REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 291 of 2005

DUNCAN KABETHI WACHIRA…….....…….1ST PLAINTIFF

KATHLEEN WANJIKU WACHIRA…….....……2ND PLAINTIFF

VERSUS

BETHLEHEM ENGINEERS AND CONSTRUCTION COMPANY LIMITED…….DEFENDANT

R U L I N G

This is an application for judgement on admission, or in the alternative, for summary judgement.

The suit herein is for the specific performance of a contract dated 12th March 2005, or in the alternative, for the recovery of the sum of KShs. 22,480,664/= together with interest and costs.

At paragraph 4 of the Defence, it is admitted that the Defendant executed the Agreement dated 12th March 2005. However, the defendant then asserted that the Agreement was void for lack of consideration.

According to the plaintiffs, the Agreement constitutes an unequivocal admission by the Defendant that it owed to the plaintiffs' the sum of KShs. 23,945,764, as at 12th March 2005. Subsequent to that date, the defendant had remitted payment of KShs. 3,158,041/60, thus leaving an outstanding balance of KShs. 20,787,722/40; that is the plaintiffs' story. Therefore, they believe that they are entitled to either summary judgement or alternatively, judgement on admission.

It is the plaintiffs' contention that the defence on record does not give rise to any triable issues at all.

However, the defendant first contends that the Agreement dated 12th March 2005 was void, for want of consideration. The reason for that contention is clause 1 of the Agreement which provides as follows:

"**WHEREAS:-**

1. The lenders have in the past advanced to the Borrower sums of money to the aggregate sum of KShs.23,945,764/= (read Kenya Shillings Twenty Three Million Nine Hundred and Forty Five Thousand Seven Hundred and Sixty Four Only) receipt of which sum the Borrower hereby acknowledges."

There is no doubt that as at the date when the Agreement was executed, the lenders had already advanced money to the borrower. It is for that reason that the defendant is saying that there was no consideration, as that which had been provided by the Plaintiff amounted to "**past consideration."**

The defendant also submitted that it was inimical for the plaintiffs to be pursuing the claims for both specific performance as well as for the refund of money previously advanced to the defendant. That submission was founded upon the fact that as at the date when the plaintiffs were canvassing this application, they had not abandoned their claim for specific performance.

As far as the claims were inconsistent, the plaintiffs ought to have conducted an election. And I say that the two claims were inconsistent because if the Agreement were to be specifically performed, the plaintiffs could not then be entitled to a refund of the money advanced to the defendant. On the other hand, if the plaintiffs received a refund of the money they had advanced to the defendant, there could not also be an order for specific performance. For that reason, the defendant was right to have submitted that the two prayers in the applications were inimical, insofar as the grant of one of them would automatically lead to the rejection of the other.

In my considered view, even though the prayers in the application are inconsistent, that fact does not, in any manner whatsoever, diminish the defendant's acknowledgement of the money advanced to it.

At clause 2 (1) of the Agreement dated 20th March 2005, it is expressly stipulated as follows:

"**The Borrower acknowledges being indebted to the Lender in the sum of KShs. 23,945,764/= (read Kenya Shillings Twenty Three Million Nine Hundred and Forty Five Thousand Seven Hundred and Sixty Four Only) advanced to it by the Lender."**

Not only does that constitute an unequivocal admission of indebtedness, on the part of the defendant, but clauses 3 and 4 of the Agreement went ahead to stipulate the agreed mode through which the defendant was to liquidate the indebtedness.

By giving to the defendant an opportunity to pay the debt over a period of six (6) months, the plaintiffs are deemed to have given the consideration for the Agreement, as by so doing they did forego their right to reclaim the debt immediately. I therefore find that the plaintiffs provided good consideration for the Agreement dated 12th March 2005.

Furthermore, subsequent to the execution of the Agreement, the plaintiffs suffered the loss of their deposit of KShs. 10,000,000/=, which they had placed with the ABC Bank, as security for the loan which the Bank had advanced to the plaintiffs. The said deposit should have been available to the plaintiffs, if the defendant had performed its part of the Agreement dated 12th March 2005, by taking over the plaintiffs' indebtedness at ABC Bank.

But, as the defendant failed to take over the plaintiffs' said indebtedness, as part of the method through which it was supposed to pay back the money advanced to the defendant, by the plaintiffs, the ABC Bank appropriated the plaintiffs' deposit. Therefore, the plaintiffs have every right to look to the defendant for the refund of the said deposit sum.

For that reason, the defendant was not right to assert, as it did, that if the Agreement dated 12th March 2005 was valid, the plaintiffs would only be entitled to the sum of KShs. 13,898,600/=. That could only have been the case, if the defendant had complied with the provisions of clause 2 of the Agreement. And, as the defendant failed to demonstrate that it did take over the plaintiffs' indebtedness at ABC Bank, it will probably be liable for the sums cited in clause 2 of the Agreement, as well.

However, the question that arises is whether the defendant can resist the application on the basis of its claim of a lien against the 1st Plaintiff. The said claim is said to emanate from the fact that the 1st Plaintiff was the beneficiary of 12,500 shares, in the defendant company, for which he had not remitted

payment. The defendant asserted that "**preliminary opinion"** of its accountant placed the value of the shares at KShs. 800 million. Therefore, the defendant asserted that the plaintiffs' claim here was adequately secured by the shares which the 1st plaintiff holds in the defendant.

First, it is noteworthy that the values of the shares was set out in the Replying Affidavit of Mr. Geoffrey Wanyama Matumbai, which was sworn on 9th June 2005. As at that date, Mr. Matumbai expressly deponed that the defendant's auditors were undertaking a valuation of the shares which the 1st Plaintiff held in the defendant. He said that the value of the said shares would "**be submitted shortly."**

Notwithstanding that assurance, the defendant did not, as at 25th February 2006, when Mr. Matumbai swore an affidavit in answer to this application, provide any proof of the value ascribed to the shares. In effect, there was no foundation upon which the value of the shares, as asserted by the defendant, could be pegged.

In any event, in my considered view, if the 1st Plaintiff had failed to pay for the shares which had been allotted to him, the defendant would be entitled to withhold from him, the benefits which would otherwise be due to the 1st plaintiff.

Furthermore, I fail to understand what the value of the said shares would have to do with the lien, for in my understanding, when shares are allotted to any member of a company, the company would already have cited a value for the same. Thereafter, the company's claim for the unpaid shares would be determinable by the provisions of the Memorandum and Articles of Association. Therefore, inasmuch as the defendant has failed to demonstrate to the court that the company's Memorandum and Articles of Association, authorised the withholding of money due to a shareholder who may have failed to pay for his shares, I believe that the court is entitled to find, as I hereby do, that even if the company has a lien over the unpaid shares, that would only entitle it to withhold from the 1st Plaintiff the benefits attributable to those shares. Indeed, the defendant does appear to acknowledge the extent to which its perceived lien extends, when it states, at paragraph 15 of the Defence, that:

"**The Defendant avers that it is entitled to an equitable lien over the shares held by the 1st Plaintiff valued at approximately KShs. 800 million and set-off the 1st Plaintiff's claim of KShs. 23,945,764.00 against this sum.**

The lien is over the shares, if the 1st plaintiff has not paid for the same. By virtue of Regulation 11 of the "**Regulations for Management of a Company Limited by Shares Not being a private Company",** it is stipulated as follows:

"**The company shall have a first and paramount lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. <u>The company's lien, if any, on a share shall extend to all dividends payable thereon</u>."**

- The emphasis is mine.

Now, whereas I am aware that the afore-cited Regulation is not for a private company, I believe that the same kind of understanding applies to private companies.

But in any event, as the 2nd Plaintiff does not hold any shares in the defendant, there would be no defence of a lien, in relation to her claim.

For all the aforegoing reasons, I hold that the defendant made out a clear and unequivocal admission of its indebtedness to the plaintiffs. The said admission was followed thereafter by part-performance, on the

part of the defendant. Therefore, the defendant ought not to be permitted to deny or delay the plaintiffs from realising, their right to judgement for the admitted sum. Accordingly, I hereby grant to the plaintiffs, judgement on admission, for the sum of KShs. 20,787,722/40. The said sum will attract interest at the rate of 17% per annum from 12th March 2005 until payment in full.

The award of interest is founded on the Agreement dated 12th March 2005; as the African Banking Corporation Limited (the ABC Bank) has stated that its base rate was 15% per annum. Given the fact that as per clause 5 of the Agreement, the plaintiffs were entitled to interest at 2% above the Base Rate currently charged by ABC Bank, the defendant is ordered to pay interest at 17% per annum, on a reducing balance, until payment in full.

Finally, the costs of the application dated 13th December 2005, as well as the costs of the suit are awarded to the plaintiffs.

DATED and DELIVERED at Nairobi, this 4th day of October 2006.

FRED A. OCHIENG

JUDGE