REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 188 of 2003

MANJIT SINGH SETHI…….…….....……1ST PLAINTIFF

PERMINDER SINGH SETHI .....…….....2ND PLAINTIFF

RUAHA CONCRETE CO. LTD……3RD PLAINTIFF

- VERSUS –

SAMSON KARIUKI NJENGI…...……..…..1ST DEFENDANT

SUSAN WAITHERERO NJENGI…….....…..2ND DEFENDANT

R U L I N G

The plaintiffs filed suit against the defendants seeking judgment against the said defendants for:

"*(a) an order that the defendants effect subdivision of LR No.2259/171 and transfer thereof of the portion equivalent to the amount paid (of) KShs.6,117,137/30 vis-a-vis the total agreed purchase price (KShs.13,000,000/=) to the plaintiffs and upon failure by the defendants to do so, the Deputy Registrar of this court be ordered to effect the subdivision and transfer.*

(b) In the alternative and without prejudice to the above (refund of) KShs.6,117,137/30 with interest thereon from the date of filing suit (4th April 2003) until payment in full.

(c) Further and in the alternative and without prejudice to the above KShs.6,117,137/30 with interest thereon from 27th April 1998 at 36% per annum until payment in full.

(d) Costs of this suit with interest until payment in full."

The defendants filed defence denying the plaintiffs' claim. They put the plaintiffs to strict proof as regard the averments made against the defendants in the plaint.

On 21st April 2008, the plaintiffs moved this court by notice of motion pursuant to the provisions of Order XXXV Rules 1(1) and (2) and Rule 8 (1) of the Civil Procedure Rules seeking the entry of summary judgment against the defendants in terms of prayer (b) of the plaint. The grounds in support of the application are stated on the face of the application. The plaintiffs contend that they entered into a sale agreement with the defendants for the purchase of parcel No. LR 2259/171, Karen *(hereinafter*

referred to as the suit property) measuring ten *(10)* acres. The purchase consideration was KShs.13,000,000/=.

The plaintiffs state that by 27th April 1998, they had paid to the defendants the sum of KShs.6,117,137/30. The defendants had however failed or refused to honour their part of the bargain. The plaintiffs reiterate that the defendants were thus truly indebted to the plaintiffs to the said sum of KShs.6,117,137/30. The plaintiffs were seeking the refund of the said sum together with interest and costs. The plaintiffs contend that the defence filed by the defendants was a sham and summary judgment ought to be entered in their favour. They contend that the claim being liquidated, it would be in the interest of justice for judgment to be entered as prayed in the application. The application is supported by the annexed affidavit of Manjit Singh Sethi, the 1st plaintiff.

The application is opposed. The defendants filed grounds in opposition to the application. Susan Waitherero Njengi, the 2nd defendant swore a replying affidavit in opposition to the application. In the grounds of opposition, the defendants stated that the application was bad in law and unsustainable. They contend that the application was frivolous, vexatious and an abuse of the court process. They state that there was no evidence that the plaintiffs made the alleged payment to the defendants or that the defendants had acknowledged receipt of such payments. The defendants denied being indebted to the plaintiffs as alleged in their plaint. In the replying affidavit, the 2nd defendant reiterated that the plaintiffs had not paid the sum claimed in their suit. She deponed that the plaintiffs' suit was statute barred as it was brought out of time. She swore that the contract entered between the plaintiffs and the defendants was unenforceable and was thus terminated for want of consideration on the part of the 3rd plaintiff. She deponed that the sale transaction was void for want of the requisite consent from the Land Control Board. She urged the court to dismiss the application with costs.

At the hearing of the application, I heard the rival submissions made by Mr. King'ara for the plaintiffs and Mr. Mogeni for the defendants. I have carefully considered the said submissions. I have also read the pleadings filed by the parties to this application in support of their respective opposing positions. The issue for determination by this court is whether the plaintiffs established a case to entitle this court enter judgment in their favour as prayed in prayer *(b)* of their plaint. The principles to be considered by this court in determining when to enter summary judgment in favour of the plaintiffs were set in the case of Five Continents Ltd –vs- Mpata Investment Ltd [2003] 1EA 65 where 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 Souza 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 again 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."*

Having carefully evaluated the facts of this case, certain facts appear to be uncontested. There is evidence that the 1st and 2nd plaintiffs entered into an agreement with the defendants for the purchase of the suit land. The sale agreement was executed before Ramesh Manek advocate on 1st November 1996. Upon the execution of the agreement, the defendants acknowledged receipt of the sum of KShs.3,020,000/= as a deposit of the purchase consideration. It is apparent that the plaintiffs paid to the 1st defendant further installments as is evidenced from the schedule annexed to the 1st plaintiff's affidavit and marked as '*MSS4'*. There are further payment vouchers prepared by the 3rd plaintiff as evidence that certain payments were made to the 1st defendant as further consideration for the purchase of the suit property.

The 2nd defendant, in her replying affidavit, particularly in paragraph 16 thereof, admitted that the plaintiffs paid to the defendants part of the amount claimed in the amended plaint to the sum of KShs.1,205,000/=. She however denied that the plaintiffs were entitled to the same on account of the fact that the said "*sum was forfeited for non-completion"*. The thrust of Mr. Mogeni's submission was to the effect that since two judges had previously considered other applications touching on whether the defence raised any triable issues, and had in fact ruled that the defendants had a defence which raised triable issues, this court cannot consider the present application for summary judgment in favour of the plaintiff.

I think Mr. Mogeni's argument is misconceived in the circumstances. The ruling rendered by Kasango J was in respect of an application made by the defendants to set aside the *ex-parte* judgment which had been obtained against them in default of entering appearance. The legal principles applicable in respect of applications to set aside *ex-parte* judgments are not the same as the legal principles taken into account by a court when considering whether or not to enter summary judgment.

As regard the ruling of Okwengu J, it was in respect of an application made by the plaintiffs for injunction. The factors that were considered by the said court in determining whether or not to grant the application for injunction are not similar to the factors that this court has to take into consideration when reaching a decision in an application for summary judgment. There is anecdotal evidence that the two courts were influenced in reaching their respective decisions by the fact that, at the time, the plaintiffs were seeking specific performance of the agreement for the sale of land. In the present application, the plaintiffs have abandoned their suit for the enforcement of the agreement. The plaintiffs now seek the refund of amount which they had paid to the defendants in the frustrated land sale transaction.

The defendants argued that the plaintiffs placed no evidence before court that they had received the said amount claimed by the plaintiffs. Upon analyzing the affidavit evidence, it is clear that part of the purchase consideration was paid in kind. For instance, the defendants accepted a motor vehicle in lieu of the sum of KShs.1,150,000/=. Although the defendants alleged that the said motor vehicles were not transferred to them by the plaintiffs, it was apparent that the defendants took possession of the said motor vehicles. They cannot be heard at this stage to say that they did not take possession of the said motor vehicles.

In response to an application which had earlier been filed by the plaintiff seeking an order of injunction, the 2nd defendant swore an affidavit on 6th July 2007 in which she deponed as follows:

"*13. That the contract having been terminated in 1998 the plaintiffs remedy if any was for the claim for refund of the payment made. An injunction or specific performance cannot issue thereof.*

14. That the payments allegedly exhibited as MSS4 were not jointly made as they were for the benefit of

the 1st defendant only. The payments did not comply with my authorization dated 19th September 1996."

'*MSS4'* referred to in paragraph 14 of the 2nd defendant's affidavit is the schedule of payment made to the 1st defendant and which was similarly annexed to the plaintiffs' present application and marked as annexture '*MSSD'*. The 2nd defendant having admitted that indeed the plaintiffs had paid to the 1st defendant the sums contained in the said schedule of payment, cannot change her story and swear in her replying affidavit in opposition to present application by the plaintiffs' application for summary judgment and deny that such payments were indeed made. If the 2nd defendant wishes to question whether the 1st defendant had her authority to receive the money, she is at liberty to pursue the said payment from the 1st defendant.

It is clear from the foregoing reasons that the defendants entered into a sale agreement with the plaintiffs for the sale of the suit property yet they had no intention whatsoever of completing the agreement. The plaintiffs are no longer interested in continuing with the said land sale agreement. As correctly stated by the 2nd defendant, the plaintiffs are entitled to a refund of the purchase consideration. The plaintiffs proved to the required standard that they had indeed paid to the defendants, jointly and severally the sum of KShs.6,117,137/30 in part payment for the purchase of the suit property.

The agreement was frustrated. The defence filed by the defendants in so far as it challenges the plaintiffs' entitlement to the refund of the purchase consideration already paid raises no triable issue. The same is a sham. The defendants can retain their land but must refund the purchase consideration. To that extent, the defence is struck out. I enter summary judgment in favour of the plaintiffs as against the defendants, jointly and severally for the sum of KShs.6,117,137/30 as prayed prayer *(b)* of their plaint. The said sum shall be paid together with interest at court rates from the date of filing suit. The plaintiffs shall have the costs of the application and the costs of the suit.

DATED at NAIROBI this 15th day of OCTOBER 2008.

L. KIMARU

JUDGE