



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL & ADMIRALTY DIVISION
AT MOMBASA
COMM. 8 OF 2016

1. MARY WAIRIMU GAKERE
2. BENSON NYUTHO GAKERE.....PLAINTIFFS

VERSUS

1. DELTA CONNECTIONS LTD
2. MOSES WAWERU NDUNG’U
3. JASPER ODUOR OMONDI.....DEFENDANTS

R U L I N G

1. The plaintiffs sued the defendant in this suit seeking declarations on and refund of Kshs.1,500,000/- paid by the plaintiffs to the defendants toward purchase of a parcels of land to be excised from SUBDIVISION NO. 463 SECTION III MAINLAND NORTH. They equally sought general damages for breach of contract costs and interests.

2. The foundation of the suit is that the parties, plaintiffs and the 1st defendant, entered into an agreements dated 11/4/2012 for the sale of the aforesaid property at an aggregate sum of Kshs.12,500,000/-. The sum of Kshs.2,500,000/- being 20% of the purchase price was paid in terms of the agreements for sale to be held by the 2nd & 3rd defendant being the advocates for the parties, as stakeholders. It is pleaded that after the agreement for sale the plaintiffs discovered that the land was non-existent and therefore sued not only the first defendant but also the 2nd and 3rd defendant not only as the directors of the 1st defendants but also as the advocates of the parties and stakeholders of the deposit.

3. When served with summons the defendants entered a joint appearance and equally filed a joint statement of defence which other than denying the non existence of the land and particulars of fraud unequivocally admitted the obligation to effect the refund. Paragraphs 6 & 8 of the statement are of relevance for purposes of this decision. These paragraphs read:-

6 “The defendants state that the defendants are read and willing to refund to the plaintiffs the sum of Kshs.2,500,000 paid as deposit upon the sale to other purchaser of plots no. 24,26,28,29 and 30.

8 In reply to paragraph 14 of the Plaint, the defendants admit that the plaintiffs are entitled to a refund of Kshs.2,500,000 as aforesaid.”

4. The plaintiffs then filed the Notice of Motion dated 1/12/2016 and filed on 12/4/2016 in which it is sought that judgement be entered for the plaintiffs against the defendants jointly and severally for Kshs.2,500,000 and the statement of defence be struck out. That application is grounded upon the provisions of sections 1A, 1B 3 & 3A of the Act as well as Order 2 Rule 15 (1) and (2) and Order 13 Rule 1 & 2 of the Civil Procedure Rules. The strongest ground upon which the application is made is the fact that the defendants have admitted the plaintiff’s claim against them for refund and that the sum was to be held by them as stakeholder and not used otherwise without the authority or directions of the plaintiffs.

5. The purpose of a court is to determine a dispute where the disputants cannot agree. Put the other way round if both sides to a litigation agree on all, some or just one issue in the controversy, that issue agreed on cases to be in controversy and is not available for any of the parties to spend its time and use the judicial time in seeking to resolve no issue. The most the court can do is to pronounce itself by a decree to the parties that there being a consensus, let there be a node of approval that it is an agreed position.

6. In this matter it is true that the plaintiff has sought from court three declaratory orders, specific liquidated sum being Kshs.2,500,000 and general damages for breach of contract.

7. However in the application I am called upon to determine by this ruling the plaintiffs other than striking out the defence, seek judgment for the admitted sum of Kshs.2,500,000. In effect the plaintiff is only seeking judgment in terms of prayer (d) in the plaint.

8. The law as enacted under Order 13 Rules 1 & 2 says

Order 13, rule 1

Notice of admission of case.

Any party to a suit may give notice by this pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.

Order 13, rule 2

Judgment on admissions.

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.

9. Expeditions disposal of court disputes has now climbed the ladder and priority of things in our country because the supreme law now dictates against undue delay. In the instant case there being an admission as aforesaid what would justify the defendants’ contention that there are triable issues to go to trial regarding the refund of the sum of Kshs.2,500,000? Indeed, the facts pleaded and regarding the existence of the land subject matter of the agreement, those fact as to who between the parties breached the agreement and allegations of fraud are indeed very weighty and substantial issues but only substantial and triable in the context of the other prayers in the plaint but not the prayer for refund which the defendants say unequivocally to be due to the plaintiffs.

10. The law on summary judgment is founded on the fact that it is undesirable to keep a plaintiff away for judgment where his claim is not disputed. Put the otherway, it is the duty of the court to forthwith enter summary judgment where no prima facie triable issue is put forward against the plaintiffs claim or part of the claim because it would be an antithesis of justice to keep away the plaintiff from his dues where there

is an admission. See **TRUST BANK LTD VS SHREJI TRANSPORTERS [1990] LTD, CACA NO. 96 OF 2001 (Unreported)**.

11. I am satisfied that for the claim for refund of the deposit paid to be held as a stakehold, it is plainly clear and obvious that there is no defence put forward by the defendants. Instead there is an admission I do not hesitate in granting and entering judgment to the plaintiff in that regard.

12. I am however not as convinced that the plaintiff is entitled to the order of striking out the entire defence as disclosing no reasonable defence. I hold the view that regarding the declarations and general damages, the defence put forward raises triable issues as regards those remedies. I would add that if not for the pleadings in paragraphs 6 & 8 of the statement of defence, this would have been a clear matter to proceed to trial by production of evidence and cross-examination. It cannot be said that the allegation of fraud put forth by the plaintiff can be dealt with on a summary manner without more. To me, away from the admissions, the defendants have come within the law as enunciated in **DHANJAL INVESTMENTS VS SHABAHA INVESTMENTS LTD, CACA NO. 232 OF 1997 (Unreported)** that

“If a defendant shows a bona fide triable issue, he must be allowed to defend without condition”.

13. The upshot of the findings foregoing is that the application dated 1/4/2016 is allowed in terms of prayer 1 in that judgement on admission is entered for the plaintiffs against the defendants jointly and severally for the sum of Kshs.2,500,000 plus costs and interests. Interest shall be at the contractual rates of 15% from date of the suit till payment in full.

14. I say jointly and severally because, the 2nd & 3rd defendants, t/a Omondi Waweru & Co. Advocates, did act for the parties in the sale transaction and were deposited with the money to hold as stakeholders while the 1st defendant was the party to benefit from the money once the sale fell through. It is therefore desirable that the judgment is joint so that no dispute or litigation is precipitated between the 1st defendant and that firm of advocates.

It is so ordered.

Dated at Mombasa this 7th day of **November 2016**.

HON. P.J.O. OTIENO

JUDGE