



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 85 OF 2015

MARTIN GATHECHA GAITI.....PLAINTIFF

VERSUS

DANIEL KIRERA BOSIRE T/A ONGEGU & ASSOCIATES ADVOCATES.....DEFENDANT

RULING

This is the plaintiff's Notice of Motion dated 2nd July 2014 in which it prays for judgment on admission in the sum of Kshs 27,030,000/-. The Plaintiff avers that he was the intended purchaser of a parcel of land known as L.R. No. 14970/89 which was being purportedly sold by one Ephraim Mwangi Maina represented by the Defendant. The sale agreement between the parties was subsequently executed on 4th September 2013. It was after this that the Plaintiff deposited the money amounting to Kshs. 25,000,000/= into to the Defendant's account.

Unfortunately due to allegations of fraud, the sale transaction was not completed. The parties thereafter recorded statements with the Criminal Investigations Department (CID). The Plaintiff claims Kshs. 27,030,000/- from the Defendant who according to him agreed to refund him the full purchase price amounting to Kshs. 25,000,000/- which he has unequivocally admitted owing. It is deponed that the admissions consist of a statement recorded at the CID headquarters and paragraphs 5-7 of his statement of Defence.

The defendant contests the motion by swearing a replying affidavit. In a synopsis, the defendant's case is that he released the completion documents after the Plaintiff paid a deposit of Kshs. 10,000,000/- and thereafter the Plaintiff indicated his intention to terminate the transaction. The Defendant further denies having admitted in writing that he owed the Plaintiff the said monies and termed this action an abuse of court process as there exists criminal proceedings against him. He is ardent that the Plaintiff has not used the prescribed procedure in instituting the suit which should therefore be dismissed.

I have heard the rival submissions. The principles guiding a court in a matter of this nature were well stated in Choitram Vs Nazari (1982 – 88) 1 KAR 437. Madan JA (as he then was) stated -

“For the purpose of Order 12, 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 on to 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”.

That authority is *pari materia* with Order 13 rule 2 of the Civil Procedure Rules 2010 (the Rules) which provides -

“2. 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”.

The admission can be in a pleading, correspondence or other document. What is paramount is that the admission has to be unequivocal and clear. It cannot apply where there are serious questions of law or fact to be argued. In this case the defendant admits both in pleadings and in the statement given to the CID that money was deposited in his account by the Plaintiff amounting to Kshs. 25,000,000/-.

In his defence for example –

“5. The Defendant admits the contents of Paragraph 7 and party admits the content of Paragraph 8 of the Plaintiff in so far as the demand is concerned but states that he has not refused to deliver the said amount of Kshs. 25,000,000/-”

In the statement to the CID which the defendant does not deny making he avers in the operative parts –

“I do aver that the purchaser herein did deposit in my client’s account the total purchase price of Kshs. 25,000,000/- (twenty five million only) in two instalmentsthe funds have not been released to the vendor as the advocate for the purchaser had expressly requested to hold on to the same pending the clearance of many issues that arose while the transaction was ongoing.....I am now obligated under the said agreement to refund the funds as per clause 7(E) and I am in the process of doing the same”

I find that the admission by the Defendant is unequivocal and obvious.

However, to strike out the application for the reason that the suit as brought offends the provisions of Order 52 of the Civil Procedure Rules as sought by the Respondent would not be in keeping with the overriding principle of Sections 1A and 1B of the Act. The Court of Appeal in the case **NICHOLAS KIPTOO ARAP KORIR SALAT -VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR** in declining to strike out an appeal discussed the overriding principle as follows –

“I will demonstrate this paradigm shift by citing three recent decisions of this Court. In Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 Others, Civil Application No. Nai. 173 of 2010 where a notice of appeal was served on the Respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ.A) observed that:-

‘The overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice’

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the Constitution of Kenya, 2010, changed the position. The former

provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

I therefore enter judgment on admission as follows -

- a) Judgment on admission is hereby entered against the Defendant for Kshs 25,000,000/= together with interest at court rates from the date of filing the suit until payment in full.
- b) The balance of the claim shall proceed to trial.
- c) Costs to abide the final judgment.

It is so ordered.

Dated and Delivered at Nairobi this 6th Day of November, 2015

A .MBOGHOLI MSAGHA

JUDGE