REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 156 of 2007

KENYA INSTITUTE OF MANAGEMENT ::::::::::::::::::::::::::::PLAINTIFF

VERSUS

KENYA REINSURANCE CORPORATION ::::::::::::::::::::DEFENDANT

RULING

The Plaintiff moved to this Court and filed suit against the Defendant vide its plaint dated 14th day of February, 2007 and filed the same date. The salient features of the same which are relevant to this ruling are that:-

· The defendant is the registered owner of land reference No.L.R. Number 209/1/154 together with all the developments thereon otherwise known as Kenya Re Sports Club situated at Nairobi South C.

· The Defendant advertised the sale of the said property through the press and internet on 24th January 2006 at a suggested price of Ksh 170 million.

· The Plaintiff entered into negotiations with the defendant with a view to purchasing the suit property. Negotiations were conducted through meetings and exchange of letters centering on the purchase price payable which was enhanced from 170 million to 185 million and then finally 200 million.

· Mode of payment was also discussed starting with paying of 20% deposit by the Plaintiff with the balance of 80% being advanced through a mortgage loan by the defendant. The repayment mode was later revised to 60% deposit. Thereafter this was revised further by requiring the plaintiff to raise 80% mortgage loan from other sources whereupon the plaintiff arranged for the facility to come from Barclays Bank Ltd to the tune of Kshs 153,000,000.00

· Upon availing of alternative source of finance for the purchase price the defendant evinced a clear intention to breach the contract hence the filing of these proceedings.

· The reliefs sought by the Plaintiff are a permanent injunction to restrain the defendant, its servants and/or agents from advertising for sale and/or offering for sale in any manner whatsoever or selling the property known as LR NO.209/11/154 NAIROBI otherwise known as South C Sports Club to any other party whatsoever save the Plaintiff, an order of specific performance directed at the defendant to compel the defendant to sign all documents and do all acts for purposes completing the contract between the plaintiff and the defendant for the sale by the defendant and the purchase by the plaintiff of the property

known as LR.NO.209/11/54 NAIROBI and the developments therein, general damages, costs of this suit, interest at court rates.

The plaint is accompanied by an amended chamber summons seeking restraint orders.

The defendant filed a replying affidavit to the interim application and then filed a notice of preliminary objection on the ground that the Plaintiff's have no or no reasonable cause of action as they do not have contract for the sale of land within the meaning of Section 3(3) and 3(6) of the Law of Contract Act Cap.23. Laws of Kenya. The grounds in support are set out in the oral submissions in court. The major ones are the following:-

· That the suit is in competent and it cannot be sustained in law.

· The suit cannot pass the test set in Section 3 (3) of the law of Contract Act Cap.23 Laws of Kenya which is worded in mandatory terms which provision came into operation on 1.6.2003.

· That Case Law before operationalization of the said provisions no longer count and cannot be urged to support the plaintiffs' case.

· That the plaint and correspondences annexed do not admit t he existence of a contract of sale to the required standards. Neither do they disclose evidence of offer and acceptance.

On the law the defendant objector relied on the case of **METRA INVESTIMENTS LIMITED VERSUS GAKWELI MOHAMED WARRAKAH NAIROBI MILIMANI HCCC NO.54 OF 2006** in the cited case the applicants moved to court, filed suit accompanied by an interim application for restraint orders. The facts in the body of the ruling by P.J. Rainsley Justice as he then was show that the Respondents in that case confirmed in writing that he was going to sell the suit property to the applicant at an agreed price of 6.4. million which the purchaser had been instructed to pay direct to the bank. Thereafter the correspondence showed that although the purchaser was anxious to complete the sale, the applicant was having cold feet and as a result the question of how the purchase price was to be paid was not agreed. Although the applicant maintained that an agreement for sale had been prepared and signed none was produced. The applicant had taken possession prior to completion, constructed a road and installed connection to water supply.

The Respondent in his replying affidavit joined issue with the contention of the applicant that there was a signed agreement adding that he was not aware of the applicant's activities on his land. Reliance was placed on section 3(3) of the Law of Contract Act and contention made that the applicant was a trespasser as there was no agreement of sale in writing. The finding of the learned judge are found at page 5-6 of the ruling paragraphs line 9 from the bottom where it is stated "*As the case is presented, there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by section 3(3) of the Law of Contract Act..*

In the absence of such agreement the Section is clear that no suit shall be brought for the disposition of an interest in land.

The applicant does not appear therefore to have a prima facie case with a probability of success.

The relief formerly available under the doctrine of part performance no longer exists.

Further the applicant has not acted in a manner which equity will countenance as by going into possession of the suit properly and carrying out development therein it has breached the provisions of the physical planning Act thus putting the Respondent in jeopardy for being prosecuted for an offence.

In the result I dismiss this application with costs".

On that account, the Defendant Objector urged the court to accept the facts and documents as being

correct, uphold their Preliminary Objection and dismiss the suit.

The Respondents Counsel on the other hand has countered the preliminary objection on the following grounds:-

- That documents show that there exists circumstances in which a court of equity would step in to compel a recalcitrant party to complete the deal especially in the circumstances of this case.

- That on the Law Section 3(3) of the Law of Contract Act Cap.23 Laws of Kenya does not oust common law.

- They maintain there was a collateral contract distinct from the one envisaged by the provision of the Act as in this case there was a deal between parties and a party cannot be allowed to run away from it without consequences.

- That the applicant has the 200 million shillings demanded by the Respondent as the purchase price and so it is unlawful for the Respondent to wave Section 3(3) of the law of Contract Act and run away from its obligation hence the need for equity to step in.

On the law Counsel for the Plaintiff relied on the case of **NARANBHA C. PRATAPAT VERSUS ASHOK COTTON CO. LTD (1964) E.A. 308** in which at page 317 pr.AB it is stated "*But the rule of law is clear that where one by his own words or conduct unlawfully clauses another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time".*

In the cited case the Plaintiff negotiated with the defendant to purchase a plot owned by the defendant. The sale was conluded. transfer declined due to none payment of increased rental arrears not disclosed by the Defendant at the time of sale. The Plaintiff paid arrears and then secured transfer. Thereafter he sued for compensation to recover the amount paid. While dismissing the action the court held *inter alia* that by his conduct in paying without protest the increased rent and having his name registered as owner of the property after he had learned the correct rental of the plot the plaintiff was estopped from complaining.

Reliance was also placed on the case of **DT DOBIE & COMPANY KENYA LTD VERSUS MUCHINA [1982] KLR 1** which laid down the law on striking out a suit. The holdings in this case relevant to this ruling are holding no 1,2,3,8 and 9 namely:-

- The words "reasonable cause of action" in order Vl rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered a cause of action will not be considered reasonable if it does not state such facts as to support the claim/prayer

- The words cause of action means an act on the part of the defendant which gives the plaintiff his cause of complaint.

- As the power to strike out pleadings is exercised without the court being fully informed of the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

- 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 solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

- 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. As long as a suit can be injected with life by amendment it should not be struck out.

On the basis of the two authorities Counsel for the plaintiff urged the court to distinguish the authority relief upon by the defendant and instead rely on theirs and sustain the suit as they have something to go to trial.

In response to the plaintiffs Counsel's submissions, Counsel for the defendant submitted that the order for specific performance prayed for is for enforcement of a contract and not a collateral contract. Secondly that equity will be called in to operate in favour of the plaintiff only if it is not in contravention with the written law.

On the courts assessment of the facts as regards this preliminary objection, there are two major issues that this court has to deal with. Firstly, whether the preliminary objection meets the test of what amounts to a Preliminary Objection and what does not. Secondly, whether the defendant has *locus standi* to attack the plaint in the absence of entry of appearance and filing of defence.

The answer to the first question is provided by the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (NO.2)[1970] E.A. 469.** At page 701 paragraph **AB SIR CHARLES NEWBOLD P. ASHETHEN** was made the following observations "*a preliminary objection is a demurrer. It raises a pure point in the nature of what used to be a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion*". There are two ingredients in this principle. The first one is that the Preliminary Objection must be purely on a point of law. The Preliminary Objection herein satisfies this first ingredient because the complaint of the objector is that the alleged contract pleaded by the plaintiff does not satisfy all the ingredients of section 3(3) of the law of contract Act cap.23 Laws of Kenya. This Section provides: "*No suit shall be brought upon a contract for the disposition of an interest in land unless:-*

(a) the contract upon which the suit is founded

(i) is in writing

(ii) is signed by all the parties there to: and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

Provided that this subsection shall not apply to a contract made in the cause of a Public Auction by an auctioneer within the meaning up of the Auctioneers Act nor shall anything in it affect the creation of a resulting implied or constructive trust."

Being a provision of law section 3(3) is nothing but law. The gist of the preliminary objection is that the plaintiff does not have a contract for the sale of land within the meaning of section 3(3) and 3(6) of the law of contract Act Cap.23 Laws of Kenya.

Having established that the first ingredient of the objection being on a pure point of law has been satisfied, the next question is whether it can be argued. This brings me to the second ingredient of the principle which is that it cannot be argued or raised if any fact has to be ascertained. Applying this ingredient to the facts of the Preliminary Objection it is clear that although correspondences are pleaded the only way this court can ascertain the contents of the correspondences is by looking at the very correspondences relied on by either aside. The correspondences are annexed to the affidavits for and against the interim application. They are not annexed to the plaint. The only way this court can use those correspondences to fault the plaint is through their being introduced as evidence. Once it becomes necessary to call evidence, the right to fault a pleading on a point of law is lost. The situation would perhaps have been saved if there had been a defence in place.

Although a preliminary objection is not the same as an application for striking out of a pleading the

end result is the same as the primary aim of both is to fault a pleading and prevent it from reaching the trial. The principles guiding the court when dealing with striking out of a pleading can also guide the court when dealing with a preliminary objection which aims at faulting a pleading. In the case of **COAST PROJECTS LTD VERSUS MR.SHAH CONSTRUCTION(K) LTD [2004] 2 KLR 119** it was held *inter alia* that a procedure for faulting a pleading is to be resorted to in very clear, and plain and obvious cases. Secondly, in such an application the court ought not to deal with such merits of the case as it cannot deal with full merits without discovery any and without oral evidence tested by cross examination in the ordinary way. Resorting to annextures to the affidavits of the parties to fault the plaint herein will amount to dealing with the merits of the case more so when the court does not have the privilege of the defendants averments in the defence before it.

As for *locus standi* a party has two entry points into proceedings in a civil action. The first time is through entry of appearance and filing of defence. The defendant has not accessed proceedings herein through this entry point as there is no memo of appearance and defence.

The second entry point is through interlocutory application proceedings. Herein the plaintiff filed a plaint which was accompanied by an interlocutory application. The interlocutory application was served and this attracted a notice of appointment of the advocate for the defendant and the filing of a replying affidavit. The interim application is governed by the provisions of order 50 rule 16 (1) Civil Procedure Rules which states "*Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of the hearing*". The entry point through order 50 rule 16(1) Civil procedure Rules allows a litigant only to attack an interim application and not the main pleading which is the plaint. This court has no doubt this is the correct position and that is why in the ruling in the case of **METRA INVESTMENTS LIMITED VERSUS GAKWELI MOHAMED WARRAKAH NAIROBI MILIMANI COMMERCIAL COURTS** case No.54 of 2006 supra. The learned judge only faulted the application and not the main pleading which is the plaint despite having found that there was no *prima facie* case with a probability of success the court did not proceed to dismiss the suit. Herein the preliminary objection is directed at the main cause of action which is the plaint and not the application. The preliminary objection is premature. In view of this finding there is no need to go into the other merits of the Preliminary Objection.

In conclusion the Preliminary Objection has been faulted on three grounds:-

(1) Out of the two ingredients necessary for establishing the preliminary objection as outlined above only one was satisfied namely the one requiring that it be purely on point of law. But it has not satisfied the ingredient which requires that it cannot be argued or relied if any fact has to be ascertained. It is the finding of the court that since the correspondences raised upon by the parties are not contained in the plaint though pleaded, their contents can only be established by a factual perusal of those correspondences. In doing so the court would be going into the merits of the suit at an interlocutory stage.

(2) It is the finding of this court that the defendants' *locus standi* only allows them to defend and fault the interim application but not the main pleading which is the plaint as *locus standi* to attack a plaint is gained through entry of appearance alone or with the filing of the defence. It therefore follows that in view of this, the preliminary objection is premature in so far as it goes to attack the plaint.

(3) In view of the findings in No.1 and 2 above there is no need to go into the other merits of the preliminary objection.

The preliminary objection is therefore dismissed with costs to the plaintiff/respondent.

DATED READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2007.

R.NAMBUYE

JUDGE