



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 246 OF 2014**

**HALIFAX CAPITAL CORPORATION LIMITED.....PLAINTIFF**

**- VERSUS -**

**ANNE WAMANI NJOROGE.....1<sup>ST</sup> DEFENDANT**

**KINUTHIA NJOROGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me is for judgment on admission.
2. The defendants are said to have made plain, unambiguous and unequivocal admissions in the Defence. In particular, the admissions are alleged to be contained at paragraphs 8 and 9 of the Defence.
3. Secondly, the advocates for the defendants are also said to have made admissions in two of the letters which they wrote to the advocates for the plaintiff.
4. The claim before the court emanates from a Sale Agreement dated 20<sup>th</sup> December 2012.
5. It is common ground that pursuant to that Agreement the 1<sup>st</sup> Defendants, **ANNE WAMANI NJOROGE** and **KINUTHIA NJOROGE**, agreed to sell to the plaintiff, their shares in L.R. No. 139/23. That piece of land was located within Kiambu District.
6. Whereas the whole piece of land measured 7.854 Hectares, the plaintiff was to buy 4.047 Hectares.
7. It is also common ground that the agreed purchase price was Kshs. 50,000,000/-.
8. After the parties had agreed on the purchase price, the plaintiff paid a sum of Kshs. 5,000,000/- as a deposit.
9. On 21<sup>st</sup> October 2013, the 1<sup>st</sup> defendant wrote to the plaintiff, notifying it that the sale transaction had been terminated.
10. Meanwhile, the plaintiff continued to be ready and willing to complete the transaction.
11. When the defendants persisted in their failure to complete the transaction, the plaintiff filed this

case in court.

12. It is the plaintiff's intention to seek an order of Specific Performance, to compel the defendants to complete the sale transaction.
13. In the alternative, the plaintiff prays for;
  - a) *A refund of the deposit amount of Kshs. 5,000,000/-;*
  - b) *Kshs. 730,000/- being the legal costs of and incidental to the preparation and completion of the Agreement;*
  - c) *Kshs. 10,000,000/- on account of lost bargain; and*
  - d) *Costs of the suit.*
14. Relying on the Court of Appeal's decision in **CHOITRAM VS NAZARI [1984] KLR 327**, the plaintiff noted that the court would grant judgment on admission if the said admissions were "*plain and obvious*".
15. And it was the contention of the plaintiff that the admissions made by the defendant were plain and obvious.
16. That case was also cited as an authority to back the submission that the admissions could be in either the pleadings or in any other format such as through letters, affidavits and other documents which were admissible in evidence.
17. In the light of the admissions, the plaintiff submitted that there was no *bona fide* defence to the claim against the defendants.
18. The reason why the plaintiff said that the defendants had no *bona fide* defence was that the statement of defence filed in this case did not raise any *prima facie* triable issue.
19. In the circumstances, the court was invited to grant judgment in favour of the plaintiff, pursuant to the defendants' admissions.
20. Finally, the plaintiff suggested that if the court considered the alternative reliefs sought in the plaint, to be more appropriate, the court ought to instruct the parties to attend before the court for further Directions as regards the claim for loss of bargain.
21. In answer to the application, the defendants explained that Anne Wamani Njoroge (the 1<sup>st</sup> defendant) sought to rescind the sale due to opposition from the members of her family, who declined to sanction the sale.
22. Apparently, the said members of Anne's family expressed their objection to the sale, by writing to the Land Control Board, telling it that they were opposed to the sale.
23. It is not in respect to all sales of land that there was a requirement for the Land Control Board to consent to the transaction. The need for such consent arises only when the transaction is in respect to agricultural land.
24. In this case, the defendants have asserted that the land in issue was agricultural. The plaintiff did not appear to disagree with that contention. Therefore, on a *prima facie* basis, it would appear that the land in issue was agricultural.
25. If that be the position, it would imply that there would have been need for the Land Control Board

to give its consent to the sale of the land.

26. In this case, the court is yet to be shown any consent. If anything, it does appear that the 1<sup>st</sup> defendant never made the application to the Land Control Board, for consent to sell the land to the plaintiff.

27. In the event, if the court were to order that there be Specific Performance of the Sale Agreement, it may be difficult to complete the transaction, as there appears to be no consent from the Land Control Board.

28. But why did I suggest that the sale transaction would have required such consent?

29. First, it is because the subject matter of the transaction is agricultural land. Secondly, the Agreement itself appears to have envisaged the requirement for consent from the Land Control Board.

30. To my mind, the plaintiff appears to have appreciated that the lack of consent would be a major stumbling block in its path to obtaining an order for Specific Performance. I say so because of the suggestion by the plaintiff's written submissions, that it was possible that the court may consider to be more appropriate the alternative reliefs sought in the plaint.

31. The defendants cited the decision in **SIMIYU VS WATAMBAMALA, CIVIL APPEAL NO. 34 OF 1984** as authority to back their arguments concerning the effect to the sale of agricultural land, when there has not been sought, the consent of the Land Control Board.

32. In that case the Court of Appeal noted that the High Court had been right in refusing to order the defendant to refund the money to the plaintiff, under Section 7 of the Land Control Act. The basis for that decision was that the plaintiff had moved the court by way of Originating Summons. But the Learned Judges of Appeal were clear that;

*“The appellants should have sought redress on other proceedings, and whether damages, or a refund under Section 7 as a debt, or any other remedy, is open to them now after the time that has elapsed since 1971, I leave the others to decide”.*

33. In this case, the plaintiff moved the Court by way of a Plaint. Therefore, in principle, it could seek to obtain the reliefs such as of refund of the deposit, compensation for loss of bargain and legal fees.

34. The only question that I need to address in this application, is whether or not the plaintiff can be entitled to those reliefs or any of them, pursuant to the admissions alluded to by the plaintiff.

35. In my considered view, the defendants have only admitted executing the Sale Agreement.

36. But the 1<sup>st</sup> defendant has insisted that the land which was the subject matter of the Agreement was the subject of a customary trust. Therefore, I understand her to be saying that she did not have the legal authority to sell off the land in question, without the express authority of her family.

37. In **AFRICAN COTTON INDUSTRIES LIMITED VS. RURAL DEVELOPMENT SERVICES LIMITED, ELC CASE NO. 212 OF 2013** (At Nyeri), Ombwayo J. expressed himself thus;

*“The last issue therein raised is that of overriding interests in the suit property and the usefulness of the contract than repudiation.... I have looked at Section 28 of the Land Registration Act 2012 and found customary trust rights are some of the overriding interests to be considered in a registered land”.*

38. Therefore, if the defendants can prove their claim that the 1<sup>st</sup> defendant had held the land in trust for the family, that may give rise to an arguable defence.

39. But if the sale cannot be completed because of lack of Land Control Board consent, why cannot the court grant judgment for the alternative reliefs sought? In particular, should not the court grant to the plaintiff judgment which would compel the 1<sup>st</sup> defendant to pay back the deposit which she had already offered to repay?

40. I hold the view that if the alternative prayer was only for the refund of the deposit, (whether or not with interest thereon), it would have been easy for the court to give positive consideration to granting judgment.

41. But in this instance, the plaintiff is also seeking recovery of legal fees which it had paid to its own lawyers. Over and above that claim, the plaintiff was seeking compensation for loss of bargain.

42. Those two heads of claim had never featured either in the pleadings or in any other documents in which the defendants allegedly admitted liability.

43. I find no admission from the defendants in respect to the claims for legal fees and the claims for loss of bargain. Therefore, the court cannot grant judgment in favour of the plaintiff, pursuant to this application which was premised on alleged admissions of the defendants.

44. In the authority cited by the plaintiff, **CHOITRAM VS NAZARI** [1984] KLR 327, at page 339, Chesoni Ag JA (as he then was) made the following position clear;

*“The court should, in an application for judgment on admissions, examine the pleadings carefully to see whether there are no specific denials or no definite refusals to admit. The only exception to the presumption that an allegation of fact made by a party in his pleadings, which is not traversed, is admitted is where the allegation is that a party has suffered damage, and the amount of damages which if not specifically admitted is deemed to have been traversed”.*

45. In this case the plaintiff lay claim to compensation for loss of bargain. In my understanding, that claim is in the nature of General Damages.

46. By dint of the reasoning cited above, the plaintiff’s said claim for compensation is deemed to have been traversed as it was never admitted by the defendants.

47. In conclusion, I find that the 1<sup>st</sup> Defendant readily admitted having executed the Sale Agreement. She also admitted having received the sum of Kshs. 5,000,000/- from the plaintiff. If the sale cannot be completed, as asserted by the defendants, it would constitute unjust enrichment if the defendants were allowed to retain the money they had received. In the circumstances, I gave due consideration to the plaintiff’s request that I do grant judgment for the sum of Kshs. 5,000,000/-, and to thereafter give directions on how the case should proceed in relation to the other claims.

48. In my view, if the court granted judgment for that sum, it may be construed that the court had already concluded that the plaintiff would thereafter not be pursuing the claim for Specific Performance.

49. The position is that the plaintiff’s position currently is still that it had not yet abandoned its claim for Specific Performance. And, as the claim for Specific Performance cannot be granted if the money which the plaintiff had already paid was being refunded, the plaintiff may need to make an election at some point in time.

50. In the event, the application for judgment on admission is rejected. The plaintiff will pay to the defendants, the costs of the said application.

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of March 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Ms. Wanjiru Ngige for the Plaintiff

Miss Nyamai for the 1<sup>st</sup> Defendant.

.....for the 2<sup>nd</sup> Defendant.

Collins Odhiambo – Court clerk.