



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

Civil Case 1209 of 2002

MUTHITHI INVESTMENTS CO. LTD. PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED....DEFENDANT

R U L I N G

This is an application (notice of motion dated 19th October 2006) by the Plaintiff seeking summary judgement under Order 35, rule 1 of the Civil Procedure Rules. The application is opposed by the Defendant upon the main ground that the defence raises triable issues.

I have considered the submissions of the learned counsels appearing, including the authorities cited. I have also read the supporting and opposing affidavits, the plaint, defence and counter-claim and reply to defence and defence counter-claim. I have also perused the court record. A short background is called for. The last pleading, that is, reply to defence and defence to counter-claim, was filed on 27th January 2003. On 11th June 2003 the parties filed a joint statement of issues of that date. The following were agreed to be the issues to be tried:

- 1. Did the Plaintiff apply to the Defendant for financial commitment in respect of its development scheme?**
- 2. If the answer to (1) is yes, did the Plaintiff agree to a commitment fee of 3.5% of the amount applied for?**
- 3. Did the Plaintiff pay to the Defendant part of the commitment fee?**
- 4. Did the Defendant negotiate, approve and make available funds for the Plaintiff's purchasers who qualified for such advances?**
- 5. If (4) is in the affirmative, was the Defendant's action, the consideration for the commitment fee?**
- 6. What were the terms of commitment in regard to the commitment fees paid to the Defendant by the Plaintiff?**
- 7. Is the Defendant entitled to the balance of the agreed commitment fee as pleaded in the counter-**

claim?

8. Is the Plaintiff entitled to the orders sought?

9. Who should bear the costs of this suit?

Subsequently the suit was fixed for hearing on 20th November 2003, 18th May 2004 and on 26th September 2006. On each of those occasions hearing did not proceed and the case was adjourned for reasons recorded.

The first point taken by the Defendant is that, having agreed that there were triable issues, and the suit having been set down for hearing on three occasions, the Plaintiff cannot now be heard to say that there are no triable issues and that it is entitled to summary judgement. No authority was cited to support this purported estoppel. In my respectful view, there is no such estoppel. Parties cannot bind the court by their views of the law. The fact that the parties had previously agreed that there were triable issues should not prevent the court, should the occasion arise, from looking at the matter to see if indeed the suit should go to trial. This is such occasion. The Plaintiff was entitled to invite the court to look at the matter to see if indeed there are triable issues, and the court is bound to do so. The application therefore must be disposed of on merit.

The Plaintiff has claimed in this suit refund of KShs. 9 million, paid to the Defendant as part of a commitment fee of KShs. 12 million, for failure of consideration. It is alleged that the Defendant was to facilitate a loan of KShs. 360 million to purchasers of certain properties of the Plaintiff. It is further alleged that the Defendant did not provide any such facilitation, and that therefore there was total failure of consideration. The Defendant admits receiving the KShs. 9 million from the Plaintiff. Its defence is that it earned the commitment fee by committing to make available to qualified persons the necessary funds for purchase of the Plaintiff's properties, and has therefore performed its part of the contract. It has also counter-claimed the balance of KShs. 3 million.

It is to be noted that the contract between the Plaintiff and the Defendant is not one document. It is a series of correspondences between them as exhibited in the supporting affidavit. What emerges from these correspondences, in essence, is that the Plaintiff asked the Defendant to commit a large sum of money (initially KShs. 711,740,000/00 but later reduced to KShs. 360 million) and make it available at the appropriate time, and to qualified persons, in the form of loans, for purchase of the Plaintiff's properties. For this commitment the Defendant wanted a commitment fee of 3.5% of the amount involved. The Plaintiff agreed to pay the commitment fee, and indeed paid KShs. 9 million towards the commitment fee of KShs. 12 million. In its turn the Defendant gave the necessary commitment in writing, and says that the commitment still stands. It would appear, *prima facie*, that the commitment fee was paid for the Defendant's commitment to make available KShs. 360 million to qualified persons for purchase of the Plaintiff's properties. It is thus not an open-and-shut case that there was a total failure of consideration. At any rate, the matter needs investigation at the hearing in order to determine, as the parties themselves have already agreed should be determined, whether the Defendant negotiated, approved and made available to qualified persons funds for purchase of the Plaintiff's properties, and if so, whether this amounted to a consideration for the commitment fee paid to it by the Plaintiff. It was also agreed by the parties, in the statement of issues, that the trial should determine what were the terms of the Defendant's commitment in regard to the commitment fee. All these are serious issues that cannot be determined at this stage and merit a hearing.

Having considered all the matters placed before the court, I am not satisfied that this is a suitable case for summary judgment. The Defendant ought to have unconditional leave to defend the suit. The application therefore lacks merit and I must refuse it. It is hereby dismissed with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2007.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF FEBRUARY, 2007