



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 527 OF 2014**

**SARRA INVESTMENTS LIMITED.....PLAINTIFF**

**- VERSUS -**

**CFC STANBIC BANK LIMITED.....DEFENDANT**

**RULING**

1. **Sarra Investments Limited (Sarra)** sued **CFC Stanbic Bank Limited (CFC)** seeking Orders of Mandatory Injunction to compel **CFC** to pay monthly rent of **ksh. 975,000** in respect to the suit property **LR No. 37/198**; Order of Specific Performance directing **CFC** to complete the contract between the parties. In the alternative, **Sarra** seeks payment of **ksh 615,707,727.30** being the balance of the total rent of the suit property. **Sarra** also seeks Special and General Damages.

**THE PLAINT**

2. **SARRA** by its plaint pleaded that the letter dated **27th June 2007**, it offered **CFC** a lease over the suit property. That the terms and conditions were stipulated in that letter. That letter was signed by **Sarra** and **CFC** and **Sarra** pleaded in the plaint that it is the letter which set out the following terms and conditions of the contract:

- a. **Rent:**– The defendant would pay to the plaintiff a monthly rent of Ksh 975,000 (Kenya shillings nine hundred and seventy five thousand only) per month, payable quarterly in advance. The said rent would be reviewed every six (6) years.*
- b. **Lease period:** - the defendant would lease the plaintiff's said premises for a period of twenty five (25) years. The lease period would commence after thirty (30) weeks from the date of handover of the site to the defendant.*
- c. **Rent escalation:**- the rent would be increased by ten percent (10%) every two years commencing at the beginning of the third year.*
- d. **Utilities:**- The defendant would be responsible for utilities and the maintenance of the building.*
- e. **Service charge:**- The defendant would be responsible for council rates, land rent, building insurance and other incidentals that ordinarily constitute service charge. The said charges were to be met at the actual costs.*

3. **Sarra** further pleaded that it was agreed between the parties that **CFC** would construct upon the suit property a structure and that **Sarra** would contribute towards that construction ksh 31 million.

**DEFENCE**

4. **CFC** by its defence filed on **19th August 2009**, raised a preliminary objection to the suit. The grounds of that preliminary objection are as follows:

***“The defendant shall raise a preliminary objection to the entire suit in limine on the following grounds:***

**GROUND OF PRELIMINARY OBJECTIONS**

(a) The purported contract dated 27th June 2007 which is for the disposition of an interest in land, is void ab initio as it contravenes section 3(3) (a) (b) and 6(b) of the Law of Contract Act in that:

(i) The signature of each party signing has not been attested by a witness who was present when the contract was signed.

(ii) There has been no affixing of the common seal of the body corporate in accordance with the constitution or the articles of the body corporate.

(b) The contract is void ab initio as the Commissioner of Lands consent for change of user was never obtained by the Plaintiff.

(c) There was no consideration for the purported contract dated 27th June, 2007.

5. CFC's Preliminary Objection is based on the provision of **Section 3(3) of the Law of Contract Act**. That section provides as follows:

*"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".*

6. CFC's learned counsel **Mr. Ogunde** submitted that the contract pleaded by **Sarra** is the one contained in the letter dated **27th June 2007**. He referred the court to that letter, which is part of sarra's bundle of documents. **Mr. Ogunde** submitted that the letter was not executed under seal, yet **Sarra** and **CFC** are corporate entities and further that the signatures are not attested as required under **Section 3(3)**. Consequently, **Mr. Ogunde** submitted that this court lacked jurisdiction. That although **Sarra** had raised estoppel in their reply to the defence that there cannot be estoppel against statute.

7. **Ms. Oseko**, learned counsel for **Sarra**, opposed the Preliminary Objection on the ground that the contract contained in the letter dated **27th June 2007**, was the one contemplated under **Section 3(3)**. That the said contract had terms of the rental period and also terms related to utilities and service charge. Further that the letter of **27th June 2007** was an agreement to lease which lease was to be reduced into writing. Learned counsel submitted that the letter was a valid contract which had three essential elements of contract **offer, acceptance and consideration**.

## **ANALYSIS**

8. I have considered the learned counsel's submissions and the authorities cited by both **Sarra's** and **CFC's** learned counsels.

9. The English Section 2 of the Law of Property (miscellaneous provisions) Act 1989 is similar to Section 3 of the Law of Contract Act, save that the English Section 2 does not require a written contract to be attested. In considering that Section of the English Act, in the case between **Charles Cleland Helden vs Strathmore Limited [2011] EWCA Civ 542** the court held thus:

*"Section 2 is concerned with contracts for the creation or sale of legal estates or interests in land, not with documents which actually create or transfer such estates or interests. So a contract to transfer a freehold or a lease in the future, a contract to grant a lease in the future, or a contract for a mortgage in the future, are all within the reach of the section, provided of course the ultimate subject matter is land. However, an actual transfer, conveyance or assignment, an actual lease, or an actual mortgage are not within the scope of section 2 at all."*

10. It will be seen that that holding reinforces what is provided by our **Section 3(3) of the Law of Contract Act**, that is, that a contract for creation or sale of legal estate or interest in land is within the reach of Section 2 of the English Act. In other words, it has to be in writing.

11. In as much as the letter of **27th June 2007**, relates to a disposition of an interest of land, it is important to note, as rightly submitted by learned counsel **Ms Oseko**, that the said letter also relates to payments of service charge, land rent, and building insurance and other incidentals. Quite clearly those payments bear no relations to disposition of interest in land. And because those provisions relating to the payments that are so intertwined with the provisions seeming to fall under the provisions of Section 3(3) I am of the view that the Preliminary Objection must and does fail.

## **DETERMINATION**

12. This court in view of the fact that the issues are so intertwined, the action of **Sarra** must be permitted to proceed to full hearing. If not, it is the court's view that **Sarra** will suffer prejudice if the case is struck out at this stage. This is because there are aspects of **Sarra's** claim that are rightly before this court. The court however, grants the parties leave to lead evidence at the trial on whether this court is barred to hear this case in consideration of Section 3 (3) of the Law of Contract Act.

13. Accordingly, the defendant's Preliminary Objection is dismissed but the costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.**

**MARY N. KASANGO**

**JUDGE**

***Ruling read in open court in the presence of***

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant