



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 202 OF 2014

SELECTA KENYA GMBH & CO. KG.....PLAINTIFF

VERSUS

CASAVIVA PROPERTIES LIMITED.....DEFENDANT

JUDGEMENT

1. Until 13th October, 2010, Selecta Kenya GmbH & Co. KG (Selecta or Plaintiff) was known as KPP Plant Production GmbH & Co. KG. This Suit, by Selecta, is substantially about Kshs.4,520,000/= said to have been received illegally and fraudulently by Casaviva Properties Ltd (Casaviva or the Defendant).
2. Selecta is in the business of Producing and selling rooted and unrooted Flower cuttings for Export to the European and American Markets. On the other hand, Casaviva is a property Developer and had put up for Sale a Luxury Residential Development erected upon L.R NO.1870/1/1571 Mpaka Road. The Development was or is known as One West Park.
3. The circumstances surrounding the payment of Ksh.4,520,000/= are not involved. Mohamed Esmail Badrudin (Badrudin) and Peter Mwangi Wanderi (Wanderi) were employed by Selecta as the Finance and Administration Manager, and Accountant respectively. The two were mandated to operate all Bank Accounts belonging to Selecta in Kenya. Of course it would be expected that the two were authorized only to further the legitimate interests of Selecta.
4. Sometime in 2011 Wanderi approached Casaviva to purchase an Apartment at One West Park. Casaviva issued a letter of offer dated 3rd October 2011 in the name of Badrudin and Wanderi. Later there was a change from the offerees and the name of Badrudin canceled and replaced by Mary Waihera Karanja (Mary). Mary is the wife of Wanderi. The letter of offer required the Purchaser to make a deposit of Kshs.4,520,000/=. Through a transfer by RTGS, Kshs.4,520,000/- was paid from the account of Selecta to Casaviva. With time the Purchasers have paid the entire purchase price, but from other sources.
5. Selecta's complaint is that the money was withdrawn and paid to Casaviva without its authority and pleads the following particulars of fraud:-
 - a) Illegally and fraudulently receiving money the total amount of Kshs.4,520,000 for the sale of an apartment for which no consideration was given.
 - b) Refusing and/or neglecting to refund the said amounts knowing very well that they were not entitled to the same.
6. The evidence of Henderikus Geert Eikens (for Selecta) is that, upon discovering the payment, he got in touch with one Mr. Murugesan of Casaviva and informed him that Badrudin and Wanderi did not have authority to carry out the transaction and that Mr. Murugesan asked Selecta to write a demand upon which Casaviva would effect a refund.
7. While the evidence of Murugesan was that Casaviva never bothered to find out whether the money was duly authorized by Selecta, he denies making any representation to refund the money.
8. That is the straightforward evidence and the singular issue for determination is whether the Defendant is guilty of fraud and should be compelled to make the refund.
9. It is common ground that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, it is something more than a mere balance of probabilities (See for example (Ratilal Gordhanbhai Patel vs. Lalji Makanji [1975] EA 314). This is because the charge of fraud is quasi-criminal in nature.

10. It is also common ground that Badrudin and Wanderi were employees of Selecta with mandate to operate its Bank Accounts. It is also true that while the payment came from Selecta, it was purportedly for the benefit of Wanderi and his wife Mary. Casaviva's concedes that it never sought to clarify whether the payment was indeed authorized. Does this make Casavica guilty of fraud?

11. It was submitted by Counsel for Selecta that Casaviva was under a legal and equitable obligation to ensure that the money received from a stranger was paid willfully and lawfully. Further that the Defendant had an obligation in law and equity not to keep money received from unknown stranger. What is the Law?

12. The Law would have to be that which is famously known as The Rule in Turquand's case which has been embraced on several occasions by our Courts. See for example in East African Safari Air Limited vs. Anthony Ambaka Kegode & Another [2011]eKLR which quoted that Rule as follows:-

"While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained."

Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows: -

"This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf."

13. It may be true that the payment was made not for the benefit of the Company but of its employer. Yet the persons who effected the payment had the ordinary mandate to make payments out of the Company's accounts. It would be unreasonable to expect Casaviva to make inquiries as to whether the two had actual authority to make the payment.

14. There is yet another difficulty that Selecta finds itself. The RTGS transfer was effected on the instructions and signature of one Winston Kitui and Badrudin (see letter of 24th October 2011 –P Exhibit page 4). If this transfer was fraudulent then either Kitui or Badrudin should have been called upon to explain their instructions. These two were not joined to the suit. Indeed even Wanderi who allegedly benefitted from the transaction was left out. Unlike in cases of Negligence, generally, the actual participation of the person sued for fraud must be proved. These three should have been joined to answer any allegations against them. The circumstances here are not entirely different from those in Bruce Joseph Bockle vs. Coquero Limited [2014] eKLR where the Court of Appeal held;-

"The appellant in their submissions on fraud and knowledge of irregularities touching on the suit premises canvass the issue by questioning how Abdalla obtained an imperfect title. However it is a matter of curiosity as the trial court rightly noted why the said Abdalla and or his estate was not enjoined in the suit. The appellant apparently relies on the "imputed knowledge" to assert that the respondent perpetuated a fraud. Due to the seriousness of the offence of fraud, the appellant had a burden of adducing sufficient particulars to demonstrate how the respondent was a party to the fraud and illegalities since the alleged fraud or illegalities if at all were perpetrated by Abdalla. There was no attempt at all to create a nexus between the respondent and Abdalla. The mere fact that the same advocate acted for both Abdalla and the respondent cannot suffice. In fact at paragraph 11 of the defence, the appellant merely stated that the plaint was defective and did not disclose any cause of action and that the plaintiff's certificate of title was invalid ab initio on account of having been acquired irregularly and illegally. As it can be readily seen the alleged particulars if any were to buttress the averment that the plaint was defective and did not disclose any cause of action and the validity of the title. The appellant of course referred to the issues of land control board, the excising of the suit premises without survey being carried out on the ground and that the subdivision was undertaken unprocedurally. However these do not adequately amount to particularity in the appellant's allegations on the respondent's alleged fraudulent actions. Nor could those malfeasance be attributed to the respondent. Faced with shortcomings in the pleadings, we do not see how the trial court could thus down the tools and investigate the fraud unless a prima facie case of fraud or illegality had been presented."

15. Perhaps it would be different if Casaviva had undertaken to refund the money but failed to do so. Whilst Selecta says this happened, Casaviva denies. It is the word of Eikens against that of Murugesan. Other than that word is the letter of demand from Selecta's Advocate (17th February 2014 P Exhibit page 2) which is answered by a Letter of 20th May 2014 (D Exhibit page 25) from the Lawyers of Casaviva in which they deny liability. There is no representation (express or implicit) in that letter to refund the money.

16. The evidence placed before this Court does not reach the threshold called for by Law to prove fraud. This Court does not find Casaviva culpable and dismisses this Suit with costs.

Dated, Signed and Delivered in Court at Nairobi this 12th day of October, 2018.

F. TUIYOTT

JUDGE

In the presence of:

Fundi (Miss) for Plaintiff

Wafula h/b for Shah for Defendant

Nixon - Court Assistant