REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 4 OF 2019

MARY AWINO KWEYU.....PLAINTIFF/ APPLICANT

VERSUS

LAWRENCE MMATA CHORE

MELISA MUHONJA MMATA.....DEFENDANTS/ RESPONDENTS

RULING

The application is dated 12th February 2020 and is brought under order 13 rule 2, order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act seeking the following orders:-

1. That judgement on admission be entered against the 1st defendant requiring that the sum of kshs. 30,000,000/- received by the 1st defendant from the plaintiff as the purchase price for the sale of land title number Butsotso/Shikoti/17938 be refunded to the plaintiff forthwith failing which execution to issue against the 1st defendant for the recovery of the said sum.

2. That the entry of judgement on admission in terms of order 1 above, the prayer for specific performance prayed for by the plaintiff's plaint dated 22nd January 2019 be deemed as abandoned.

3. That all other outstanding questions between the parties herein including the plaintiff's claim for mesne profits, costs, interest and damages for breach of agreement to await hearing and determination of the consolidated suits.

4. The costs of this application to be in the cause.

It is based on the grounds that part of the alternative remedy sought by the plaintiff is a claim for the refund of the purchase price of kshs. 30,000,000/= which she paid to the 1st Defendant for the sale of land title number Butsotso/Shikoti/17938. That the 1st defendant vide his affidavits filed admitted having entered into the land sale agreement and receiving the purchase price of kshs. 30,000,000/=. Despite this the defendants have refused to transfer the suit land to the applicant claiming lack of spousal consent. That it is in the interest of justice that judgement on admission be entered.

The application is opposed by the respondents who submitted that, the application cannot be granted before the suit is heard and determined and allowing it is tantamount to conducting the suit prematurely. That the application amounts to a waste of the court's time as the applicant effectively seeks to have the cause heard twice when the same can be concluded in one hearing. That this suit is subject to the court of appeal and allowing the application will render the appeal nugatory and/or academic.

This court has carefully considered the application and the submissions therein. The applicant applies that judgement on admission be entered against the 1st defendant requiring that the sum of kshs. 30,000,000/- received by the 1st defendant from the plaintiff as the purchase price for the sale of land title number Butsotso/Shikoti/17938 be refunded to the plaintiff forthwith failing which execution to issue against the 1st defendant for the recovery of the said sum. That the 1st defendant has admitted to receiving the same. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission provides as follows:-

> *"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just."*

In the case of **Choitram Vs Nazari (1984) KLR 327** the above provisions were captured under **Order XII rule 6**. **Madan JA** (as he then was) stated that:-

> *"For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."*

In the instant case I find that the facts are not obvious. The 2nd defendant has not admitted to the same and there is the issue of spousal consent. The 1st defendant admits to have sold a portion of the suit land measuring 0.17 Ha and not the whole portion as the applicant insists. He admits selling the undeveloped portion while the applicant states it included the developments and hence she is entitled to the rent being received therefrom. The plaint has an alternative remedy and by seeking judgement on admission at this stage the applicant seeks to amend the plaint. The applicant has further filed an appeal at Kisumu appeal No. 199 of 2019 over the same matter. I find that there are other remedies sought in the plaint including the plaintiff's claim for mesne profits, costs, interest and damages for breach of agreement. The facts of this case are not *plain and obvious and this matter should go for full trail.*

In the case of Cassam vs Sachania [1982] KLR 191 the court held that:

> *"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."*

In the case of **Job Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR,** the court stated as follows:

> **"Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."**
>
> **What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "***triable"* **as,** *subject or liable to judicial examination and trial".* **It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.**

The defence raises triable issues and judgement on admission cannot be granted in this matter. I find this application has no merit and I dismiss it with costs. Parties are advised to take a hearing date in this matter.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH JULY 2020.

N.A. MATHEKA

JUDGE