrowed KShs.35 million from Trust Finance Limited and paid the defendant the sum of KShs.32 million being part payment of the purchase consideration of the suit property. The said amount was paid in two installments of KShs.7 million and KShs.25 million respectively. According to the plaintiff, the said amount was deposited with the defendant in his capacity as an advocate to hold as a stake holder pending the conclusion of the sale transaction. On his part, the defendant denies receiving the said sum of KShs.32 million from the plaintiff. He however admitted that he received the said of KShs.32 million from a company known as Deltron Limited for which the plaintiff was a beneficial owner. According to the defendant, upon receipt of the said sum, he paid the owner of the suit property. The suit property was registered in the name of a company known as Mathaga Limited. The defendant stated that he paid to the vendor the said amount so as to save the purchaser i.e. Deltron Limited from being penalized on interest in respect of the payment of the purchase consideration.

There is dispute as to what caused the sale transaction in respect of the suit property to collapse. The plaintiff claims that the sale transaction failed when he learnt that the suit property was encumbered and was not therefore available to be transferred to him. On his part, the defendant claimed that the agreement collapsed because the company in which the plaintiff was a beneficial owner, failed to pay balance of the purchase consideration i.e. KShs.28 million. The issue that came to the fore for determination before this court is who actually paid the said sum of KShs.32 million to the defendant. The defendant acknowledged receiving the said sum of KShs.32 million but denies that it was paid to him by the plaintiff. He insists that the said sum of money was paid to him by a company known as Deltron Limited of which the plaintiff was a beneficial owner.

The plaintiff claimed that he was advised by the defendant to use an "*off the shelf*" company to purchase the suit property. The plaintiff averred in its plaint that the defendant was a director by nominee of both Mathaga Limited and Deltron Limited. He claimed that he was not informed by the defendant of his interest in the two companies. In his defence, the defendant denied that he had any connection with the two companies. He put the plaintiff to strict proof thereof. When the defendant was confronted with the application for summary judgment, and the same allegations were made by the plaintiff, the defendant was required to disprove the averments of the plaintiff by at least annexing exhibits to disclaim his connection with the two companies. This is a mandatory requirement under **Order XXXV Rule 2(1)** of the **Civil Procedure Rules**. He failed to disprove the plaintiff's contention that he was a beneficial owner of the two companies or at least that he did not have control of the said companies. The defendant claimed that during the entire transaction he dealt with one Salim Mawani who was a co-director with the plaintiff in Deltron Limited. It is surprising that the defendant did not deem it necessary to enjoin Salim Mawani to the suit or alternatively obtain an affidavit from the said Salim Mawani to disclaim the allegations made against him by the plaintiff.

What is clear from my evaluation of affidavit evidence and the pleadings filed in court is that it was the plaintiff who paid the said sum of KShs.32 million to the defendant. The fact that an agreement was later executed in the name of Deltron Limited as a purchaser does not disentitle the plaintiff to the said amount. What is material in this case is who actually deposited the said sum of KShs.32 million with the defendant. The defendant was the advocate of both the vendor and the purchaser in the sale transaction in respect of the suit property. The defendant was required to hold the said sum of KShs.32 million as a

stake holder. It is apparent that the defendant released the said sum of KShs.32 million to Mathaga Limited without the consent of the plaintiff. In any event, the defendant presented no proof in form of payment vouchers or cheques or correspondences that he had paid the said sum of KShs.32 million to the said Mathaga Limited. I further hold that the defendant has not been candid as to his connection with both Deltron Ltd and Mathaga Ltd. The plaintiff established that the defendant had control of both companies and was therefore a beneficial owner of Mathaga Limited.

When the plaintiff sued the defendant for the said amount, the defendant could have enjoined Mathaga Limited as a third party to these proceedings. He did no such thing. What is clear is that when the sale transaction collapsed, the defendant was required to refund the said sum of KShs.32 million to the person who had deposited the amount with him. The person is the plaintiff. The defendant's insistence that it was Deltron Limited which had paid the said purchase consideration is not supported by evidence. I therefore hold that the plaintiff has established to the required standard that he is entitled to summary judgment entered against the defendant for the said sum of KShs.32 million. The defence filed by the defendant is sham, evasive, and contains mere denials and is meant to delay the just determination of this suit.

I also hold that the defendant admitted vide his letter of the 9th June, 1998 to the plaintiff that he had received the said sum of KShs.32 million in two installments of KShs.7 million and KShs.25 million and therefore the defendant was required to refund the same upon the failure of the sale transaction. Mr. Nagpal, counsel for the defendant made heavy weather of the propriety of the plaintiff's application as it was allegedly based on amended plaints which were filed respectively in court on the 23rd July, 2004 and the 26th July 2004. In the opinion of the court, there is no legal requirement that when an amended plaint is filed, it has to be verified by an affidavit. The requirement of verification by affidavit relates to plaints when suits are filed and not when the said plaints are amended. In any event, nothing turns on the issue of the amended plaint because in essence both amended plaints are similar in all respects save for the fact that one is verified by an affidavit and the other is not.

The upshot of the above reasons is that summary judgment is entered for the plaintiff as against the defendant as prayed in the amended plaint. Judgment is entered for the plaintiff for the sum of KShs.32 million. The said amount shall be paid with interest at court rates from the date the suit was filed. The plaintiff shall have the costs of this application and the costs of the suit.

It is so ordered.

DATED at **NAIROBI** this **9th** day of **APRIL, 2008.**

L. KIMARU

JUDGE