



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 136 OF 2017

BETWEEN

TERNIC ENTERPRISES LIMITED.....APPELLANT

VERSUS

WATERFRONT OUTLETS LIMITED.....RESPONDENT

(Being an appeal from the entire Ruling/Order of the High Court of Kenya at Nairobi, Milimani Law Courts (G.L. Nzioka J.), dated 13th March, 2017

in

High Court Civil Case No 164 of 2016)

JUDGMENT OF THE COURT

[1] The facts stated in the plaint, the subject matter of this appeal appear quite straight forward. It was the appellant's case that together with the respondent, they were registered as tenants in common of a property known as **L.R No. 209/16717** Nairobi under Grant No. I.R. 116277 in the proportions of two thirds (2/3) and one third (1/3) shares respectively. Pursuant to an agreement for sale dated 16th December, 2011, the appellant agreed to sell to the respondent its two-thirds shares (hereinafter referred to as the suit property) for a sum of Ksh 28 million. It was a term of the agreement that the respondent was to deposit Ksh 8 million upon execution of the sale agreement and the balance of Ksh 20 million was to be paid on or before completion and the agreement was subject to the Law Society of Kenya Conditions of sale (1989 Edition). Time of completion was of essence and in the event of default in payment of the purchase price, the interest rate payable was indicated as 15% per annum.

[2] According to the appellant, the agreement was signed on 16th December, 2011 but the respondent did not pay the deposit of Ksh 8 million as per the agreement. That notwithstanding, the appellant executed the transfer of the suit property to the respondent and availed the completion documents to the stakeholder which were transferred to the respondent on 13th February, 2012 notwithstanding non-payment of the purchase price. On November, 2013 the suit property was charged to Gulf African Bank Ltd to secure a loan of Ksh 14 million but the purchase price was not paid thus on 10th May, 2015 the appellant filed suit seeking judgment for Ksh 28 million, with interest and damages for breach of contract, loss of business and costs.

[3] The suit was followed hot on its heels by a notice of motion seeking summary judgment for a liquidated claim of Ksh 28 million with interest at the agreed rate of 15% from 16th December, 2011 until payment in full. The respondents entered appearance and filed a replying affidavit sworn by Christopher Onwongá Oanda on 27th June, 2016. The respondents contended that the original allottees of the suit property were Njeka Ochunyi, Willis Agwata and the appellant as tenants in common in equal shares. That on 30th July, 2010 the respondent purchased the interest of Njeka and Willis at a consideration of Ksh 26 million. Since the said original allottees were entitled each to 1/3 share, the respondent entered into an agreement with the appellant on 16th December, 2011 on the mistaken belief that the appellant was entitled to 2/3 shares instead of 1/3. The respondent also accused the appellant's director in particular Nicholas Owino Ochiel who works at Ministry of Lands Nairobi of fraudulent transfer of 1/3 shares instead of 2/3 initially owned by the original allottees. As demonstrated here below these are the allegations that became the Achilles heel as far as the appellant's application for summary judgment went.

[4] The notice of motion fell for hearing before G. Nzioka J., who fastidiously went through the affidavits, submissions by respective counsel and decided cases and concluded the matter was not a suitable one for summary judgment and the motion was dismissed thereby giving rise

to the present appeal which is predicated on some ten grounds of appeal to wit:-

That the learned Judge erred in law and fact in finding there were triable issues meriting a full trial; failing to interpret and appreciate the principles governing granting of summary judgement application and law of contract; failing to find the appellant had demonstrated a case of **‘money earned and received?’**; failing to enforce a written agreement; taking into account irrelevant considerations especially un-pleaded, and unsubstantiated allegations of fraud made by the respondent.

[5] During the plenary hearing both counsel, Mr. Miyare for the appellant and Mr. Oyugi for the respondent sought leave to rely on their written submissions and did not make any highlights as the said submissions were quite elaborate. In the submissions by counsel for the appellant, he has reiterated the chronology of how the suit property was acquired and transferred to the respondent according to a sale agreement. According to counsel for the appellant it is not disputed the respondent did not pay the purchase price, demand was made for a liquidated claim with interest; there is no mistake as the sums sought as summary judgment were due and owing; the respondent contrived issues of mistake and/or fraud as an afterthought so as to deny the appellant its due entitlement after it transferred all the shares in favour of the respondent.

[6] The respondent did not file a defence; there is only a draft that was attached to the replying affidavit; which in any event was a mere sham. Counsel cited the case of **Job Kilach versus Nation Media Group Ltd. & Others** [2015] e KLR. The same case was also relied on by the respondent but the appellant relied on the proposition that a mere denial is not sufficient; a defendant or the respondent in this case was under a duty to demonstrate cogent reasons why a contractual obligation was not discharged; the respondent’s only defence was that there was a mistake as to the portion of the suit premises it purchased from the appellant. Counsel further submitted that, since the respondent admits the existence of the agreement against which the appellant transferred the suit property, and it went on to charge the title to secure a loan of Ksh 14 million, the learned Judge erred by concluding there were triable issues regarding mistake and fraud which were not even pleaded.

[7] On the part of the respondent, by its written submissions counsel supported the ruling stating that the learned Judge was spot on in appreciating the appellant was not entitled to summary judgment which would have denied the respondent an opportunity of being heard on substantive issues of fraud and mistake. The respondent annexed a draft defence and counter-claim to the replying affidavit and the learned Judge could not fail to consider all the documents that were on record. In the affidavit and the said draft defence and counterclaim raised a number of issues which could only be investigated during the hearing. Counsel cited the case of **Isaac Awuondo vs Surgipharm Ltd & Another** Civil Appeal No. 134 of 2003 [2001] e KLR in which this Court emphasized that summary judgement is a drastic remedy which may be granted in clearest of cases in which there is no *bona fide* defence to the plaintiff’s claim.

[8] Following the above summary of what transpired before the learned trial Judge, the single issue for our determination is whether there was proper exercise of discretion for holding there were triable issue(s) arising from the response given by the respondent in opposition to the notice of motion seeking summary judgment. The application was principally brought under **Oder 36 Rule 1(1) (a) and (2)** of the Civil Procedure Code and what we are called upon to determine is whether the application for summary judgment met the threshold and whether the defence set up by the respondent in the affidavit raised triable issue(s). A preliminary finding of triable issues made at an interlocutory stage does not at all guarantee that the respondent will succeed after trial, just that the courts and the law have set very stringent measures to ensure every litigant is given an opportunity to ventilate their case. See the case of; **Isaac Awuondo V Surgipharm Limited & Another** [2011] eKLR the Court of Appeal had to reiterate the following principles in **Moi University V Vishva Builders Limited** - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-6

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

And also in **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** at p. 365 this Court said:-

“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court’s decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this Court stated:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.

If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham”.

[9] Bearing in mind the above principles, we have to examine whether the learned Judge brought the same into consideration by examining a pertinent portion of the ruling where she stated;

“In the instant case, I find that the respondent has deposed under paragraphs 10 of the replying affidavit that, the plaintiff and in particular Mr. Nicholas Owino Ochiel “without the defendant’s permission transferred to the plaintiff two thirds shares of the suit property, without paying any consideration”. In paragraph 13 the defendant avers that “it entered into a sale agreement and effected a transfer under a mistake that, the plaintiff was entitled to one thirds instead of two thirds shares it purported to (sic) sale”. Under paragraph 14 thereof the defendant states that, all this amounts to fraud. The plaintiff has vehemently denied all these allegations terming them as „fraudulent, baseless, outrageous and actuated by malice and bad faith?. It is therefore clear that these allegations and counter allegation call for evidence at the trial. This is also evident from the submissions of the parties, where the applicant avers that, “the defendant has not demonstrated indisputable evidence to rectify any mistake alleged by it. There is no documentary evidence to corroborate the allegations of mistake.”

The respondent on its part invited the court to note that parties have been engaged in negotiation to resolve the matter amicably. The disturbing issue is the allegation by the applicant at paragraph 5 of the supporting affidavit that “the respondent failed to pay Ksh 8,000,000/” and at paragraph 6 it deposed, “despite non-payment the applicant executed all documents of transfer”. At paragraph 7 the applicant states “the property was registered in the name of the defendant/respondent notwithstanding non-payment of the entire purchase price”. How did this happen when the applicant depones that both parties were represented by a lawyer. That is not a normal process and procedure in purchase of property and in particular real property.”

[10] We are unable to fault the learned trial Judge as she fastidiously examined all the averments in the affidavits of both parties and posed very pertinent questions that can only be answered after trial. We somehow find the respondent seems to admit the appellant was entitled to one third share of the suit property as opposed to two thirds, in which case partial judgment could have been entered in that aspect and the rest of the claim be subjected to trial. However, we find it was not a straight forward claim that is liquidated as there would obviously arise an issue of the value of one third share of the suit premises which would move from the realm of a liquidated claim to perhaps requiring evidence of what constitutes one third of the share of land. In the circumstances, like the learned trial Judge, we are of the view that the best forum for all the parties is a trial which would afford all parties an equal forum and for the court to make a determination of all issues raised including what appears to be an admission of one third share.

[11] Accordingly, having found as we have there are triable issues, it goes without saying, this appeal lacks merit and we do order it dismissed with costs to abide the outcome of the suit.

Dated and delivered at Nairobi this 16th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR