



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COURT
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE. 163 OF 2015

CM CONSTRUCTION EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

LUX HOMES LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. The claim herein concerns an alleged failed consideration pursuant to fraudulent misrepresentation on the part of the Defendant.
2. The Plaintiff a real property contractor asserts that it was induced into paying a total of Kshs. 35,482,607/= to the Defendant and or the Defendant's undisclosed principal. The Plaintiff seeks a refund by way of indemnity from the Defendant of the said amount together with interest and costs.

Background

3. The brief factual background is that the Plaintiff was approached in April 2013 by one G. Kanja Kuria, an architect, claiming to be the project manager of the Defendant. The Plaintiff was to be engaged as the main contractor for the Defendant's 64 ambassadorial villas project which was to be developed by the Defendant in conjunction with some unidentified foreign investor on L.R No. 23259 and 23260 Nairobi. The project cost was stated to be worth over Kshs. 2 billion. It was to be financed by an international investor based in Qatar who was only going to sign the contract once the main contractor had been identified and committed.
4. To secure the contract, the Plaintiff was expected to pay Kshs. 32,982,607/=. The Plaintiff agreed to the transaction. The Plaintiff paid the amount to the designated bank account as identified and disclosed by the Defendant. The project however did not kick off. It turned out to be a hoax. The Plaintiff now seeks to be refunded the amount.

The pleadings and the parties' cases

5. The above narrative is largely repeated in the plaint filed on 31 March 2017. The Plaintiff further contended that there was fraudulent misrepresentation on the part of the Defendant leading to the Plaintiff's monetary loss. The misrepresentation is stated to have concerned the property where the

development was to take place. The misrepresentation is also stated to have taken the form of the name and details of the law firm stated to represent the international investor. The misrepresentation is also stated to have been in the form of the bank account details availed by the Defendant.

6. The Plaintiff further contended that the Defendant had admitted liability and even sought to secure the amounts claimed by offering a title deed as well as a log book as security. The title deed offered and accepted was for Loc. 12/Sub Loc 4/ Githunguri T. 143 while the log book offered was for motor vehicle registration No. KBK 225F. According to the Plaintiff, the Defendant had no tenable defense to the claim.

7. The Defendant filed a defense statement on 26th June 2015. It was bare. It consisted of general denials. There were no documents filed alongside the defense by the Defendant. The defense said nothing of substance.

8. On 30th January 2017, I issued clear case management directions to the Defendant to file its witness statements and bundle of documents, or risk having the Defense statement struck out. The Defendant did not comply and pursuant to the orders, the Defense statement was accordingly struck out. The trial was then scheduled for 13 March 2017.

The hearing and evidence

9. The Plaintiff called only one witness.

10. PW1 was Mr. Manji Ravji Vekaria. He testified that he was a director of the Plaintiff together with his wife. He relayed how the Defendant urged him to pay the amount of over Kshs. 32 million so that the Plaintiff could secure a billion shilling worth of a contract. He paid the money by way of RTGS to a law firm known as Vinson & Elkins. He also testified that he paid Kshs. 2,500,000/= to the Defendant on 25th November 2015. He gave specifics and produced documents in support of the payments. He concluded his testimony by producing a copy of the personal guarantee given by the Defendant's directors.

11. In the course of his testimony PW1 stated how he made the startling discovery that the Defendant had completely and intentionally misrepresented facts to PW1. The land on which the Plaintiff was to help construct 64 villas was non-existent. The securities that the Plaintiff had been offered were also fake. The lawyers the Defendant prompted the Plaintiff to pay the amount of Kshs. 32 million were also part of the fraud but were nowhere to be tracked. The entire scheme was a hoax. There was no multi-billion scheme. It was a con. PW1 accused the Defendant of being part of the con-game and indeed testified that he had lodged a criminal complaint against the Defendant's directors.

Determination

12. The only issue is whether the Defendant is liable to pay to the Plaintiff the amount claimed on the basis of alleged fraudulent misrepresentation.

13. From the evidence of PW1 and the documentary evidence availed there ought to exist no controversy on whether the Plaintiff paid the amount aggregating Kshs. 35,482,607/=. Part of the amount was paid to the Defendant. An amount of Kshs. 2,500,000/=, it was. PW1 stated that this was to cover a portion of the insurance premium. The balance was paid to an account designated by the Defendant. It was not paid directly to the Defendant.

14. There would also be no contest on the fact that the Defendant's directors guaranteed the sum of Kshs. 35,482,608/= vide a deed dated 7th February 2014. The guarantee was supported and supplemented by non-possessory securities in the form of motor vehicles and land, the documents of title being deposited with the Plaintiff.

15. The instant claim is however not against any of the guarantors. The claim is also not for realization of any security. It is a claim for refund of monies deceptively and fraudulently obtained but which the

Defendant later admitted and agreed to repay.

16. The foundation of the Plaintiff's action is fraud and deceit in the Defendant. The Plaintiff's witness extensively described how through untruths and bare naked lies the Defendant induced the Plaintiff into paying amounts to third parties whom only the Defendant knew or had contact with. The representations made to the Plaintiff were that the Defendant together with foreign investors was set to endeavor into a multi-billion real property development. The Plaintiff, it was represented, would benefit as contractors but only if they made advance payments. The Defendant even availed bank details for the payments to be effected by the Plaintiff. The Plaintiff made various payments totaling Kshs.32,982,608/=. Additionally, the Defendant further convinced the Plaintiff to pay a sum of Kshs. 2,500,000/= ostensibly to cover the insurance premium.

17. It all turned out to be a hoax, so testified the Plaintiff's witness. No contracts were forth-coming. No projects were on the table. There was indeed no land for development. The title documents availed by the Defendant to the Plaintiff copies of which were availed as evidence were all not genuine documents. It was however too late. Upon reliance on the fraudulent representations the Plaintiff had parted with large sums of money. The representations had been material and had induced the Plaintiff to act to its detriment.

18. I hold the view that the Plaintiff has established what it needed to prove on a balance of probability to succeed on its claim for fraud and deceit. The Plaintiffs evidence established that was fraudulent representation made by the Defendant which was material and induced the Plaintiff to act to his detriment: see **Downs v Chappel [1996] 3 All ER 344.**

19. The Plaintiff had been told lies in order to induce it to pay the amounts now claimed. It suffered loss as a result. I find that the Defendant through its agents willfully made false statements with the intention that the Plaintiff should act in reliance upon it and when the Plaintiff did act, the consequence was loss and damage as the monies paid were in consideration of nothing ultimately. I would hold the Defendant responsible for the Plaintiff's loss which was relatively foreseeable.

20. I must also add that the Defendant also took full responsibility for the loss when it admitted its indebtedness to the Plaintiff. Through various correspondences which were produced in evidence the Defendant agreed to pay the amount claimed to the Plaintiff. The acknowledgment by the Defendant would lead me to the irresistible conclusion that the Defendant knew or ought to have known the folly of the unconfirmed representations it made to the Plaintiff. The Defendant must bear the full responsibility and restitute the Plaintiff the full amount.

Conclusion and disposal

21. I am satisfied that the Plaintiff has proven its claim. I am also satisfied that there is in existence unequivocal acknowledgments by the Defendant which was further supported by the Defendant's willingness to secure the repayment of the amounts paid by the Plaintiff. The Plaintiff deserves the reliefs sought.

22. I consequently enter judgment for the Plaintiff against the Defendant in the sum of Kshs. 35,482,608/= together with interest. The Defendant will also pay the Plaintiff the costs of the suit.

Dated, signed and delivered at Nairobi this 9th day of June, 2017.

J. L.ONGUTO

JUDGE

Advocates

Kipyator Kibet & Associates Advocates for the Plaintiff

