



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 133 OF 2015

SEDNA AGENCIES LTD.....PLAINTIFF

VERSUS

THE PRESBYTERIAN FOUNDATIONRESPONDENTS

J U D G M E N T

Introduction

1. By its plaint dated 24/9/2015 the plaintiff sought judgment against the defendant in the sum of Kshs.11,450,000 being the sum of Kshs.11,400,000 paid to the defendant by the plaintiff toward the purchase price of an intended agreement of sale of an apartment then under development upon the defendants parcel of land known as MN/1/1518/ CR NO. 33392 and Kshs.50,000 being legal fees paid to advocate to handle the conveyance. The agreement was never formally drawn and executed but there is a letter of offer by one PINNACLE PROJECTS LIMITED addressed to the plaintiff and offering the suit property for sale at Kshs.22,800,000 payable in two equal instalments of Kshs.11,400,000. There is also a swift application form for transfer of Kshs.11,400,000 by the plaintiff transferring the sum to the defendant and a receipt by Milele Luxury Apartments acknowledging receipt of the sum.

2. It is on the basis of suit documents produced as exhibits pleaded that despite payment by the plaintiff, the defendant did not avail the formal agreement for sale for execution despite requests by the plaintiff and that the construction of the apartment stalled and was not completed as promised by the 31/12/2013. When the plaintiff demanded the refund of the money, the defendants agent PINACLE PROJECTS LTD admitted receipt of the money but pleaded for time to effect a refund while citing shortage of finances, but did not effect a refund till the suit was filed and todate.

3. After the suit was filed the defendant did enter appearance and filed a statement of defence which in essence admitted receipt of the sum but denied breach of any agreement while insisting that the payment was intended to be used for construction and has been so used. By the 18/5/2016 when the matter came before court for a case conference the defendant had not filed witness statements nor documents hence timelines were set for compliance and a default clause to the effect that failure to file within the timelines would lead to the inference that they would call no witness nor rely on any documents at trial. Those directions were again never complied with in time and at all by the 29/6/2016 when time was extended yet again but still there was never compliance. Ultimately on the 28/7/2016 the court gave trial directions and ordered that the defendant would not lead any evidence or seek to rely on any documents at trial.

Evidence at trial

4. When trial commenced the plaintiff called one witness, MIRIAM MBEKE NYAMASYO who produced exhibits marked **P1-P10**. Among the exhibits produced were an RTGS application form, a receipt by the defendant and a series correspondence between the advocates for the parties. The evidence by witness supported the pleadings in the plaint that the money was paid, and acknowledged; that no agreement was executed between the parties and that the letter of offer was never signed by the plaintiff. There was also exhibit P7 a letter dated 31/3/2014 by which the plaintiff demanded a refund of the sum paid together with interests and legal costs.

5. The letter was responded to by the defendants lawyers who admitted receipt of the money but contended that the date 31/12/2013 was merely an estimated date of completion of works and that the works had not stalled but were 80% complete. Thereafter there were further demands for the refund which did not seem to have yielded any response. In her evidence the witness stated that she paid purchase price and not money for construction as alleged by the defendant. She therefore sought judgment for the principal sum together with interest at 17% which she contended was the commercial prevailing rate.

6. In cross examination the witness said that the negotiations were between her and one Mr. Kariuki of PINNACLE PROJECTS LTD who showed her '**a complete show house**' but the shell of the apartment she was buying was in place and only needed to be completed. She reiterated that there was no agreement nor indication that the deposit was to be employed for construction. On the completion date for construction the witness was shown clause 12 of the letter of offer and she conceded that it was clear that it was just but 'an estimated date of completion'.

7. With that the plaintiffs case was closed and as had been ordered the defendant case was equally closed and the parties then took time to file and exchange written submissions.

Submissions by the parties

8. By the submissions filed on 13/12/2016 the plaintiff took the view that the deposit was for part of purchase price and not money for construction and that it having demanded the same for failure of an agreement to be executed it was entitled to a refund.

9. On the defendants stand that this suit affronts section 3(3) of the Law of contract Act, the plaintiff took the position that there was never a contract for disposition of land but just an interest to buy which never crystalized into a contract.

10. On its side the defendant in its submissions took the stand that the deposit paid was for construction and that it has since been used towards construction as contracted and therefore the plaintiff is not entitled to a refund as there was never any agreement for refund. It was further submitted by the defendant that due to failure by the plaintiff to sign the letter of offer the defendant was never bound to any period of completion and lastly that the suit could not lie on the basis of section 3(3) Law of Contract Act.

Issues for determination

11. When the court gave trial directions, parties were ordered to file a joint statement of agreed issues and in default the issues then already filed by the plaintiff would be the ones adopted by the court for determination. Indeed no agreed issues were filed with the consequence that the issues filed by the plaintiff remain the issues for determination.

Those issues were framed as follows:-

a. Was the deposit of Kshs.11,400,000.00 paid by the Plaintiff to the Defendant to be applied in the construction of the suit apartment or the purchase thereby?

b. Is the deposit refundable to the Plaintiff plus interest?

c. Who should pay the costs?

Analysis and determination

12. Prior to the determination of the issues as framed, there is an issue of law raised by the defendant in its submissions which I would have ignored but for the sake of the development and interpretation of the law I will not brush aside. It concerns the ramifications of the section 3(3) of The Law of Contract Act which the defendant contends makes this suit untenable as there exist no agreement in terms of that provision. The provision reads:-

Section 3(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.”

(4) (5) (6) & (7)

13. Now in this matter it is clear to the court that there was all intention to contract and an offer was made towards that end but not accepted. Equally no contract was ever executed. But, the plaintiff is not insisting on specific performance of the contract. Instead the plaintiff is saying that ‘since no contract for sale of land was concluded in terms of the law, there is none to be enforced and I need to be restituted by a refund of the sum paid’.

14. To this court this is not a suit grounded on a contract for the disposition of an interest in land. The suit is purely one for refund for money paid for a consideration that failed. In my view, therefore, Section 3(3) Law of contract Act, as much it was never pleaded is not available to the defendant to defeat the plaintiffs suit. It would be relevant, and due for consideration had there been a suit for specific performance but even then, the section is not absolute but gives room for the court to consider equitable remedies in the nature of resulting and constructive trusts. See *Neepu Autospares Ltd vs Narendra Chaganlal Solanki & 3 Others [2014] eKLR*.

15. Now on the issues of the suit, is the deposit refundable? It is evident that the letter of offer was issued on 6/6/2013 and payment made on the 18/6/2013. That payment must be seen to have been made on the strength of the letter of offer or pursuant to it. The letter of offer itself at clause 13 provides:-

“CONFIRMATION: Kindly confirm acceptance of this letter of offer by way of signing the triplicate copies of this offer and returning the same to us on or before the close of business on June 20,2013 together with confirmation of your instruction for a wire transfer to PREBYTERIAN FOUNDATION (Account details attached) for the amount of Kshs.11,400,000 being the reservation amount described in clause 5(a) above. If this acceptance is not signed and returned to us on or before the said date, this offer will be treated as cancelled”.

16. This court takes the view that the terms of engagement were to be found on this letter of offer. It was unequivocal on what failure to sign it by the plaintiff would lead to. There being concurrence that the letter of offer was never signed as directed and at all, it is not difficult to say that by the 20/6/2013 the offer remained cancelled and there was no agreement to be pursued and the only remedy available to the parties was to renegotiate afresh or just be restituted to their previous positions.

17. The flip side is to say that there was no enforceable contract and therefore this court has no assistance to offer. That to any judicial authority duly applying his mind to a dispute would be unjust and would promote unjust enrichment. The plaintiff would be deprived of its money without consideration and the defendant would have been unduly and unjustly enriched for giving no consideration at all.

18. This Court proceeds from the position that legal disputes must be resolved with a broader need to meet fairness and evenness between the parties. A court must always shun the prospects of a party before it leaving the court unjustly enriched at the expense of its opponent. The doctrine of unjust enrichment is not new to our jurisdiction. As early as the year 1957, **The Court of Appeal for Eastern Africa** had addressed itself to the principle and said:

“So far as the allowance are concerned, this was a case of unjust enrichment leading to suffering of wrongful loss of which equity would provide a remedy” *Saleh Bin Galeb vs Hussain [1957] EA 55.*

19. Later on, Madam JA, in ***CHASE INTERNATIONAL INVESTMENT CORP & ANOTHER VS LAXMAN KESHRA & OTHERS [1978] KLR***, 143 added his usually flowery language and voice and said;

“Woe unto the day it is lost sight of in Kenya, which would also be contrary to the spirit of section 3(c), of the Judicature Act I trust that in future, in appropriate cases, there will be less smothering of just equitable rights on the basis of technical objections and artificial distinctions oblivious to justice and substance”.

20. To this court, the future foreseen by Judge Madam, is here with us, if not on the overriding objectives of the court, then under Article 159(2)d of the Constitution Justice must be done devoid of technicalities and even if section 3(3), Law of Contract Act, was to be read to say that the plaintiffs money is not recoverable on account of want of a written agreement, which I have found it cannot be interpreted to mean, the sense of justice would militate against disallowing the suit and thus allowing the defendant to keep the plaintiffs money for free.

21. The only conclusion that must flow from the foregoing is that there having been no consideration for the payment the plaintiff made, the plaintiff is entitled to a refund of his money paid to the defendant. I need not add that the money in the wording of the letter of offer was a reservation amount and expressed to be 50% of the purchase price. It was not money to be employed in the construction work. If the defendant intended it to be, it ought to have put it clearly so in the only document forming understanding between the parties then.

Is interest payable?

22. The defendant, as the seller, set the terms of such sale and expressed them in the letter of offer already canvassed above. The defendant having failed to get the acceptance of the letter of offer by the 20/6/2013, would have opted to either extend the time, if it was still keen to sell to the plaintiff or could have just effected a refund. It did not do either with the consequence that after the 20/6/2013 it was holding the money without justification and therefore getting unjustified benefit for such withholding. See ***Edwin Asava Majani vs Telkom Kenya Ltd [2014] eKLR.***

23. The purpose of interest is to compensate the decree holder for the period his money was kept away from him unjustly. For that reason and taking reliance of section 26 of the Civil Procedure Act, I order that the interest be paid to the plaintiff on the deposit paid being Kshs.11,400,000 from the 21/6/2013 till payment is full.

24. There was the sum of Kshs.50,000 also sought from the defendant being the sum the plaintiff says was paid to its lawyers who were to act for it in the conveyance. I have looked the receipt produced as evidence of such payment and note that the same is dated 19/6/2013. It must have been paid after the plaintiff received the letter of offer and noted that it was under an obligation to accept it by the next day,

20/6/2013. At that time if there were terms in the letter of offer which were not acceptable the plaintiff it ought to have made its decision. I did not get the justification, from the plaintiffs evidence, why it was engaging an advocate on the eve of the deadline and still doing nothing to beat that deadline. To me, I think this sum is not recoverable from the defendant.

Conclusion

25. The upshot is that the court funds for the plaintiff and enters judgment for the plaintiff against the defendant in the sum of Kshs.11,400,000 together with interest thereon at 14% from 21/6/2013 till payment in full.

26. I also award to the plaintiff the costs of this suit which costs will also attract interest at court rates from the date the costs shall have been taxed till payment in full.

It is so ordered.

Dated and delivered at Mombasa this 15th day of February 2017.

P. J. O. OTIENO

JUDGE