



**Resilient Investment Limited v Presbyterian Foundation (Environment & Land
Case 24 of 2020) [2023] KEELC 19829 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 24 OF 2020
SM KIBUNJA, J
SEPTEMBER 20, 2023**

BETWEEN

RESILIENT INVESTMENT LIMITED PLAINTIFF

AND

THE PRESBYTERIAN FOUNDATION DEFENDANT

RULING

1. The plaintiff moved the court vide the notice of motion dated the April 25, 2023 and filed on the April 26, 2023 seeking for inter alia judgement to be entered as prayed for in the amended plaint against the defendant on admission at Kshs. 42,600,000, interests at prevailing commercial bank rates from June 26, 2012 till payment in full and costs of the suit. The application is premised on the nine (9) grounds on its face and supported by the affidavit of Purity Kagwiria Mutea, a director of the plaintiff, sworn on the April 25, 2023. It is the plaintiff's case that it had on diverse dates paid the defendant a total sum of Kshs. 42,600,000 for the purchase of apartments C10 on Block C, B03 on Block B, and A13 on Block A all on LR No MN/1/11518 Bamburi, Mombasa Municipality but the defendant has failed to honour its obligation leading to the filing of this suit vide the plaint amended on the January 23, 2019. That the defendant has expressed its willingness to settle this suit out of court through several written correspondences, meetings with the plaintiff and paid Kshs.10,500,000 towards the settlement. That despite the implied and expressed admission of the debt, the defendant has been unwilling to record a formal consent in court so as to have the matter marked as settled and hence this application.
2. The application is opposed by the defendant through the seven (7) grounds of opposition dated July 12, 2023 inter alia that the application is misconceived, frivolous and ought to be dismissed; that the documents relied on do not amount to admission for the entire sum; that the relationship between the plaintiff and defendant was based on the letters of offer under which the plaintiff had paid Kshs.42,600,000 by the time of filing the amended plaint dated the January 23, 2019; that the plaintiff has through the supporting affidavit conceded that the debt has been reduced by the Kshs.10,500,000 that the deponent admitted has been paid; that the letters of offer had not provided for interest and the



prayer for commercial bank rates should not be allowed; that the application is averse to the overriding objective principle of a just, expeditious and efficient adjudication of civil matters and should be dismissed with costs.

3. The court issued directions on filing and exchanging reply and submissions on the April 27, 2023. The learned counsel for the plaintiff filed and served their submissions dated the May 15, 2023 that the court has considered. By the time the matter was mentioned on the July 12, 2023, no reply or submissions had been filed by the learned counsel for the defendant. The counsel for the Defendant submitted that as his client had started making some repayments and there was evidence the parties were in contact, they should be given more time to come up with an agreed schedule of repayments. That application was opposed by the counsel for the plaintiff who indicated that they had waited for the defendant to execute the consent for a long time without success prompting the filing of the instant application. The court declined the defendant's counsel's application but granted the defendant the rest of the day to file and serve a reply and submissions and proceeded to set the matter for ruling. The record shows that only the grounds of opposition was filed by the defendant and the court has considered it.
4. The following are the issues for the court's determinations;
 - a. Whether the plaintiff's claim is a liquidated one and if so, whether the defendant has impliedly or expressly admitted it.
 - b. What orders to issue if any.
 - c. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, pleadings filed, submissions by the learned counsel for the plaintiff and come to the following findings;
 - a. That the averments and prayers in the amended plaint dated the January 23, 2019 confirms that the plaintiff's claim against the defendant was for "a) Kshs 42,600,000/= being money paid to the defendant. b) Cost of this suit. c) Interest on a and b above." That a liquidated claim refers to a claim for a specific amount of money that is owed under a contract. The plaintiff's claim is based on the letters of offer which were from the defendant which accepted and which offers the Plaintiff accepted. The offers totaled Kshs.42,600,000/= which the Plaintiff paid to the Defendant. The plaintiff's claim is therefore a liquidated one, and if proof of admission is presented, the court would be within its jurisdiction to enter judgement as prayed.
 - b. The defendant has in its amended defence dated the January 15, 2020 admitted the parties' relationship under the letters of offer and conceded to having received the monies subject matter of this suit. The defendant's contention is that the amount has been employed in the construction, and that there was no provision for its refund. The court has taken judicial notice that the defendant has since refunded to the plaintiff Kshs 10,500,000 which the later has acknowledged. The letters by the defendant dated the May 6, 2022, May 16, 2022, June 6, 2022, and August 3, 2022 that are attached to the affidavit sworn by Purity Kagwiria Mutea, a director of the plaintiff, have not been challenged and clearly amounts to an admission by the defendant of the debt and part payment of the same.
 - c. That record shows that the parties were given time to negotiate on the September 17, 2020, October 22, 2020, October 21, 2021, and September 20, 2022, and it is disheartening to note that no consent was filed reportedly because the defendant was unwilling to execute the agreed consent. The same defendant cannot now turn around and blame the plaintiff for filing the



instant application claiming that it goes counter the overriding objective of a just, expeditious and efficient adjudication of the dispute. Indeed, the application will help the court to make a determination on the matter unlike the endless mentions after the numerous applications for more time to negotiate, negotiate and negotiate an already admitted liquidated claim that has been partially settled. The application is therefore not misconceived, unmeritorious, in bad faith, frivolous or vexatious as alleged by the defendant.

- d. That the fact that the plaintiff's application has sought for liquidated judgement in the sum of Kshs 42,600,000 when the defendant has partly paid Kshs 10,500,000 that is acknowledged by the plaintiff does not make the application bad or to be without merit. That whatever amount of the debt the defendant will have paid to the plaintiff by the time execution is commenced will be taken into consideration through a commensurate reduction.
 - e. That on the prayer for interest at the prevailing commercial bank rates, the parties are represented by counsel who must have advised them that they are bound by their pleadings. There is nothing in the amended plaint to show that the plaintiff had pleaded and sought for interests at commercial bank rates. What the plaintiff sought for in prayer (c) was "Interest on a and b above." The court will therefore grant interest at court's rates.
 - f. That per the dictates of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya that costs shall follow the events, the plaintiff having succeeded in the application is awarded costs.
6. Flowing from the above conclusions, the court finds and orders as follows;
- a. That the plaintiff's notice of motion dated the April 25, 2023 is with merit and is allowed and judgement entered against the defendant as per prayers (a) to (c) in the amended plaint dated the January 23, 2019.
 - b. The defendant will pay the plaintiff's costs in the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 20th DAY OF SEPTEMBER 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF: Mr Kamundi Advocate

DEFENDANT : Mr Kamau Advocate

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

ELC No 24 OF 2020 – RULING Page 2 of 2

