REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 151 of 2002

KIRINYAGA COUNTY COUNCIL.....……..……APPELLANT

AND

KIMMI HOUSING CO-OPERATIVE SOCIETY LIMITED……..RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nairobi (O'Kubasu, J)

dated 29th September, 1998

in

H.C.C.C. NO. 6815 OF 1991)

****

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (O'Kubasu, J., as he then was) delivered on 29th September 1998 whereby the superior court entered summary judgment for Kshs.1,630,899/15 with interest and costs against the appellant.

In December 1991, the respondent herein filed a suit against the appellant claiming Shs.1,630,899/15 being the Architect's, Quantity surveyor's, structural engineer's, electrical engineer's fees and other expenses in respect of the proposed development of a plot at Baricho Market Kirinyaga which the appellant had allocated to the respondent and which plot did not belong to the appellant as the respondent later discovered.

The respondent averred in the plaint, *inter alia*, that it applied to the appellant sometime in 1982 for allocation of a plot at Baricho Township; that the appellant by a letter dated 19th October 1982 informed the respondent that the application had been approved; that the respondent relying on that information instructed a surveyor, architects, and quantity surveyors pertaining to the development of the plot and thereby incurred expenses in the sum of Shs.1,630,899/15; that the respondent subsequently discovered that the appellant did not own the plot at the time of allocation and had no title to transfer and that the appellant had made an actionable representation which the respondent acted on to its detriment.

The appellant filed a defence to the respondent's claim denying the claim and averred that the respondent had never applied for a plot and was never allocated a plot and further that the respondent

never submitted any building plans to the appellant for approval.

In December 1992 (a year later) the respondent filed an application for summary judgment under ***Order XXXV RULE 1*** Civil Procedure Rules (CPR). The application was supported by the affidavit of one Jinalius Kathuri Muraria to which he annexed several documents, among them, a letter dated 19th October 1982 from the Clerk to the Council addressed to M/S Ndia Co-operative Society Ltd. which stated in part:

"***APPLICATION FOR A SITE AT BARICHO TOWNSHIP:***

I am glad to inform you that your application for 5 acres site at Baricho for go-down and Residential Houses for staff has been approved by the County Council Town Planning, Markets and Housing Committee/Trade and Markets Committee vide its minute No. TPM & H 96/81 ……".

That letter is signed on behalf of the Clerk to the Council. The Kirinyaga County Clerk D. N. Mwangi filed a replying affidavit deponing, *inter alia*, that the purported allocation is a nullity and *ultra vires* the Local Government Act as the appellant did not approve the minutes of Town Planning Markets and Housing Committee held on 15th July 1980 and 28th September 1991; that the allocation did not specify the title number; that the appellant did not approve any building plans and that the respondent did not do any development on the 5 acres plot purportedly allocated to it.

The respondent filed a further affidavit annexing more documents. The trial judge after hearing the application made the following findings amongst others:

1. "The plaintiff has produced documents to demonstrate that all necessary procedures were followed and that the plot was allocated to the plaintiff ……. It cannot be denied that the plaintiff spent the amount in question ……"

2.** "**Having considered the documents produced it is clear that the plaintiff acted on the defendant's action which led to the plaintiff spending Shs. 1,630,889/15 in preparation to develop the plot. The amount in question has not been disputed…"

3.** "**All that is stated in the plaint cannot be disputed as the defence contained mere denials and as already demonstrated what has been stated in the plaint has been fully supported by the documents placed before this Court…..".

The grounds of appeal question those findings.

The general principles governing summary judgment applications are well known – (see ***Giciem Construction Company v. Amalgamated Trade Services (1983) KLR 156***).

The application for summary judgment can been made after the defendant has appeared and can even be made before the defendant has filed a defence to the suit (see ***Order XXXV rule 1 (a)*** and ***rule 4 CPR***). In this case, the appellant had filed a defence and in addition had filed a replying affidavit to the summary judgment application. The respondent was required to show that the appellant was truly liable to compensate the respondent in the sum claimed and that the defence did not raise any genuine issues which should go for trial. The appellant on his part was required to show that it should have leave to defend the suit (***Order XXXV rule 2(1) CPR***).

The appellant was represented by Mr. Muguku in the superior court. The first submission by Mr. Muguku at the hearing of the application was that the plaint did not disclose any reasonable cause of action. He submitted further that the suit was based on what was referred to as "*actionable representation"* and contended that there is no such thing as actionable representation. He submitted that the suit was not based on fraudulent mispresentation a fact which was conceded by Mr. Nyamu, counsel acting for the respondent in the superior court. On his part, Mr. Nyamu, submitted that there was a representation in law which was acted on causing the respondent to suffer loss for which it should be

compensated. Mr. Nyamu referred to the tort of unjust enrichment and urged the court to stop it. The 3rd ground of appeal states that the learned Judge erred in law in failing to find that there was no consideration from respondent to appellant that could give rise to liability and in the 4th ground of appeal the appellant faults the Judge for failing to find that the suit disclosed no cause of action. Was the suit based on contract or tort? On our analysis of the pleadings, the respective affidavits and submissions in the superior court and in this Court we have found it difficult to appreciate the respondent's cause of action. The cause of action is not easily discernable. Indeed, the issue whether or not the plaint disclosed a cause of action known in law was a genuine one and should have gone for trial.

The appellant averred that the respondent never applied for a plot and was never allocated a plot. The respondent did not annex the application for allocation of the plot which it made to the appellant. It relied on the letter dated 19th October signed on behalf of the Clerk to the Council which indicated that the application had been approved by County Council, Town Planning Markets and Housing Committee vide its Minute No. 96/81. Firstly, that letter was addressed to M/s. Ndia Co-operative Societies Ltd and not to the respondent Jinalius Kathuri Murari. Although he explained in the supporting affidavit that Ndia Societies is the same entity as Kimmi Housing Co-operative Society Ltd. He did not however provide any documentary evidence to establish that the two entities are one and the same thing. All the receipts and documents issued by the appellant in connection with a plot variously described as No, 96, 97 and 98 are in the name of Ndia Co-operative Society Ltd.

Secondly, the minutes number TPM&H 96/81 by which the Town Planning, Markets and Housing Committee allocated the plot were not produced in the superior court.

Thirdly, D. N. Mwangi, the County Clerk deponed that the appellant did not approve the minutes of the Town Planning, Markets and Housing Committee and that the purported allocation was a nullity and *ultra vires* the provisions of the Local Government Act. The respondent did not produce any minutes of the appellant Council in the superior court verifying that the appellant approved the allocation of any specific plot by its Town Planning Markets and Housing Committee to the respondent.

Lastly, the plot number of the plot allegedly allocated to the respondent was not identified. The receipts and documents issued to Ndia Co-operative Society Ltd do not consistently refer to one plot. They refer variously to Plot No. 96, 97 and 98. One broad issue can be deduced from all this – whether or not the respondent was allocated any specific plot at Baricho Township by the appellant in accordance with the provisions of the Local Government Act. That is a genuine triable issue which arose from the pleadings, affidavits and submissions.

The respondent did not give the particulars or the breakdown of the claim of Shs.1,630,899/15 either in the plaint nor in the first affidavit in support of the summary judgment application. The appellant deposed in the replying affidavit that no valid invoices for professional services had been annexed to the supporting affidavit.

The respondent thereupon and without leave of the court filed a further affidavit accompanied by copious documents. That was tantamount to a trial on affidavits. The superior court should not have relied on the further affidavit filed without leave. Had that further affidavit been excluded, then there was a triable issue whether or not the respondent indeed expended Shs.1,630,899/15 on the proposed developments of the plot.

It is apparent from the documents filed by the respondent in the superior court that a major component of the claim – over Shs.1,600,000/= relate to fees charged by the architect, quantity surveryor, structural engineer and electrical engineer. The appellant disputed that any development was done on the plot and deposed that no building plans were submitted to the appellant for approval.

The appellant was questioning whether the professional services were rendered to the respondent in the sum claimed and whether the appellant was liable to compensate the respondent for services rendered. The finding of the superior court that the amount claimed was not disputed is, with respect, erroneous. An allegation that a party has suffered damage and any allegation as to the amount of

damages is deemed to have been transversed unless specifically admitted (see ***Order VI Rule 9 (4)*** CPR). The issue raised by the appellant should have gone for trial.

Lastly, the appellant deposed in the replying affidavit that it made no representation to the respondent which the respondent relied on to its detriment. It is not clear from the documents filed by the respondent as to when the respondent engaged the professionals or when it discovered that the appellant had no plot to convey. It is clear however, that the Architectural drawings were done sometime in 1987.

It has been submitted that the respondent should have checked the ownership of the plot and that it should not have expended money on a mere letter of allotment. That submission necessarily arises from the documents which were filed in the superior court. A valid issue arises whether the respondent acted reasonably in expending money from professionals before it had obtained a valid document of title – a lease for the plot.

From the foregoing, we are persuaded that the appellant had shown that there were genuine triable issues fit for trial and that it should have been given unconditional leave to defend.

In the result, we allow the appeal and set aside the ruling and decree of the superior court dated 29th September, 1998 entering summary judgment against the appellant and substitute, therefor, an order dismissing the respondent's application for summary judgment dated 17th December, 1992. The appellant is entitled to the costs of the appeal and of the dismissed motion and we so order.

Dated and delivered at Nairobi this 14th day of December, 2007.

E. M. GITHINJI

……

JDUGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR