



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KOOME & KIAGE, J.J.A)

CIVIL APPEAL NO. 175 OF 2008

BETWEEN

PETER KIMANI KAIRU T/A KIMANI

KAIRU & COMPANY ADVOCATES..... APPELLANT

AND

ANNA MARIE CASSIEDE..... 1ST RESPONDENT

BRUNO CASSIEDE..... 2ND RESPONDENT

(An appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (Luka Kimaru, J.) dated 4th June, 2008

in

H. C. C. No. 39 of 2007)

JUDGMENT OF WAKI, JA

The appeal before us is fairly short but it appears to have taken 11 years to determine. That is because the parties at some point took a detour and attempted a settlement leading to the withdrawal of the appeal only for the withdrawal to be recanted and the appeal reinstated for hearing through a court order. See *Peter Kimani Kairu t/a Kimani Kairu & Company Advocates vs Anna Marie Cassiede [6] Another [2017] eKLR* decided on 28th day of July, 2017. I now have to determine whether the High Court (Kimaru, J.) properly considered the pleadings and the law before denying the appellant the opportunity to have his defence considered on its merits and instead entering summary judgment for the respondents.

I may summarize the germane facts from the pleadings and affidavits on record:

The two respondents are a married couple who are nationals of Georgia. In the month of January 2006, whilst in Kenya, they saw an advert in one of the dailies for sale of LR No. 3734/348, a 0.8 acre developed property situate along Othaya road, in Kileleshwa, Nairobi (**the property**). The advert was made by M/s Colburn Holdings Ltd, an estate agent, on behalf of the property owners, Mr. & Mrs. Christopher Hornby (**the sellers**), who were resident in Saudi Arabia. The sellers had instructed the Firm of M/s Kimani Kairu & Company Advocates to act for them, and the appellant is a partner in that Firm.

The respondents visited the property with a director of the Estate agent, one Sharon Hays, and made a decision to buy it. At the offices of the estate agent, they addressed a letter dated 14th January, 2006 to the sellers offering to buy it for Ksh.25 million, subject to clear title with all utilities and rates paid. They also expressed the wish to enlist the services of the appellant if it was acceptable. On 18th January, 2006, the estate agent notified the respondents that their offer had been accepted and requested for a 10% deposit of the agreed price to be paid to the Advocates of the sellers.

There is a dispute as to whether the appellant induced the respondents to instruct his Firm or the respondents made the decision on their own accord, but the appellant ended up acting for both the sellers and the respondents. On 27th January, 2006, the

respondents dispatched from Georgia, the 10% deposit of Euros 28,370 (equivalent to Ksh.2.5 million) into the appellant's client account with CFC Bank Ltd. Subsequently, on 24th February, 2006, the appellant drew up and forwarded a sale agreement to the respondents for execution.

In their response made on 2nd March, 2006, the respondents committed to transferring Euros 286,000 being the balance of the purchase price but raised some issues with the terms of the sale agreement relating to beacon identification and physical planning authority to develop, as well as the occupation certificate from the local authority. The sum of Euros 286,000 was forwarded to the appellant's account on 17th March, 2006 with a caveat not to convert it to Kenya Shillings immediately. The appellant acknowledged receipt of the amount and undertook not to convert it until "*you authorize us to do so or until completion date, whichever is later.*" There was no rejoinder from the respondents.

The appellant then amended the agreement showing the completion date as '*30th April, 2006 or such other date as may be agreed in writing*'. He also drew up the transfer and both documents were executed by the sellers and dispatched to the respondents. The appellant also obtained from the sellers and forwarded the architectural drawings to the respondents on 9th June, 2006. By that time, the respondents had instructed an engineer to make a search and advise on the state of the architectural drawings and the engineer found that some extensions to the original building had not been authorized by the City Council. The appellant promised to contact the sellers for rectification of the architectural drawings, which the sellers followed up and eventually rectified. By then, the respondents had expressed their displeasure with the appellant who advised that they were at liberty to instruct another counsel.

The respondents instructed M/s Ojiambo & Company, Advocates in September 2006 and the appellant forwarded all the completion documents to those advocates. In response, the respondents' advocates asserted that the sale agreement had not been concluded and would not be until the issues of architectural drawings, beacon report and occupation certificate were resolved. The appellant took the view that the sale had been concluded when the offer was accepted and the required consideration paid. The respondents could not therefore insist on a better title than the sellers had, after the contract was concluded. At any rate, they stated, the respondents had visited the property and approved it before giving the offer to purchase it. As far as the sellers were concerned, the respondents were at liberty to take vacant possession of the property. The die was cast and a stalemate ensued.

On 17th November, 2006, the respondents withdrew instructions from M/s Ojiambo & Co. Advocates and notified the appellant that they no longer wished to buy the property. They demanded a refund of the 10% deposit (Ksh. 2.5 million) and Euros 286,000, together with interest on those amounts from the date of payment. The completion documents forwarded to the respondents' advocates were returned to the appellant on 27th November, 2006. The appellant could not comply since, according to him, the transaction had been substantially completed.

The suit that gave rise to this appeal was filed on 31st January, 2007. In it the respondents sought refund of the liquidated sums of Ksh. 2.5 million and Euros 286,000 together with interest, on the basis that there was no consideration for it after withdrawal of the offer to buy the property. The suit was resisted by a defence filed on 12th March, 2007 which was amended with leave of the court on 17th October, 2007. The appellant also applied for and was allowed to serve a third party notice on the sellers on 10th March, 2008. Basically the appellant has maintained all along that there was a contract concluded between the sellers and the respondents once their offer was accepted and the necessary consideration paid. That contract was not subject to another formal contract to be entered into and signed by the parties. As such, all the actions taken by the appellant to pay for, obtain and furnish the respondents with the completion documents were lawful and the respondents were in breach of the contract by demanding more than they had contracted to buy. The sellers had thus complied with their part of the bargain and were entitled to payment.

In their motion dated 5th July 2007 (filed on 17th July 2007), the respondents invoked **Order XXXV rule 1** of the **Civil Procedure Rules (CPR)** (now **Order 36, rule 1** of **CPR, 2010**). They sought summary judgment as prayed in the plaint. It was strenuously opposed through the defence already on record and by way of the replying affidavit of the appellant sworn and filed on 16th October 2007. The parties were heard in oral submissions and they filed authorities. Upon analysing the affidavit evidence and considering the submissions of counsel, **Kimaru J.** made findings that the respondents appointed the appellant to act for them in the sale transaction; that the written offer given by the respondents was conditional upon the property being free from encumbrances; that amendments to the sale agreement as proposed by the respondents were not made by the appellant and therefore there was no basis for payment of the 10% deposit; that the payment of Euros 286,000 was conditional but the appellant unilaterally changed the conditions; that the appellant was serving the interests of the sellers more than the respondents; and that the developments existing on the property were made without requisite planning permission from the Nairobi City Council.

On the basis of those findings the learned Judge held as follows:

"I therefore hold that the plaintiffs established that they did not enter into an agreement for the purchase of the suit property. They did not sign the agreement. Neither did they authorize the defendant to pay the purchase consideration which was deposited with him to the vendors. In any event, even if this court were persuaded by the defendant's argument that the agreement executed by the vendors on the agreement which bound the plaintiffs, paragraph 11 of the said agreement provided that:

"Upon registration of the Discharge of Charge and Transfer in favour of the Purchasers at the Lands Office and possession of the said property being given by the Vendors to the Purchasers, the parties' lawyers shall release the purchase price to the Vendors."

It is common ground that the suit property has not been transferred to the plaintiffs. Possession of the suit property has not been handed to the plaintiffs. It is therefore clear that the defendant acted contrary to the express provision of the agreement that he is seeking to rely on to justify his decision to pay the vendors the purchase consideration before he was instructed to do so by the plaintiffs. Even if this court were to consider that the e-mail written by the defendant on 24th March, 2006, acknowledging receipt of the sum of Euro 286,000 was binding on the plaintiffs, the agreement in question did not have a completion date. The plaintiffs therefore established that the defendant acted contrary to their instructions when he purported to pay the purchase consideration in his custody to the vendors".

.....

I therefore hold that the defence filed by the defendant raises no triable issues that would make this court grant the defendant leave to defend the suit. The plaintiffs established that they deposited the said sums of Kshs.2,500,000/= and Euro 286,000 with the defendant pending conclusion of the agreement in respect of the purchase of the suit property. The defendant acted contrary to the plaintiffs' instructions and released the said purchase consideration to the vendors even before an agreement in respect of the suit property had been executed. The defence of the defendant is a sham".

Those are the findings and holding which aggrieved the appellant. It would appear that the appellant attempted to arrest the Ruling by an application before the same court made on 18th June, 2008 invoking **Sections 3A and 63(e)** of the **Civil Procedure Act (CPA)**. The basis of the application was that the ruling was a nullity since the cause of action arose out of an advocate-client relationship, in which case, the respondents should have invoked the jurisdiction of the court by filing an originating summons as provided under **Order LII Rule 4(2)** of the **CPR**, not by way of a plaint. By his ruling made on 9th day of July, 2008, Kimaru J. dismissed that application and gave leave to appeal. **Civil Appeal No. 176 of 2008 (CA 176/08)** was subsequently filed but was withdrawn under **rule 96(5)** of this Court's rules by an order given on 15th December 2015.

Pending the hearing and determination of both appeals, this Court on application, granted an order for stay of execution under **Rule 5(2)(b)** of the Court's rules on terms that the appellant paid to the advocates for the respondents the sum of Kshs.27,5000,000/= within 14 days. See **Peter Kimani Kairu T/A Kimani Kairu [7] Company Advocates v Anna Marie Cassiede & another [2008] eKLR** decided on 9th October 2008. That order was complied with. Indeed, a further sum of Ksh. 2 million has since been paid by the appellant in a failed effort to have the matter settled amicably.

The memorandum of appeal raises 20 grounds. However, learned Senior Counsel **Mr. Paul Muite**, assisted by **Mr. Kithinji Marete**, both instructed by M/S Kithinji Marete & Company Advocates, in their written submissions which were orally highlighted, urged the appeal in four tranches. The first tranche combines **grounds 3, 4, 5, 6, 18, 19 and 20**, all of which raise the complaint that the suit was a procedural nullity as it ought to have been an 'Originating Summons' instead of a 'Plaint'. **Order 52 rule 4** of the CPR was invoked in aid. It becomes apparent at once that those grounds of appeal relate to the selfsame issue as raised in **CA 176 /08**, which was withdrawn. Indeed, the respondents took objection to the grounds of appeal on the ground that they cannot be re-agitated in this appeal.

With respect, the respondents are right in that objection. As stated earlier, CA 176/08 arose specifically from a decision of the trial court relating to the procedural issue. That appeal was subsequently withdrawn and there was no application made to re-instate it. The only application made related to this appeal, and as earlier stated, it was re-instated for hearing. In my view, the withdrawal of CA 176/08 crystallized the ruling of the trial court on the issue and it would be an abuse of court process to rehash it. Indeed, in my finding, the issue is *res judicata*. It follows that the tranche of grounds of appeal relating to procedural impropriety in filing the suit are misguided and I decline to discuss them.

The second tranche covers **grounds 8, 9, 12, and 13**. They all attack the findings made with finality by the trial court, on the basis of untested affidavit evidence. According to counsel, such were the findings that the respondents did not authorize the appellant to pay the purchase price to the sellers; that possession of the property had not been handed over to the respondents; that the appellant had forgotten that he owed a duty to the respondents; and that the appellant favoured the sellers or disregarded the respondents' instructions. In counsel's submission, the trial court erred in failing to hear oral evidence from the parties and their responses in cross examination.

The third tranche urges **ground 7** only challenging the finding that there was no contract entered into between the parties, and that there was only an offer which was subject to contract. Counsel submitted that in a transaction for sale of land, a written offer and acceptance, coupled with payment of consideration constitutes a valid contract. The **Law of Contract Act, Cap 23**, which applies the English common law of contract to Kenya was relied on. In counsel's view, the drawing of a formal agreement thereafter, or stating that the offer was "*subject to contract*" does not detract from that legal position. For that proposition, counsel relied on the High Court case of **Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR** which applied the English Supreme Court decision in **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14** that using the phrase "subject to contract" during negotiations did not prevent an enforceable contract from being formed. It was held that *'whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the*

parties had agreed on all terms essential to form a contract'.

Counsel further submitted that what matters which is determined, according to **Lord Denning** was the intention of the parties **MR** in the case of **Storer v Manchester City Council [1974] 1 W.L.R. 1403**, as follows:-

“In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

Counsel concluded that there was no consideration of the intention of the parties in this matter and therefore the trial court was in error.

Next urged were **grounds 10** and **11** positing that the trial court inexplicably imported an agreement between the parties after holding that there was no agreement. The divergence of opinion, in counsel's view, precipitated a triable issue and called for oral evidence.

Lastly counsel urged **grounds 1, 2, 14, 15, 16** and **17** which dwell on the principles of summary judgment. Several authorities on the law were filed and referred to, including: **ICDC v. Daber Enterprises Ltd. (2000) EA 75**; **Harit Sheth T/A Harit Sheth Advocates v. Shamas Charania [2014] eKLR**; and **Dhanjal Investments Limited v Shabaha Investments Limited [1997]** all to the effect that summary judgments are only justified in plain and obvious cases and that where a defendant shows a *bona fide* triable issue, he must be allowed to defend without condition.

Several authorities were also cited on what constitutes a triable issue, including: **Kenya Trade Combine Ltd v N. M. Shah [2001] eKLR**; **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR**; **Job Kilach v Nation Media Group Ltd, & 2 Others [2015] eKLR** and **Gupta V. Continental Builders Limited (1976-80) 1 KLR 809**--all to the effect that a triable issue is a matter warranting further interrogation or intervention by the court during full trial, and not an issue that would succeed.

In counsel's submission, the trial court misconstrued and misapplied those principles and failed to identify the serious triable issues raised by the appellant in his defence, as amended, and the affidavits on record. Failing to hear the appellant on his defence amounted to deprivation of the appellant's rights to access to justice and fair hearing as contemplated in **Articles 48** and **50** of the **Constitution**. In counsel's view, the decision of the trial court was draconian and had far reaching financial consequences reflecting on the appellant's livelihood and profession.

In conclusion, counsel identified several triable issues as follows:-

“(i) Was there a legally binding contract between the Respondents and the vendors and if so, what were the terms?

[7] Did the Respondents expressly instruct the Appellant to act on their behalf?

[8] On what terms were the sums of Kshs.2,500,000 & Euros 286,000 to be held?

[9] Did the vendors hand over possession of the subject property?

[10] Were the Respondents entitled to a refund of the sums claimed in the Plaint? If so, was the refund in Euros or Kenya Shillings?

[11] Subject to (5) above how much were the Respondents entitle to.

[12] Who pays the legal fees of the appellant?

[9] Was any interest payable on the deposits made?”

In response to those submissions, learned counsel for the respondents **Mr. Aldrin Ojiambo**, instructed by the Firm of M/S Ojiambo & Company Advocates, filed written submissions which were orally highlighted. No authorities were filed but counsel relied on the **ICDC** and **Gupta** cases (supra) cited by the appellant's counsel. He submitted that the defence filed by the appellant was a sham, and raised no *prima facie* triable issue at all to call for a trial. Counsel supported the findings of fact made by the trial court, particularly that there was no sale agreement or contract concluded between the parties. That is because the deposits paid to the appellant were to be held pending conclusion of the transaction and only be paid out upon registration of transfer and handing over possession of the property to the respondents. As there was no sale agreement, submitted counsel, there was no lawful excuse for releasing the sale proceeds to the sellers, hence the

demand for refund.

Secondly, there was no triable issue as held by the trial court because the defence that the release of the deposits was based on a concluded contract was plainly a sham. All there was, was a draft agreement, unsigned by the respondents, which provided the terms upon which the deposits would be released to the sellers, but even those terms were not complied with by the appellant.

Finally counsel observed that the appellant had partially complied with the Decree after paying the principal amount and only the balance comprising of interest accrual is outstanding. He submitted that there was no basis for setting aside the orders in those circumstances.

I have considered the matter fully. As stated at the opening paragraph of this judgment, the main issue is to determine whether the trial court considered the pleadings, affidavits and the principles of law applicable before denying the appellant the opportunity to have his defence considered on its merits, and instead entering summary judgment in favour of the respondents. For if there was a judicious exercise of discretion, then it matters not that we may be of a different view in the matter. We must be slow to interfere. The principles are now well settled in many previous decisions but, in order to keep them in focus, I take them from Madan, JA in ***United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] KLR 898*** :

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

The cause of action in this matter, as well as the motion that gave rise to the appeal, arose before the amendment of the civil procedure rules in the year 2010, and therefore it is the old rules that govern the matter before us. The motion filed by the respondents thus invoked **Order XXXV rule 1** which provided, in relevant part, as follows:

"1. (1) In all suits where a plaintiff seeks judgment for -

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days.

2. (1) The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

(2) Any set-off or counterclaim may entitle a defendant to defend to the extent of such set-off or counterclaim".

The same rule was reproduced in the CPR, 2010 as **Order 36 rule 1** but was amended significantly to open only a small window for applications under that rule, by the inclusion of the words: ***“but not filed a defence”*** after the words: ***“where the defendant has appeared”***. The logic of the amendment was that after the filing of a defence, and in the absence of a reply, there would be a joinder of issues under **Order VI rule 10(1)** CPR. It would then be a contradiction in terms to seek summary judgment on the basis that there was no triable issue when there is a joinder of issues in the first place. If the defence filed was not reasonable or was scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of court process, then the rule available for striking out such defence is **Order VI rule 13**, CPR.

The appellant had entered appearance in this matter on 26th February 2007 and filed his defence on 12th March 2007, while the motion by the respondents was filed long after the joinder of issues on 5th July 2007. There was no assertion that the defence had any of the infirmities listed under **Order VI rule 13** and perhaps that is why the respondents did not invoke that rule. Nevertheless, as is clear from the old rule, a plaintiff was at liberty, after the defendant enters appearance, to seek summary judgment for the amount claimed. In the case of ***Richard H. Page and Associates Ltd vs Ashok Kumar Kapoor (1976-80) 1 KLR 1394***, Chesoni J. (as he then was) held that the ordinary time for making an application for summary judgment is after the defendant has appeared, and when the defence has not been filed, but such an application may be made after the defence has been filed, in which case the Plaintiff must satisfy the Court that the delay is justifiable. It follows that any authorities decided after the amendment to **Order XXXV rule 1** must be distinguished accordingly.

Order XXXV rule 2 provides for the manner in which a defendant may resist such application. In this case there was a defence filed and several affidavits. The defence was amended with leave of the court before the motion was heard and, as always, the amendment goes back

to the original pleading. It is the amended defence that ought to have been considered. A further application to enjoin the sellers in the suit was also allowed by the court before the hearing of the respondents' motion, which was also a matter for consideration by the trial court.

I must now examine the principles that should have guided the court in the exercise of its discretion in this matter. The trial court was indeed aware of those principles as it cited the case of Giciem Construction Company v Amalgamated Trade and Services (1983) KLR, which, as in this case, involved an alleged contract and the terms thereof, and the Court upheld the finding that there were triable issues. The trial court cited the dicta of **Chesoni JA**, who stated thus:

“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.” (emphasis added)

For his part, **Hancox JA** stated:

“The proper principles to be considered in a case such as the present were set out in the locus classicus in East Africa on this subject, namely Zola v Ralli Brothers [1969] EA p 691, in which Sir Charles Newbold said at p 694:

“Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment.

.....

This court on appeal will therefore examine the decision of the judge in the court below together with the material before him to see if there really was an arguable defence or triable issues raised”.

Learned counsel on both sides do not differ on the principles applicable. It is in their application of the principles that they part company. They agree, as held in the authorities, that to justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary,

there has been discovery and oral evidence subjected to cross-examination. What amounts to a triable issue is also settled on authority, thus:-

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.” The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues.....

Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant’s right to defend the suit. [Emphasis added].

-----See Harit Sheth T/A Harit Sheth Advocates v Shamas Charania [2014] eKLR

Finally, on the principles, this Court stated in the case of Baldev Raj Aggarwal v Kamal Kishore Aggarwal (Nairobi civil appeal No 48 of 1985) that:

“This Court will resist with as much fortitude as it can command any attempt to weaken the effect of order 35. At the same time, we shall remain vigilant to ensure that no defendant with a reasonable or arguable defence who comes to Court is deprived of an opportunity to put it forward. It is in our view more unjust to shut out a defendant with a good defence than to require a plaintiff to wait a little longer and prove his claim against such a defendant on the merits.”

See also Lalji t/a Vakkep Building Contractors v Carousel Limited [1989] eKLR.

Can it be said in the matter before us that it is plain and obvious that the appellant's defence disclosed no triable issues?

One of the central planks of the respondents' case was that they were in the offices of the appellant when they made the offer to buy the property and that they were enticed by the appellant with promises of cheaper legal services to retain him as their advocate in the transaction. They also state that the offer to buy the property for Ksh. 25 million was 'subject to contract.' All these assertions are denied by the appellant who asserted to the contrary that the offer and acceptance were completed away from the appellant's offices and the appellant made it clear

when approached for appointment as the respondents' advocate, that he had been retained by the sellers and if there was any conflict, the respondents were at liberty to seek the services of other counsel. According to him, the basic essentials of a contract were met when the intention of the parties was clearly identified through the offer, acceptance and payment of consideration. It was for the respondents to satisfy the court that there were other terms which the appellant, as counsel, did not comply with.

In my view, that was a serious contestation that ought to have been subjected to further investigation. It was a triable issue which went to the root of the liability that was visited on the appellant. More importantly, there was a categorical finding by the trial court that there was no contract of sale between the parties. Ironically, the court also found that the appellant did not comply with the terms of the agreement drawn between the parties. I agree with the appellant that the parties should have been subjected to oral evidence, tested in cross examination, on whether there was a contract and if so, the exact terms thereof. It was a triable issue. Furthermore, the amended defence pleaded that the issues raised by the respondents about non approval of architectural drawings and occupation certificate became non issues when the Nairobi City Council granted them, and that all completion documents for the sale transaction were at the respondents' disposal. The trial court made no reference to the amended defence and there was no reply to it by the respondents. It was a triable issue. The other issues raised before us by the appellant as listed above are not trivial either. Generally, the documents exhibited with the affidavits on both sides are not beyond question, and an opportunity should be given to the parties to test their respective stories on merit. I so find.

As only one *bona fide* triable issue would suffice to grant the appellant leave to defend the suit, I think the appeal is meritorious. I would allow it with the consequence that the ruling and orders made by the High Court on 4th June 2008, as well as the decree issued in consequence thereof on 7th August 2008, shall be and are hereby set aside. I would substitute therefor an order rejecting the notice of motion dated 5th July 2007, and granting unconditional leave to the defendant to defend the suit .

Ordinarily, the parties ought to revert to the *status quo* obtaining as at the time the decision of the High Court was made. However, I am not oblivious to the peculiar circumstances of this case and its history over the last 11 years. I would order that the *status quo* as exists at the time of this judgment shall remain until the hearing and determination of the suit in the High Court. The costs of this appeal as well as the costs in the court below shall abide the result of the trial.

As Koome JA is in agreement, the Orders shall issue accordingly.

Dated and delivered at Nairobi this 19th day of July, 2019.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KOOME JA

[1] I concur with the Judgment of Waki, JA entirely, and in doing so, I wish to make a few observations of my own. The facts are well set out in both judgments of my brother Justices Waki and Kiage, JJ.A as indeed most were common ground and I need not restate them save to restate albeit briefly a few high lights so as to place my opinion in perspective.

[2] At the center of controversy was whether the sum of Ksh. 25,000,000 paid towards the purchase of LR No. 3734/348, a 0.8 acre developed property situate

along Othaya road, in Kileleshwa, Nairobi (**suit property**) paid to *M/s Kimani Kairu & Company Advocates* (appellant) by the *Marie Cassiede* and *Bruno Cassiede* (respondents) was subject to a contract of sale. On 11th January, 2006 both respondents made an offer to purchase the suit property at a price of Ksh. 25,000,000. They also appointed the firm of the appellant to act for them in the sale transaction. It remains in my view a disputed fact whether the appellant pressured the respondents to appoint his firm as their advocate as he was already acting for the sellers, or that he misrepresented to them that it would be cheaper for one advocate to act for both parties.

[3] Be that as it may, pursuant to that offer the respondents transferred to the appellant's account a sum of Euros 28,370 being an equivalent of Ksh. 2,500,000 on 27th January, 2006 and on 15th March, 2006 transferred the balance of Euros 286,000 representing the balance of the purchase price. The appellant forwarded to the respondents a draft sale agreement of the suit property and that is where the relationship of advocate/client started collapsing. The respondents demanded to be furnished with documents of title, site beacons, architectural drawings and building approvals for the house erected on the suit property. The long and short of the matter is that after much back and forth the appellant supplied the respondents architectural drawings which showed a simple two bedroom bungalow and not the massive 6 bedroom property standing on the suit property.

[4] For this reason the respondent declined to sign an agreement, withdrew the offer to buy the suit property and demanded a refund of the

purchase price. On the other hand the appellant forwarded to the respondents, the sale agreement and transfer duly signed by the sellers and intimated that the suit property was available for them to take vacant possession. The appellant also indicated that if the approval of the building plans was the problem, an architect would be able to adjust the drawings and seek the necessary approvals which eventually they did. The respondents would take none of that and proceeded to file a suit claiming the said sum with interest at the court rate from the dates the deposits were made until full payment. The appellant filed a defence.

[5] In his defence the appellant generally agreed that he received the sums pleaded but he claimed that it was in performance of the respondents' contractual obligations under the said contract; that the appellant forwarded the sale agreement as well as the transfer both duly signed by the sellers to the respondents with instructions to sign them so as to secure the registration of title but they failed to do so; also the property agents informed the respondents that the suit property was vacant and they were informed to proceed and take possession thereof but they declined. Also the issue of drawings was not within the advocates' domain, as he tried to get them from the relevant authorities which took some time.

[7] On closure of pleadings, the respondents filed an application seeking summary judgment which application was allowed. In so doing the learned Judge, Kimaru J., concluded that;

“I therefore hold that the defence filed by the defendant raises no triable issues that would make this court grant the defendant leave to defend the suit. The plaintiffs established that they deposited the said sums of Kshs.2,500,000/= and Euro 286,000 with the defendant pending conclusion of the agreement in respect of the purchase of the suit property. The defendant acted contrary to the plaintiffs' instructions and released the said purchase consideration to the vendors even before an agreement in respect of the suit property had been executed. The defence of the defendant is a sham”.

[8] The appellant challenged the aforesaid orders and I need not repeat the grounds of appeal, and the elaborate submissions made by the respective counsel either in writing or during the plenary hearing which I have considered and reflected on at length. It seems to me that there are hidden implications in the way this transaction was carried out that required the respondent to be given a merit hearing. I recognize that the total purchase price was paid to the appellant to hold in trust and not to release to the seller. I nonetheless also ask myself what was the import of the letter of offer made by the respondents to the seller and what was the significance of its acceptance. Was the offer subject to a sale agreement, or was the sale agreement a condition precedent? Was the respondents' offer to buy the property as it was; did they inspect the property; did they indicate any terms and conditions in the offer; was it subject to production of approved architectural development plans? Why for example did the respondents deposit the entire purchase price before signing the sale agreement; was it to hold the property so that it was not offered to other buyers or it was subject to the offer or the sale agreement that had not been prepared?

[13] While these questions linger in my mind, and I dare say that they form part of what I discern to be triable issues, I must also say I appreciate that the Judge was exercising his unfettered discretion, in allowing the application for summary judgment. I am also cognizant of the fact that this jurisdiction is sparingly exercised as the Judge should always ensure that discretion is exercised judiciously; the ultimate goal being that a party with a plain claim should not be delayed by a defendant who deliberately avoids or prolong the hearing so as to obstruct justice. In this case, the appellant pleaded that the sale agreement with a signed transfer were availed to the respondents and so was the house in vacant possession and that the letter of offer which was accepted was a contract from which the respondents could not just resile from.

[14] Consequently I have further wondered whether there was a meeting of the minds in the circumstances of this matter where a buyer deposits the entire purchase price and the seller signs a sale agreement and a transfer both of which are deposited with the common advocate and they are forwarded to the respondents. In this regard I am persuaded by what was said by **Lord Denning MR** in the case of **Storer vs Manchester City Council [1974] 1 W.L.R. 1403**, as follows:-

“In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

[10] To me the defence put forward by the appellant was not hopeless and a hollow sham, and I say so with a caution that a defence need not be one which must succeed. All the appellant needs is to raise one triable issue. A right to a hearing is a constitutional right that is well protected as a fundamental right. In a case such as this, I agree with the judgment of Waki, JA that if the appellant is denied a forum to ventilate his defence, it would leave a bitter taste in his mouth that the ends of justice would not be met. After all, the entire sum that was deposited by the respondents has already been paid to them and therefore a trial by way of hearing the matter will not prejudice the respondents in any way.

Accordingly I allow the appeal in the terms proposed by Waki, JA.

Dated at Nairobi this 19th day of July, 2019

M. K. KOOME

.....

JUDGE OF APPEAL

JUDGMENT OF KIAGE, JA.

The procedural history, background facts, grounds, submissions and issues in this appeal have been set out admirably in the lead judgment of my learned brother Waki JA, which I have had the benefit of reading in draft. It is unfortunate that I am respectfully unable to agree with the conclusion and determination reached by the majority that Kimaru J exercised his discretion improperly, or that he was plainly wrong in entering summary judgment against the appellant before us.

The learned Judge did so in a ruling dated 4th June, 2008, on an application by the respondents herein dated 5th July, 2007, seeking judgment as prayed in the plaint on the stated grounds that;

- (3) the applicants retained the legal services of the defendant in an intended purchase of a house in Kileleshwa;**
- (4) the plaintiffs in readiness of the transaction, deposited the sums claimed with the defendant in trust and upon terms;**
- (5) the house was found not to have been approved by the relevant authorities and the plaintiffs declined to sign the proposed Sale Agreement;**
- (6) in the premises, no contract for sale of land consummated;**
- (7) despite repeated demand, the defendant has refused to refund the money claimed;**
- (8) the defendant has no right in the money claimed and is under obligation to refund the same;**
- (9) the defendant is justly indebted to the plaintiffs;**
- (10) the defence filed herein is a mere sham that does not raise any triable issue;**
- (11) the grant of this application will save the court's time, save the parties costs of litigation and serve the ends of justice.**

From my own perusal of the record there is no doubt that the appellant, an advocate who was already acting for the vendors **Mr. & Mrs. Hornby** was retained by the respondents as intended purchasers in the transaction involving a prime 6-bedroomed property erected on **L.R. No. 3734/348** along Othaya Road in Kileleshwa. Besides the averments in the rival affidavits, the paper trail comprising correspondence between the appellant and the respondents tell what appears to me to be a rather straight forward story;

2. on 14th January, 2006, the respondents made a written offer to purchase the property for the sum of Kshs.25 Million which was the vendors' asking price,

3. the said offer was explicit that it was *"subject to a clear title with all utilities paid up to date and rates clearance,"*

4. on 18th January, 2006, the appellant wrote an email to the respondents who are residents of the Republic of Georgia conveying that their offer had been accepted. He also gave his client account details for the request of 10% deposit. The email ended with the statement: *"Mr. Kimani will be in touch regarding sale agreement and anything else to be done"*

5. on 27th January, 2006, the respondents wired some 28,370 Euros being the equivalent of Kshs.2.5 Million into the appellant's client account,

3. on 24th February, 2006, the respondent sent a draft agreement to the respondents for their approval,

4. by an email sent on 12th March, 2014, the respondents made a number of comments regarding the draft sale agreement including, on planning consent to the original structure, this;

"we would request to have the originals of planning consent to the original structure and any further extension and the accompanying habitation certificates.

Please could you confirm that the rates correspond to the current structure of the house."

- on 11th March, 2006, the respondents addressed an email to the appellant as follows;

“Dear Mr. Kimani,

I am sending today a bank transfer order of an amount of 286,000/= euros to your account. If it is possible, please do not convert it into kshs. immediately. According to my estimation, this should be enough to cover the balance for the purchase of the house (based on eur/kshs 84 rate). Once the funds have been credited on your account, could you please inform us of the amount effectively received?” (My

emphasis)

- That transfer was duly made and in response the appellant by an email dated 24th March, 2006, addressed the respondents as follows;

“Dear Mr. & Mrs. Cassiede,

We write to inform you that our bank yesterday informed us that they had received from you euro 286,000/= (see attached). The said amount has been put on account in euros and will not be converted into Kenya Shillings until you authorize us to do so or until completion date whichever is later.

Meanwhile, on Monday next week we shall forward to you via FedEx courier service, the Agreement for Sale and Transfer for execution by you and return.” (My emphasis)

- The appellant duly forwarded the agreement of sale to the respondent. It had been pre-signed by the vendors and invited the respondents to sign.
- The respondents did not sign, however, because they took the view that a number of significant issues had not been addressed. By their e-mail dated 22nd June, 2006, they in particular raised concern that;

“there was no additional paperwork on the file relating to the extensive extension work that we witnessed. It appears certain that no occupation certificate has ever been issued for the extensions.”

- At this time there were long lulls and lapses on the part of the appellant causing the respondents to start querying the state of the monies they had paid to the appellant including an email dated 3rd July, 2006, in which they said,

“Dear Mr. Kairu,

*We have already e-mailed you two times requesting you to confirm that you are holding our monies to our **accounts, the balance of the purchase price is still in Euros and the interest rate that is being earned.***

To date we have not received a reply. Please reply with full details. Anna-Marie and Bruno Cassiede.”

- They e-mailed again on 6th July, 2006, addressing the appellant thus;

“Dear Mr. Kairu,

Thank you for your email of the 4th July 2006.

In your email of the 28th June 2006, you informed us you were going to discuss the outstanding issues with the vendors and added meanwhile, please note that the above property is yours and that is why we had informed you that you should put in a tenant and start earning rent.

For the second time we asking you to clarify:

How and when did the house become ours?

You also say that you will account for the monies we sent when the transfer is completed. We are clearly requesting that you provide us with this information now.

So we ask, for the fourth time:

Please confirm that you are holding the 10% deposit to our account in shillings and declare the interest rate it is attracting.

Please confirm that you are holding the 90% balance (along with the rest) in our name in a euro account and the interest that it is attracting.

Yours sincerely,

Anna and Bruno Cassiede.” (My emphases)

- Matters had clearly gone south rather rapidly and the respondents instructed the firm of Ojiambo & Company Advocates to represent them in the transaction. Those advocates by a letter dated 5th September, 2006, repeated verbatim on 11th September, 2006, addressed the appellant thus;

“01/C0008/1

5th September, 2006

Kimani Kairu & Company Advocates, Marakwet House, Elgeyo Marakwet Road, Dropping Zone No. 3, Revlon Professional Plaza, Nairobi.

Dear Sir,

RE: PROPOSED SALE OF L. R. NO. 3734/348 - OTHAYA ROAD CHRISTOPHER & NANCY HORNBY TO ANNA & BRUNO CASSIEDE

We are instructed by Anna & Bruno Cassiede to represent them in this transaction in which you act for the Vendors.

We have perused e-mail correspondence passing between you and our clients and it appears the Vendors are yet to produce title deeds, deed plans, building plans and other documents necessary to identify the Vendor's title, nature of encumbrances, the property and the developments thereon. Further, that no Sale Agreement has been concluded between the parties. Our clients are unhappy about this delay.

In anticipation of the sale, our clients had paid you 10% deposit in February, 2006, to hold as stakeholder being a show of their commitment. Thereafter our clients wired 286,000 euros to you with instructions that you hold it in that currency to their order.

Our urgent instructions are to peruse the draft Sale Agreement, and the documents of title. Please let us have the draft Agreement, copies of title documents, Building Plan for the developments on the land to enable us advise our clients. It is urgent that a Sale Agreement be concluded.

Finally, our clients demand immediate return to them of 286,000 euros with interest. You may continue to hold 10% deposit pending execution of the Sale Agreement. Yours faithfully,

Aldrin Ojiambo

Ojiambo & Co. Advocates

CC. Anna & Bruno Cassiede.” (My emphases)

The appellant's response to that letter by one of his own dated 13th September, 2013, was to the effect that he had sent the Sale Agreement and transfer documents to the respondents but they had not returned them to enable the appellant to attend to registration. He also expressed the vendors' preference that the respondents who had paid the full purchase price for the property “to take possession immediately as they continued to incur management expenses thereon as the house has been vacant for several months now.”

Doubtless by this time a proper impasse had occurred and it was not long thereafter that the respondents demanded, by their letter dated 17th November, 2006, an immediate refund of the monies paid to the appellant. He did not pay and the appellant duly filed suit for the same.

The appellant's response to that suit as expressed in his amended defence was essentially as captured in paragraphs 4 and 7;

4. ... the defendant avers that the offer and acceptance to purchase the subject property was made to an estate agent namely Colburns Holdings Limited. The defendant avers that there having been an offer in writing made by the plaintiffs, which offer was accepted by the vendors in writing, there is an admission on the part of the plaintiffs that a legally binding contract was entered into between the plaintiffs and the vendors in respect of the subject property.

7. ... the defendant admits paragraph 9 and 10 of the plaint only in as far as the same states that he received the sums pleaded. The defendant avers that the said sums were paid by the plaintiff in performance of their contractual obligations under the said contract and that the same were paid out to CFC Bank Limited and Commercial Bank of Africa Limited to discharge the liabilities on the title of the subject property after the completion date as requested by the plaintiffs.” (My emphases)

That was the state of the pleadings, and of the documentation by way of correspondence, when the respondents applied for summary judgment.

I have no doubt in my mind that if ever a plain and obvious case of money being owed by a defendant to a plaintiff, this was such case. It seems clear to me that shorn of all the legal niceties, sophistries and gymnastics, the position plain and simple is that the appellant was in receipt of money under terms that he would not release the same unless certain things occurred. Those things did not occur and he had absolutely no colour of right to release the same, if ever he did. And if he did, he stands obligated to refund the money to the respondents.

The law on summary judgment is not doubtful or obscure at all. It is as clear as the noon day sun: In a proper case where there really is no answer worth the name to a plaintiffs' liquidated claim, then, on application, the court ought to enter judgment without further ado. If an answer does not exist from the inception of the claim it will not somehow germinate and mature through a process of jural germination or spontaneous animation. Giving a case time and subjecting it to the process of trial will not create some magic defence somewhere along the way. And that is why I would not myself subject litigants to an empty ritual in the name of giving a defenceless defendant his day in court. Courts are called upon to see defences maintained for what they are. Some are genuine *bona fide* and worth exploration but some, alas, are ghostly, chimeric vaporous and insubstantial, existing in pleaded words craftily crafted, but shadowy and flimsy, mere mirages when juxtaposed with when the cold hard facts that emerge from even a cursory look at the documents and correspondence placed before the court.

The defence mounted by the appellant and the affidavit he swore did little more than skirt around the stubborn facts of money paid under clear terms and not to be otherwise released. Release contrarily created a legal obligation to pay and the learned Judge was correct to so find. His view, with which I entirely agree, was that the respondents had established that the appellant acted contrary to their instructions when he purported to pay out the purchase consideration in his custody. The respondents were categorical in their 12th March, 2006, instructions that the appellant was to await their instructions on when to exchange from Euro only the required amount into Kenya Shillings. The appellant well understood those instructions and committed to honour them by not converting into Kenya Shillings until they authorized him to do so or until completion date, ***whichever was later***.

It seems to me quite plain from all the correspondence that the respondents never gave instructions for the release of the money. In fact, at no point did the appellant advise them or their new advocates that he had released the same despite numerous requests that he give an account of the state of the money. Even when he first filed his defence he did not mention release. It is a matter that only emerged months later in the amended defence. He now pleaded that he had paid the money to CFC Bank Limited or Commercial Bank of Africa Limited ***"to discharge the liabilities on the title of the subject property after the completion date as requested by the plaintiffs."*** With great respect, that was a case of dodgeful pleading. Nowhere on record did the respondents request the appellant to pay to those two banks. Nowhere in the correspondence and even in the agreement was there mention of liabilities in the title to be discharged. If anything, clause 6 of the draft agreement sent to the respondents states that ***"the property was sold subject to the terms and conditions on which the vendors hold the same but otherwise free from all encumbrances."*** It is not difficult to see that by that pleading the appellant was belatedly springing a surprise. Pleadings are not evidence, however, and the evidence on record showed a different story. In any event, the appellant clearly committed himself to release on the respondents instructions or completion, ***whichever was the later***. This meant that even had there been completion (*and it is clear from the record there never was*) he was obligated to await the later event of instructions from the respondents and these never came.

It is the appellant's contention, despite the overwhelming evidence to the contrary, that so long as there was an offer to buy the property, which the vendors accepted, there was a contract and an obligation to pay crystallized. This is falsified by the trove of correspondence indicative that there was much that was yet to be settled. This is the reason the respondents never signed the agreement. So, is the ***"effective and binding contract"*** the appellant spoke of between the vendors and themselves? Which signed agreement was there between the vendors and the respondents? To my way of thinking the purchase of a house in Kileleshwa is not the same as the purchase of a bunch of bananas at Keumbu, a sack of carrots at Karatina or a goat at Mogotio markets. There is more to be thrashed out and agreed in the purchase of real property than just the price. And the agreement would ordinarily be reduced into an Agreement of Sale which the parties execute. That never occurred in this case.

When the learned Judge entered summary judgment as he did, and it is my firm conviction that he was, in the circumstances of this case correct in doing so, he was exercising a judicial discretion. That being so, we as an appellate court are enjoined to approach the matter with circumspection. We do not wish to overturn and reverse a Judge's exercise of discretion even when we are certain that were we the ones deciding the matter in the first instance we would have decided differently. As has been said in a long line of authorities, we would be entitled to interfere with a Judge's discretion only if, as was held in **UNITED INDIA INSURANCE COMPANY LIMITED & 2 OTHERS -vs- EAST AFRICAN UNDERWRITERS (K) LIMITED [1985] KLR 898;**

- he misdirected himself in law; or

- he misapprehended the facts; or
- he took into account considerations he should not have; or
- he failed to take into account considerations he should have; or, finally
- his decision, though discretionary, is plainly wrong.

See also **MBOGO -vs- SHAH [1968] EA 93**

Given the facts as I have endeavoured to highlight them herein from the evidence on record, I do not think the learned Judge misapprehended the facts at all. He also did not take into account any consideration he ought to have, nor failed to take into account what he should have. I also am confident that he arrived at a just and fair determination of the matter in requiring the appellant to pay back to the respondents the substantial sums of money that he wrongfully and contrary to express instructions released.

The only straw the appellant clutches on, in my estimation, is the contention that the learned Judge misdirected himself in law by granting summary judgment in a matter that ought to have awaited trial in the normal way instead of being determined on affidavits. This argument appears to me, with great respect, to be spurious as well. I have carefully read the learned Judge's ruling and it is clear that he fully appreciated and bore in mind the law on summary judgment. He was cognizant that it is a jurisdiction to be sparingly exercised and in the clearest most obvious cases where the defendant doubtless is indebted to the plaintiff and what defence he conjures is really, on proper analysis, a sham and a bubble unable to dislodge the evidence of liability presented by the pleader for judgment. He properly understood the law as set out by this Court in **GICIEM CONSTRUCTION COMPANY -vs- AMALGAMATED TRADE & SERVICES [1983] KLR 156**, and was well guided by the sentiments of Chesoni JA (as he then was), at P.164 which he quoted;

“As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”

The way I see it, I do not see that, given the facts and the correspondence exchanged between the parties, there is any real substantial question to be tried, and there is no dispute as to facts or law. The appellant does not deny having received money from the respondent. Nor does he deny that he was expressly instructed not to release the same until authorized by the respondents. The argument he proffered, rather belatedly from where I stand, is that he considered the contract between the respondents and the vendors to have been concluded and that he was therefore entitled to release the funds to or for the vendors. I think that argument is quite lame as the respondents never did sign the agreement for sale and had raised various issues with the draft, which the appellant never addressed as he ought to have, having at the time been their advocate too.

In this regard, I am of opinion that the appellant's learned counsel misapprehended the true meaning of the English Court of Appeal case of **STORER -vs- MANCHESTER CITY COUNCIL [1974] 3 ALL ER 823**, which they have cited. That case did not decide that so long as there has been offer and acceptance of a transaction involving the sale of a house, then there is a concluded and effective contract notwithstanding that no agreement is signed by the parties. Rather, what it did hold was that where parties are represented by the same solicitor or advocates, then, the usual requirement for “*exchange of contracts*” is not necessary in order for a contract to come into being. It does not suggest that incomplete, un-agreed contracts that are unsigned do acquire the status of binding contracts. It is noteworthy that in that case, the offer for sale of houses was made by the Council to various of its tenants including Mr. Storer. The Clerk of the Council by a letter forwarded a Form titled “*City of Manchester. Sale of Council Houses*” containing some nearly a dozen clauses which really were the terms of the agreement. Once the tenant/purchaser signed it, the contract was concluded and did not require for validity and efficacy a further contract exchange from the Council. That is what Lord Denning addressed at P.826 of his judgment;

“When parties arrange for a sale „subject to contract?, that means, as a rule, that there is no binding contract and the contracts of sale have been formally exchanged. That is clear from Eccles v Bryant. But where there is no arrangement „subject to contract?, the only question is whether a contract has been concluded: see Bigg v Boyd Gibbins Ltd. One example is where one solicitor is acting for both sides, such as in Smith v Mansi. It is „artificial nonsense?, Danckwerts LJ said [1962] 3 All ER at 861, [1963] 1 WLR at 33, to have an exchange of contracts where there is only one solicitor acting. The present case is, I think, another example. The corporation put forward to the tenant a simple form of agreement. The very object was to dispense with legal formalities. One of the formalities-exchange of contracts-was quite unnecessary. The contract was concluded by offer and acceptance. The offer was contained in the letter of 9 March in which the town clerk said:

„I ... enclose the Agreement for sale. If you will sign the Agreement and return it to me I will send the Agreement signed on behalf of the Corporation in exchange.?”

The acceptance was made when the tenant did sign it, as he did, and return it, as he did on 20 March. It was then that a contract was concluded. The town clerk was then bound to send back the agreement signed on behalf of the corporation. The agreement was concluded on Mr. Storer's acceptance. It was not dependent on the subsequent exchange.

I appreciate that there was one space in the form which was left blank. It was cl 7 for „Date when your tenancy ceases?. That blank did not mean there was no concluded contract. It was left blank simply for administrative convenience. A similar point arose in *Smith v Mansi* where *Russel LJ* said [1962] 3 All ER at 865, [1963] 1 WLR at 37):

„There was nothing left for the parties themselves to do but agree the date. Its insertion in the already signed document-in the hands of the common solicitor-could surely be nothing but an administrative tidying up to be done, if at all, at the solicitor's convenience.?”

The obvious difference between that case and the one at bar is that once the draft agreement herein reached the respondents/purchasers, they did not sign it, precisely because a number of concerns had not been addressed. Here, unlike there, therefore, there was no concluded agreement. The appellants resort to the argument was therefore, with respect, a red herring.

Equally misconceived, from my point of view, is the appellants' reliance on that same English court's decision in **WENLOCK -vs- MOLONEY & OTHERS [1965] 2 All ER 871**, which is quite easily distinguishable from the present case. That case related to the jurisdiction for striking out of pleadings. The court held that the master had erroneously taken a course that amounted to a trial of the case in chambers without discovery, oral evidence or cross-examination upon an application to strike out the claim as the pleadings disclosed no reasonable cause of action and were vexatious and an abuse of process. This was neither authorized by the rules nor a proper exercise of the inherent jurisdiction of the court.

That decision was undoubtedly correct because it was clearly wrong for the master to have struck out the suit on an application in which eventually ten affidavits were filed, the hearing of the application took two full days and the master had to write a 22-paper judgment on striking out. It was a case where “*the defendants delivered lengthy defences, admitting some allegations, denying others, and making serious affirmative allegations, and the plaintiff delivered replies to these defences.*” It was not a plain and obvious case deserving of summary dismissal.

Now, in that judgment **Lord Danckwerts** did make the following observations at P3;

“There is no doubt that the inherent power of the court remains, but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

Those words, though perfectly correct within the context of an application to strike out a suit such as he was addressing, are often misinterpreted and misapplied to applications for summary judgment and which, to my mind, is a different jurisdiction altogether and requires a Judge to examine with a measure of thoroughness whether a plaintiff who claims judgment in summary fashion is entitled to it. Where such judgment is sought on the basis of documents placed before the judge, and which tell a consistent and compelling story, I do not see how the Judge can be blamed for declaring the conclusion of that narrative if it be that the defendant is truly and justly indebted and is devoid of an answer to the claim.

Thus understood, the summary judgment jurisdiction is not one to be denigrated or frowned upon. Its existence in our law is neither accidental nor aberrant. To the contrary, it does serve salutary ends of patent utility. I would therefore not be dissuaded nor unnecessarily troubled by descriptions of the jurisdiction as „*draconian?* or „*drastic?* Judgments in the end are often draconian and drastic, shattering hopes and imposing burdens, but courts should never hesitate to enter them where they are indubitably deserved. I readily agree with Madan JA (as he then was), that where appropriate the power should be used “*with a view to eliminate (sic) delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property*”. See **CONTINENTAL BUTCHERY LIMITED -vs- NTHIWA [1989] KLR 573**.

To me, this case falls under the category of the plain, obvious, and straight-forward deserving of summary judgment there being no triable issue and the defence being a shell no matter how well-decorated or attractively packaged. It is not one calling for interrogation at a trial such as in **HARITH SHETH T/A HARITH SHETH ADVOCATES -vs- SHAMAS CHARAMA [2014] eKLR**, where there had been substantial allegations of fraud pleaded and which required to be proved on a standard higher than on a mere balance of probabilities and therefore

required a full trial; or **DHANJAL INVESTMENTS LIMITED -vs- SHABAHA INVESTMENTS LIMITED**, (Civil Appeal No. 232 of 1997),

where, in a dispute of a sale agreement, it turned out that the plaintiff who sought summary judgment had been embroiled in on-going litigation yet he had in the agreement of sale confirmed that “*there [was] no litigation pending against the property and or business*” or as in **LALJI t/a VAKKEP BUILDING CONTRACTORS -vs- CAROUSEL LIMITED [1989] eKLR**, where what was involved was “*a difficult question of construction of documents not to mention the issue of alleged custom in the construction industry in Kenya upon which evidence would have to be led.*” Those three cases presented by the appellant are thus easily distinguishable.

I think, with respect, that to overturn the learned Judge’s entry of summary judgment in the circumstances of this case serves to bastardize the entirely legitimate power of summary judgment. It is a serious departure from the Court’s very clear affirmation in **BALDEV RAJ AGGARWAL -vs- KAMAL KISHORE AGGARWAL NBI**, Civil Appeal No. 48 of 1985, that “*this Court will resist with as much fortitude as it can command any attempt to weaken the effect of order 35 [36].*”

I resist, even though I resist alone in this appeal.

As I conclude this opinion, I return to the complaint by the appellant that the learned Judge erred by, to quote **Mr. Marete**, his learned counsel, “*embarking on a minutiae examination of the facts which ought to have been left to the trial.*” With respect, this argument cannot stand scrutiny. A Judge does not apply any less of his mental acuity and capacity or fail to employ the totality of his faculties, learning and experience merely because he is not at the trial stage. If a document is before a Judge, he is obligated to interpret it for what it is and if it speaks unmistakably requiring no further explanation, he must say what its import and effect is. Being at the summary judgment stage does not mean that the Judge is called upon to be any less perceptive or perspicacious than he would be required to be at a trial. And I am not alone in thinking so. More than 40 years ago Madan JA dealt with precisely this issue in **GUPTA -vs- CONTINENTAL BUILDERS LIMITED [1976-80] 1 KLR 809**, at P. 814-15, and I respectively concur;

“In any given case it is the duty of the court to examine with minute care the documents and facts laid before it. In this case there is a complaint made that this was done instead of paying a compliment to the court’s assiduity for doing so. If it had not been done, there would be some cause for making a complaint that the court failed in its task to do so, thereby possibly causing a failure of justice. A minute and careful examination of documents and facts laid before the court is carried out by the court as a part of the daily task in the performance of its judicial duty and, understandably (even inevitably), it may lead to both the acceptance or rejection of some documents and some facts which some people, in the case of an application for summary judgment, may construe, albeit incorrectly, as an actual trial. There is no more in it except the process of determining the judicial verdict to be delivered. The merits of the issues are investigated to decide whether leave to defend should be granted; but the case is not tried upon affidavits, it is that this is the procedure in the main provided for this purpose. Sometimes the prima facie issues which are proffered are rejected as unfit to go to trial being, by their very nature as disclosed to the Court, incapable of effectively resisting the claim. The court does not thereby shut out any genuine defences of a defendant, as it is the only proper order to make if no reasonable grounds of defence are disclosed, even as only prima facie triable issues, at this stage. What happens is that the Court merely does not accept the prima facie issues offered as genuine. This is exactly the task which the Court is required to perform on an application for summary judgment.” (My emphases)

It is the duty of courts to allow parties who come before them to obtain speedy and just judgments. They must not allow the entanglements that legal words and phrases spawned for the convenience of the case to become traps that convert the quest for justice into a long and frustrating journey akin to a Sisyphean travail. Courts should in appropriate cases cut to the chase and let parties receive their justice in expeditious fashion. I very much doubt that it is just that these innocent respondents who just wanted to buy a beautiful house in a decent neighbourhood in one of Nairobi suburbs and who paid more than Kshs. 25 Million more than thirteen years ago are still houseless and moneyless out there in faraway Georgia.

I would say, as did Madan JA in **GUPTA** (Supra) that what the appellant pleaded and argued before us was, with respect, “*pure jargon, a whole shoal of red herrings*” and that, he was “*indulging in chicanery*” when he claimed that there was a completed agreement between the vendors and the respondents which therefore entitled him, as their common advocate, and against the respondents’ express prohibition to nevertheless release the money.

Like Madan JA at P. 822 my firm conviction is that;

“It would be a monstrous failure of justice if the contract (sic) is [the respondents are] kept out of his [their] money. Justice demands, therefore the law requires, that the appellant should pay the sum of Kshs.119,000 [Kshs.2,500,000 and Euros 286,000] with interest and costs to the contractor [respondents].”

I would dismiss this appeal with costs.

As the majority are of a contrary view, however, this appeal shall be disposed of in the terms proposed by my learned brother, Waki JA.

Dated and delivered at Nairobi this 19th day of July, 2019

P. O. KIAGE

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JUDGE OF APPEAL