REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: T.W. CHERERE-J)

COMMERCIAL CASE NO. 41 OF 2018

(FORMERLY ELC 263 OF 2017)

UNITED MILLERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI JAVA HOUSE LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. The gravamen of this case is whether broken-off negotiations at pre-contractual stage impose obligations and liabilities on the parties.

2. The Plaintiff adopts the approach that pre-contractual negotiations impose binding obligations on the parties. The Defendant on the other hand adopts the view that binding obligations only arise when an offer has been accepted and the dotted line of an engrossed document is perfected through signatures, attestation and stamping.

Background facts

3. The Plaintiff is a limited liability company and registered proprietor of KISUMU MUNICIPALITY BLOCK 9/112 where it has erected a building known as United Mall (**hereinafter referred to as *"the Mall"***).

4. The Defendant is a limited liability company dealing in retail restaurants.

5. The circumstances leading to this dispute are stated in the parties' respective cases as follows.

Plaintiff's claim

6. The Plaintiff's claim as presented by **MUKESH JAISWAH** (PW1) is that sometimes on or about August, 2016, the Defendant proposed to enter into a lease agreement for lease of a shop on Mezzanine Floor measuring approximately 2381 square feet and the deck and terrace measuring approximately 1,344 square feet in ***the Mall***.

7. The parties made various offers and counter-offers by way of emails which culminated into Head of Terms that Defendant sent to Plaintiff for review and execution by an email dated 20th December, 2016.

8. Plaintiff did not accept the head of terms but instead made a counter-proposal and by its email dated 5th January, 2017 sent a Letter of Offer to the Defendant comprising the following terms among others:

a) Defendant to pay rent at Kshs. 305,530/- with escalation of 5% per year

b) Defendant to get a Fit-Out period of 90 days

c) Defendant to pay service charge of Kshs. 20/- per square foot (excluding the terrace) with escalation of 5 % per year

d) Defendant to pay security deposit of Kshs. 928,590/-

e) Defendant to make own arrangement for water reservoir by putting up a 10,000 litre water tank on the rear side of the building

f) Defendant to get an insurer to cover its assets

g) ***Defendant to pay Kshs. 4 million for renovation to be carried out by the Plaintiff (increasing height of the ceiling roof to 3.1 metres to beam and 3.5 metres to roof, stair case be redone to provide entrance at the front, building new terrace deck of minimum width 3 metres, removal of 2 pillars and provision 80KVA power source***).

9. No agreement was reached by the parties and by an email dated 1st February, 2017; the Defendant intimated to the plaintiff that it was withdrawing its interest in the lease premises.

10. The Plaintiff faults the defendant for breaching the parties' common intention to enter into a contract as a result of which it alleges to have lost rent and incurred losses in redesigning and remodeling the lease premises and seeks the following reliefs;

a) Kshs. 13,772,319.00 together with interest thereon at the prevailing commercial rates from 1st February, 2017 until payment in full

b) General damages for breach of contract with interest thereon at the prevailing commercial rates from 1st February, 2017 until payment in full

c) Costs of this suit together with interest thereon at court rates

Defendant's case

11. Defendant through its Head of Property **SAM IMENDE** (DW1) largely admitted that Defendant proposed to enter into a lease agreement with the Plaintiff for lease of a shop at the Plaintiff's ***Mall***.

12. Defendant also concedes that the Plaintiff's counter-proposal dated 5th January, 2017 was accepted.

13. Defendant acknowledges receipt of the Letter of Offer which contained the Plaintiff's counter-proposal dated 5th January, 2017 which it did not sign subsequent to which it informed the Plaintiff that it was withdrawing its interest in the lease premises.

14. The witness confirmed that in the course of negotiations, he attended a site visit in which renovations to the premises were discussed and agreed with the Plaintiff's architect.

Issues for determination

15. I have considered the parties' respective cases together with the documents in support thereof. I have also considered the submissions by the parties' advocates and the authorities which were cited in support thereof and I have summarized framed issues for determination as follows:

a) Whether a common intention to contract existed between the parties

b) Whether any agreement ensued from the negotiations between the parties

c) Whether the agreement that ensured from the negotiations is enforceable in law

d) Whether Plaintiff has a cause of action against the Defendant

Common intention to contract

16. The facts giving rise to this suit are to a large extent not disputed. It is not disputed that the Plaintiff and the Defendant entered into negotiations for the Defendant to lease a shop at Plaintiff's ***Mall***. The parties are in agreement that the negotiations did not culminate into a written contract and that the Plaintiff's claim is based on the parties' intention to contract contained in their pre-contractual negotiations.

Whether any agreement ensued from the negotiations between the parties

17. Under the principle of pre-contractual liability, a party is free to negotiate a contract. (See **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR)**.

18. Chitty on Contracts, 24th edition, volume 1 at page 21, paragraph 41 states that -

"In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally

deny that he intended to agree."

19. From the evidence on record, it is evident that the negotiations in this case mutated and assumed the form of an agreement. This is apparent from the Defendant's acceptance of Plaintiff's counter-proposal dated 5th January, 2017 summarized at paragraph 13 and 14 of this judgment and which form part of the Plaintiff letter of offer.

Whether the agreement that ensured from the negotiations is enforceable in law

20. The Plaintiff holds the view that the pre-contractual agreement is binding on the parties for the reason that it acted on it on the assurance given by the Defendant. In support of this position, reliance was placed on the case of **Benjamin Ayiro Shiraku v Fozia Mohammed [2012]eKLR** where **Havelock** J (as he then was) citing **Denning LJ** in the case of the **Combe v Combe (1951) 2 KB 215** stated that:

> **"the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.**

21. The Defendant on the other hand has argued that parties' did not intend to be bound by the pre-contractual agreement. The Defendant drew the court's attention to paragraph 26 (a) of the letter of offer drawn by the Plaintiff which states as follows:

> "This letter is sent to you in triplicate. **Acceptance shall be in writing on the duplicates of this letter and shall be effective only when the signed duplicates of this letter together with the unconditional payment of the deposits specified hereunder shall be received by us. If such a written acceptance and payment of deposits specified hereunder is not received within the stipulated period, this offer will lapse".**

22. Defendant further argued that paragraph 26 (a) of the letter of offer is vague and as such the court should apply the ***contra proferentem*** rule of contractual interpretation and interpret the same against the Defendant who drew it. In support of this submission, reliance was put on the case of **Horne Coupar vs. Velletta & Company, 2010 BCSC 483** and Black's Law Dictionary 8th Edition page 352.

23. I am in agreement with the Defendant that where there is an ambiguity in a contract, the contract should be construed or interpreted against a party who drew it. In this particular case however, I do not find any ambiguity in paragraph 26 (a) of the letter of offer. The clause explicitly demonstrates that parties intended to be bound only upon acceptance in writing of the letter of offer by the defendant. This position is buttressed by paragraph 2 of the letter of offer drawn by the plaintiff which states as follows:

Please note that these terms and all subsequent discussions and correspondences remain subject to lease and until execution of the formal lease, no contractual obligation will arise. (Emphasis mine)

24. The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning.

25. The language in the Letter of Offer is does not contain any ambiguity. The Letter of Offer ought to be interpreted against the Plaintiff that drafted it. The fact that the parties did not intend to be bound by the pre-contractual agreement is evident from the Letter of Offer and the Plaintiff cannot be heard to say otherwise. Plaintiff has failed to discharge the burden to prove that the Letter of Offer had any other meaning other than the one that is clearly spelt out in writing. (See **Maria Ciabaitaru M'mairanyi & Others vs. Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280)**. Plaintiff's submissions that the parties intended to be bound by the pre-contractual negotiations contradict the plain language in the Letter of Offer.

Whether plaintiff has a cause of action against the defendant

26. In support of its proposition that it has a cause of action against the Defendant; the Plaintiff urges the court to apply the equitable principles of "***equity sees as done what ought to be done***" and "***equity looks at intent and not form.***" In support thereof, Plaintiff relies on ***Walsh v Lonsdale [1882] 21 ch.* D 9**. Defendant on the other hand submits that this case governed by the Law of Contract and in support thereof relies on **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR**.

27. The wording in the letter of offer undoubtedly demonstrates that the parties well aware that this matter revolves around a disposition of interest in land were keen to comply with the provisions of Section 3 of the Law of Contract Act (Cap 23 Laws of Kenya) which provides:

> **(3) 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 thereto; 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:

28. It is therefore difficult to comprehend the legal basis of the view taken by the Plaintiff that the court has the power to ignore clear and express provisions of a statute under the guise of equity. (See **Ol Loita Road Limited v Kenya Commercial Bank Ltd [2011] eKLR, Leo Investment Ltd v Estuarine Estate Ltd [2017] eKLR** and **Metra Investments Limited v Gakweli Mohamed Warrakah [2008] eKLR**). The case of ***Walsh v Lonsdale*** *(Supra)* cited by the Plaintiff is distinguishable for the reason that although no lease was granted, the tenant in the case took possession of the lease premises and the court rightfully applied the equitable principles that "***equity sees as done what ought to be done***" and "***equity looks at intent and not form.***"

29. The Plaintiff also urged the court to find that a constructive trust was created between the parties on the ground that it had acted on the common intention between the parties. In support thereof, Plaintiff relied on ***Lloyds Bank v Rosset [1991] 1 A.C. 107.*** The Defendant argued that trust was not pleaded and cannot be presumed and in support thereof placed reliance on **Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR, *Samuel Njuguna Kimemia v Rose Mgeni Mtwana* [2012] eKLR** and ***Marie Ayoub and others v Standard Bank of South [1963] 1 EA 619*.**

30. A constructive trust is founded upon a common intention that can either be expressed or inferred but cannot be based upon an intention that the parties never in fact had. I have already found from a reading of the Letter of Offer that the parties did not have the intention to be bound by it until it was signed by the Defendant. It is trite that parties are bound by their pleadings so that each party knows the case he has to meet and cannot be taken by surprise at the trial. A perusal of the pleading shows that the Plaintiff did not plead trust and has only raised it in its submissions. Courts have stated *over* and *over again* that the court itself is as bound by the pleadings of the parties as they are themselves. It is therefore no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. This court would be acting contrary to its own character and nature if it were to pronounce the Plaintiff's claim on constructive trust which was neither pleaded. This court therefore rejects the Plaintiff's invitation to presume existence of a trust.

31. An issue has arisen as to whether the Plaintiff's claim can be founded on estoppel. Plaintiff argued that it incurred expenses of reconstruction of its premises to suit the Defendant's specification on the understanding that the Defendant would undoubtedly lease out the space for business purposes. In support thereof, it relied on **Benjamin Ayiro Shiraku v Fozia Mohammed[2012]eKLR** where **Havelock** J (as he then was) citing **Denning LJ** in the case of the **Combe v Combe (1951) 2 KB 215** stated:

> **"the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.**(Emphasis mine).

32. Plaintiff also relied on **Steadman -vs- Steadman (1976) AC 536 at 540** where the court held that:

> **"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable."** (Emphasis mine).

33. In response, the Defendant argued that the principle of promissory estoppel does not by itself stand as a cause of action and that the parties herein were not in any agreement upon which the doctrine would apply.

34. To begin with, it is not disputed that Plaintiff's representatives including DW1 visited the premises and the extent of renovations to be carried out were discussed and agreed by the parties. The question is first, the stage at which the renovations were to be carried out and secondly, whether the renovations were carried out as alleged by the Plaintiff.

35. Regarding the first issue, the emails exchanged between the parties on 26th October, 2016 confirm that the works were to start upon payment of the goodwill sum. The Head of Terms and the Letter of Offer drawn thereafter likewise demonstrate that there was a meeting of the minds that Defendant was to pay Kshs. 4 million to renovate the building upon execution of the plaintiff's standard Letter of Offer. No evidence was tendered to support plaintiff's contention that the Defendant approved the commencement of the renovations before the payment of the good will sum. The Plaintiff's contention that it acted on the assurance given by the Defendant does not meet the threshold of proof contemplated by Section 108 of the Evidence Act and it is therefore rejected.

36. Regarding the second issue, Plaintiff has pleaded that it spent a total of Kshs. 9,595,240/- on demolition and reconstruction costs, architect's fees and architect's travelling costs and lost rent from April to December, 2017 to the tune of Kshs. 2,785,770/-. Defendant argued that the claimed sums fall in the category of special that must be specifically pleaded and proved with a degree of certainty and particularity and has placed reliance on **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR.**

37. Section 109 of the Evidence Act stipulates that:

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".***

38. Whereas there is evidence that Bills of Quantities in respect of the renovations were prepared, there is no evidence that any renovations

were carried out or that any sums were paid to the architect as alleged by the Plaintiff. As it were, the Plaintiff merely threw figures at the court without any credible evidence in support thereof and to expect the court to award them is untenable. There's however evidence that plaintiff paid Kshs. 20,000/- to the County Government of Kisumu on 6th March, 2017 as building renovation fees. The sum in my considered view is however not recoverable for the reason that the sum was paid long after the negotiations between the parties had fallen through sometimes in February, 2017. Similarly, the sum of Kshs. 2,785,770/- sought by plaintiff for loss of rent from April to December, 2017 is not recoverable for the reason that no binding contract upon which the sum could be recovered was executed by the parties.

39. Concerning damages for breach of contract, it is a general rule that general damages are not recoverable in cases of alleged breach of contract. (See **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR**). I therefore find that the general damages sought by the plaintiff are not allowable.

40. As regards costs, Section 27(1) of the Civil Procedure Act, Cap 21 of the Laws of Kenya gives courts the unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought to be fairly reimbursed for the costs that he has had to incur and the defendant being the successful party ordinarily ought to be awarded costs.

Disposition

41. In view of the foregoing analysis, the Plaintiff's case fails and it is dismissed with costs to the Defendant.

T.W.CHERERE

JUDGE

DELIVERED AND SIGNED IN KISUMU THIS 14th DAY OF *March* **2019**

F.A.OCHIENG

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Plaintiff - Miss Kwamboka for Ogejo

For the Defendant - Miss Ayutta for Kuyo