



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

Civil Case 456 of 2004

**THE REGISTERED TRUSTEE OF THE DIOCESE OF
MT. KENYA SOUTH ANGLICAN CHURCH OF KENYA.....PLAINTIFF**

VERSUS

CHARLES WACHIRA NGUNDO.....DEFENDANT

R U L I N G

By a motion dated 11th November 2004, the Plaintiff moved the court for the striking out of the defence, so that judgement could be entered in favour of the Plaintiff, as prayed in the Plaint. In the alternative, the Plaintiff sought summary judgement.

The application was expressed as having been instituted pursuant to the provisions of Order 6 rule 13 (1) (b) (c) and (e); Order 35 rule (a) 2; Order 50 rule 1; and Section 3A of the Civil Procedure Act. It is supported with an affidavit sworn by Paul N. Karanja, who is the Administrative Secretary of the Diocese of Mt. Kenya South.

By his said affidavit, Mr. Karanja deposed that the Plaintiff had appointed the Defendant as its agent to facilitate and recommend a suitable property for purchase and development. The said appointment was said to have been made in March 1997.

In pursuance of his role, the Defendant recommended the purchase of L.R. No. 11781/9, Kikuyu. Thereafter, the Plaintiff executed an Agreement for Sale with **M/s STIRLING CIVIL ENGINEERING (KENYA) LIMITED**, (hereinafter called the vendor).

It is the Plaintiff's case that on diverse dates between April 1997 and January 1998, it remitted to the Defendant the sum of Kshs.11,958,000/= towards the purchase of the property cited above. However, the Plaintiff did not manage to put together sufficient funds to pay the purchase price of Kshs.32,000,000/=. Therefore, the Plaintiff was forced to rescind the contract of sale.

The Plaintiff says that following the rescission of the Agreement of Sale, the Defendant retained a total of Kshs.9,958,000/= on behalf of the Plaintiff. Out of that sum, the Plaintiff contends that the Defendant was entitled to deduct "10%" **forfeiture,**

His agency fees and other disbursements and incidentals,"

which left a sum of Kshs.7,625,000/=, that was refundable to the Plaintiff.

It is said that the Defendant did admit that he was holding the said funds, and that he promised to pay the same back to the Plaintiff. The payment was to have been made within three months from February 2002, but the Defendant has failed to honour his word, says the Plaintiff.

Therefore, the Plaintiff believes that the Defendant has absolutely no defence to this claim, given that the Defendant had promised to repay the money to the Plaintiff.

Furthermore, it is asserted that the said money should attract interest at the rate of 29% per annum, as the Plaintiff had borrowed the said sums from Barclays Bank of Kenya Limited, at that rate of interest. And as the Plaintiff had borrowed the money from the bank on 17th October 1997, the Plaintiff submits that the Defendant should be ordered to pay interest as from that date. The reason advanced by the Plaintiff for that submission is that the Defendant was aware that the Plaintiff had borrowed the money from Barclays, on 17th October 1997, and at the rate of 29% per annum.

When canvassing the application, Mr. F. N. Kimani, advocate for the Plaintiff placed reliance upon the affidavit of Mr. Paul Karanja. He also emphasized the fact that the Defendant had promised to pay the debt within three months. Then, thereafter, the Defendant's advocate is also said to have written to the Plaintiff, not only admitting the debt, but also promising that the Defendant would pay it. Having committed himself to pay the debt, the Defendant did not have a defence which raised any triable issues, submitted the Plaintiff.

Mr. Kimani, advocate, went on to point out that even in the Replying Affidavit, the Defendant had admitted receiving the money from the Plaintiff. As far as the Plaintiff was concerned, it was not good enough for the Defendant to now allege that he could not repay the money until he got it back from persons who were not parties to this suit. Therefore, the court was called upon to grant the prayers sought in the application, by holding that the Defendant was truly indebted to the Plaintiff.

When the application was prosecuted, the Defendant was not represented in court. However, the defendant's advocates were well aware of the date when the application was to be argued, as on the previous court session, Mr. Ingosi advocate held brief for Mr. Mwashimba, advocate for the Defendant. Therefore, the said advocate was present in court when the date for the hearing of the application was set. In the circumstances, even though the Defendant was not in court when the Plaintiff prosecuted the application, I was satisfied that he had due notice. But the absence of the Defendant from court, deprived me of the benefit of his input into this application, in terms of submissions. However, there was a Replying Affidavit, as well as the Defence which had been filed earlier. It was thus incumbent upon me to give due consideration to the Defendant's position, as portrayed through the said Defence and Replying Affidavit.

By paragraph 2 of the Defence, it is denied that there was an Agreement for sale, or remittance of any money to facilitate the said Agreement. However, in paragraph 3 of the Defence, the Defendant goes on to confirm receipt of Kshs.11,958,000/= from the Plaintiff.

The question that arises is what that money was supposed to be used for, if not for the purchase of the property which the Plaintiff was buying from the vendor. The Defendant says that the money was to have been used to pay third parties, agency fees, disbursements and incidentals which were well within the Plaintiff's knowledge. He adds that the money was utilised in the intended manner, and that the Plaintiff is therefore not entitled to look to him for any refund.

The Defendant also denies knowledge of the assertion by the Plaintiff that it borrowed the money from Barclays Bank of Kenya Limited on 17th October 1997, or at any other time whatsoever.

And, in relation to the assertion that he admitted owing the money now claimed, the Defendant contends that the said admission was made on behalf of the third parties who were the recipients of the money in issue.

In his Replying Affidavit, the Defendant re-emphasises that he was no more than a conduit or

middleman, for onward transmission of funds from the Plaintiff to the vendor.

In the light of all the material before the court, I now need to ascertain if the Defence put forward raises any triable issues. If I should come to the conclusion that the said Defence raises at least one triable issue, I would then be obliged to grant to the Defendant unconditional leave to Defend. But in the event that the Defence is held not to give rise to any triable issues, the court would then grant summary judgement, in favour of the Plaintiff.

In evaluating the pleadings, I first take note of paragraphs 3 and 4 of the Plaintiff. Basically, in my understanding of the averments in those paragraphs, the Plaintiff itself was saying that the Defendant was an **“agent to facilitate and Recommend a suitable**

property for purchase and development.”

By that averment, the Plaintiff must be deemed to acknowledge that the Defendant had his principals, who he was answerable to. But as far as the Plaintiff is now concerned, the Defendant’s principals were the Plaintiffs themselves. That is made clear from the following words in paragraph 4 of the Plaintiff:-

“It was part of the agreement that Plaintiff would pay all moneys through the defendant as Plaintiff’s agent.”

That position is acknowledged by the Defendant, who then goes on to say that he paid out the money in accordance with the terms of the agency.

However, none of the parties has yet placed before the court any document(s) from which the court could ascertain the terms of the said agency. Therefore, the court is not able to ascertain, at the moment, whether or not the Defendant did or did not pay out the money which he received from the Plaintiff, in accordance with the terms of the agency.

Clearly, if the Defendant were to prove that he performed his role of an agent, in the manner that was intended, his defence may well stand the test.

But what about the admissions of indebtedness, which the Plaintiff attributes to the Defendant? The Defendant denies that the two letters cited by the Plaintiff constitute admissions.

The first of the two letters was written by the Defendant on 23rd February 2002. The relevant portion of that letter reads as follows.

“However, as agreed between the Bishop and myself, and also between my principals and myself, we agreed to pay Kshs.7,625,000/= within a period of three months from today’s letter.”

I understand that letter to be giving the commitment of the Defendant and his principals. I say so because the conclusion is to the effect that **“we agreed to pay.....”**

The second letter was written by the Defendant’s advocates, M/s Wangong’u & Company Advocates, on 9th April 2003. The relevant portion of that letter reads as follows:-

“Our client regrets that the church was not able to proceed with the purchase of the above property. His principals were in the process of relocating, anticipating the completion of this transaction and did make commitments to the third parties by way of payment of deposits which has resulted in delay in making refund.

Arrangements are however almost complete to transmit funds from overseas and we have been instructed to liaise in the payment and furnish you with our undertaking to pay to you the sums outstanding upon receipt thereof.”

Once again, the letter makes reference to the Defendant's principals, who were in the process of relocating in anticipation of completion of the transaction. For that reason, the principals are said to have made commitments to third parties by way of deposits, thus resulting in the delay in making the refunds.

At the moment, it appears that the said letter does not constitute an unequivocal admission of liability by the Defendant.

Another issue which does not come out clearly from the documents now available to the court, is how the Defendant is said to have become aware of the fact that the Plaintiff borrowed money from Barclays Bank of Kenya Limited on 17th October 1997. There is no evidence yet before the court to show how and when the Defendant became aware of that borrowing. Therefore, the Plaintiff would have to adduce evidence to prove its entitlement to demand that the Defendant should pay interest at 29% per annum, from 17th October 1997.

In the final analysis, I find that the Defence and the Replying Affidavit do give rise to triable issues. Accordingly, the Defence is not a proper candidate for striking out, nor is this a proper case for the grant of summary judgement. The motion is therefore denied, with costs.

Dated and Delivered at Nairobi this 27th day of July 2005.

FRED A. OCHIENG

JUDGE