REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 525 of 2010

SIMON NJOROGE MUCHIRI …..…… PLAINTIFF

VERSUS

AMOS KABUE MWANGI …….1ST DEFENDANT

MARY NGIMA MUNYU ……..2ND DEFENDANT

R U L I N G

By his amended Plaint dated 24th October, 2011, the Plaintiff pleaded that he entered into an Agreement for sale dated 24th March, 2009 for the purchase from the Defendants a half an acre property on LR No. 2259/343 in Karen, Nairobi (hereinafter "the suit property"), that the purchase price was Kshs.7,200,000/- of which the deposit was Kshs. 3million and the balance was payable on completion, that although he paid the Deposit of Kshs. 3million as agreed, the Defendants failed to complete the Sale and they transferred the suit property to a 3rd party. The Plaintiff therefore prayed for the refund of the said deposit of Kshs.3million together with interest at 16.75% from 24th March, 2009.

The Defendants filed a Defence on 21st February, 2012 which constituted a complete denial of the Plaintiff's claim in its entirety.

On 8th March, 2012, the Plaintiff took out a Motion on Notice under Order 13 Rule 2 and Order 36 Rules 1 and 6 of the Civil Procedure Rules seeking that judgment be entered against the Defendants as prayed for in the Plaint. The grounds were that the Defendants had admitted the Plaintiff's claim, that there was no good defence filed and that the Defence filed was a mere denial. That application was supported by the Affidavit of the Plaintiff sworn on 6th March, 2012. He reiterated his claim in the Plaint and swore that a sum of Kshs.3million was paid to the Defendants' Advocates Ms Munyu and Company on 24th March, 2009, that despite the deposit being paid the Defendants had sold the property to a 3rd party, that the Defendants had admitted his claim in a Replying Affidavit sworn by the 1st Defendant on 13th August,

2010, that the Ruling delivered on 25th March, 2011 by the Hon. Njagi J had made finding that the Plaintiff had made the deposit and the Defendants had offered to refund the said deposit.

Mr. Namachanja, learned Counsel for the Plaintiff submitted that there is no good defence on record and that the admission in the subject Replying Affidavit was unequivocal. Counsel relied on the case of **Agricultural Finance Corporation –vs- Kenya National Assurance Company Ltd (In Receivership) C.A No. 271 of 1996** for the proposition that where there has been an unequivocal admission judgment should be entered at once without necessarily waiting for other issues to be tried. Counsel therefore urged that the application be allowed as prayed.

The Defendants did file a Replying Affidavit sworn by Amos Kabue Mwangi on 23rd March, 2012. They contended that the Defence discloses triable issues and sufficient grounds to proceed to full trial, that the issues raised in the Defence can only be determined after a full trial, that the deposit was paid to the Defendants' lawyers and not the Defendants and that the Plaintiff is not entitled to interest of 16.25% as claimed.

In their written submissions, the Defendants reiterated what had been stated in their Replying Affidavit and stated that the Plaintiff had amended the Plaint without leave and therefore the motion was not properly before the court. They therefore urged the court to dismiss the application with costs.

I have considered the pleadings, the Affidavits on record and written submissions.

This is an application for judgment on admission. The principles applicable in considering such an application were considered and settled in the case of **Choitram –vs- Nazari (1982-88)1 KLR 437 wherein at page 441 – 442** the Court held:-

"For the purposes of order 12 Rule 6 admissions have to be plain and obvious, as plain as a Spikestaff 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 even 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".

What I have to consider therefore is whether the admissions alluded to by the Plaintiff are clear, plain and unequivocal to warrant a determination of this suit without necessarily awaiting a trial.

Looking at the Defendants Defence, it is a general and complete denial of the Plaintiff's claim. I have seen the Sale Agreement dated 24th March, 2009 produced as "SNM1" by the Plaintiff. That Agreement has not been denied by the Defendants. The admissions relied on by the Plaintiff are contained in the Replying Affidavit of the 1st Defendant sworn on 13th August, 2010 and produced as "SNM4". In that Affidavit, the 1st Defendant swore:-

"1. THAT I am the 1st Defendant herein and I have the authority to swear the Affidavit from the 2nd Defendant who is my wife.

2. ……

3. THAT the agreement dated 24th May, 2009 and the Deposit of Kshs.3,000,000/- is admitted.

4. THAT after payment of the said deposit we proceeded with the subdivision process.

5. THAT sometimes in October, 2009 I personally called the Plaintiff and told him that I needed Ksh.75,000/- to pay the Nairobi City Council to enable issuing of final approval to subdivide the property and the Plaintiff told me that he cannot give me any more money.

6. THAT we have not failed to perform our obligations under the Agreement for sale dated 24th March, 2009 that it is the Plaintiff who frustrated the same.

19. THAT we identified an alternative buyer who was willing to help us salvage the whole property and who has since paid the agreed purchase price and taken possession and commenced construction work.

20. THAT in view of what is stated above we are not in a position to give the Plaintiff vacant possession.

21. THAT in view of the above we are ready and willing to refund the Deposit to the Plaintiff."

That Affidavit was sworn in reply to an injunction application filed by the Plaintiff in these proceedings. In a ruling delivered by the Hon. Mr. Justice Njagi on 25th March, 2011, the court in declining the injunction sought stated that:-

"In my humble view, the Applicant can easily be paid back his money and the 1st Respondent has offered to do as much in paragraph 21 of his Replying Affidavit."

I do not think there could be any clearer and plain admission than this. The statements by the 1st Defendant which were also made on behalf of the 2nd Defendant were made on oath. Indeed they formed a basis of the court denying the Plaintiff the injunction sought. What could have changed between 13th August, 2010 and now? I cannot think of anything. I am satisfied that there is clear admission by the Defendants of the Plaintiffs' claim as pleaded.

The issue that the money was not paid to the Defendants but to their Advocates in my view is not genuine. In their Replying Affidavit I have referred to, they did not tell the Court that the said deposit had not been released to them. They clearly bound themselves to refund the same and thereby denied the Plaintiff the injunctive orders sought. Ms. Munyu and Company Advocates to whom the deposit was paid was their Advocates and the money was paid to those Advocates for and on behalf of the Defendants. In any event, it was for the Defendants to join those Advocates to these proceedings if the said Advocates had not released the monies to them.

On the interest payable, I have seen Clause 6 of the Agreement for sale dated 24th March, 2009. It made the sale subject to the Law Society Conditions of Sale (1989 edition). Clause 2(1) (g) of those conditions stipulate that:-

"g. 'interest' means the annual rate of interest specified in the Special Conditions or, if none is so specified, two (2) percentage points above the maximum rate of interest which may be charged by specified banks for loans or advances pursuant to Section 39 of the Central Bank of Kenya Act (Cap.491); provided that, if more than one maximum rate is so specified, the lowest rate shall be applied."

The Plaintiff submitted that the ruling rate of interest of the Housing Finance Corporation of Kenya at the date of the suit was 14.75% per annum and that in claiming the interest of 16.75% he had added 2% to the said rate in terms of Clause 2(1) (g) of the Law Society Conditions. There is no evidence that was placed before me to show that at the time of the filing of the suit, the rate of interest charged by the Housing Finance Corporation of Kenya was 14.75% per annum as submitted by the Plaintiff. Accordingly, I decline to hold that the rate of interest applicable is 16.75%. I will, however, allow interest of 12% per annum to be applied from the date of expected completion i.e. 24th June, 2009 until payment in full in terms of clause 8 of the Law Society Conditions of Sale.

As regards the issue that the Plaint was amended without leave and that the Motion was therefore not properly before the court, my take is that under Order 8 Rule 1(1) of the Civil Procedure Rules, a party is allowed to amend his pleading at least once without leave at any time before the pleadings are closed. As

at the time the Plaint in this case was being amended, pleadings had not closed and therefore the Plaintiff was within his rights to amend the Plaint.

For the foregoing reasons, I find the Plaintiff's Notice of Motion dated 6th March, 2012 to be merited and I accordingly allow the same and enter judgment for the Plaintiff against the Defendants, jointly and severally, for Kshs.3,000,000/- together with interest thereon at the rate of 12% per annum from the 24th June, 2009 until payment in full.

I also award the costs of the application and the suit to the Plaintiff.

DATED and delivered at Nairobi this 6th day of July, 2012.

……..…
A. MABEYA
JUDGE