



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CIVIL CASE NO.660 OF 2015

SHARDACK MUSYOKA.....PLAINTIFF

=VERSUS=

TIARA PROPERTIES LIMITED.....DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 28th September 2015, but filed in Court on 16th December 2016. The application is brought by the Defendant, a limited liability Company which seeks to have the Plaintiff's suit struck out on the ground that the Plaintiff's suit seeks to enforce an offer letter dated 3rd July 2012, which is not a contract as contemplated in section 3 of the Law of Contract Act.
2. The Defendant/Applicant therefore contends that since the parties to this suit had not signed a contract, this court cannot entertain the suit which has to be struck out as it is an abuse of the process of the Court.
3. The Plaintiff/Respondent has opposed the applicant's application based on a replying affidavit sworn on 12th January 2017. The Respondent contends that he has a case against the applicant and that the same cannot be struck out. That the applicant is seeking to benefit from its own breach which is not acceptable in law.
4. The Respondent further contends that he fully complied with what he was required to do and that it is the applicant which did not do its part. The Respondent had paid a deposit of Kshs.1,600,000/=. The balance was to be paid on completion of the house and on signing the agreement for sale. That the applicant completed the houses but decided to refund the deposit without explanation which deposit he declined to take.
5. I have considered the applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties herein. The applicant had started the process of constructing offices and associated units on LR No. 3734/619 Mugumo Road Lavington in Nairobi. It offered to sell unit N. 2A 11 covering 40.40 square metres at a consideration of Kshs.8,000,000/=. The purchaser was expected to pay 20% booking fee payable in July 2012. The balance was to be payable on completion of the offices which was expected to be in September 2014.
6. The Respondent paid Kshs.1,600,000/= being the 20% booking fee within the required time. As the Respondent was waiting to be given an agreement for sale as per the offer letter, he received some cheques in refund of the deposit. He declined to take the refund cheques and filed this suit.

7. The issue for determination is whether the Respondent's suit should be struck out. The grounds for striking out a suit are now well settled. A suit can only be struck out when it is so hopeless that not even an amendment can breath life into it. In the instant application, the applicant is contending that what is in contention was a dealing in land and that as per the law of contract there must be an agreement which is duly witnessed for it to make a basis of any claim. The applicant argues that the offer letter was not a contract and that the Respondent cannot base it to seek orders of specific performance of the contract. That since there was no contract signed between the parties, the Respondent's claim amounts to an abuse of the process of Court.

8. The Respondent argues that there was no ground for the applicant to seek to refund the deposit. That the applicant is the one who was to present a contract for signing which it did not present and is now claiming that it did not go on as there were no approval plans as anticipated which led to it changing the initial concept. The Respondent argues that the applicant did not inform him of any such change and that the change of mind is because the offices prices have gone up and that the applicant is out to enrich itself after it used the Respondent's money to develop the property.

9. The Respondent contends that he is seeking an alternative prayer for special damages and as such his suit cannot be struck out. Both parties have cited very good authorities which are relevant. The offer letter did not provide for any refund of the deposit. To this extent, there is an issue on what happens to the deposit paid which is returned. Does it attract interest or not. Is the Respondent entitled to claim loss of bargain? All these are issues which will have to be determined. The applicant has to say on what basis it was seeking to return money which had been paid in 2012 and was only being refunded in March 2015 without any interest.

10. There are also issues to be addressed whether a letter of offer which refers to a contract which is to be signed in future but which contract is not given as per the offer letter can be taken as part of the documents forming the contract which was anticipated. The Respondent has cited authorities which answer those issues. The applicants kept the Respondent's money for close to three full years before it purported to return the same. There are triable issues whether the Respondent is entitled to refund with or without interest. I find that this is a case which cannot be struck out. I do not find any merit in the applicant's application which is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this *10th* day of *May 2017*.

E.O .OBAGA

JUDGE

In the presence of ;-

Mr Saluni for Defendant/Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE