REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 457 of 2004

BENJAMIN NGUA KIMUYU…….....……..1ST PLAINTIFF

ANASTACIA NDUKU MULI…….....…...……..2ND PLAINTIFF

VERSUS

KENLINE AGENCIE LIMITED…….....…….DEFENDANT

AND

BARCLAYS BANK OF KENYA LTD…….....…….....3RD PARTY

RULING

The defendant *KENLINE AGENCIES LTD* had secured a loan from *BARCLAYS BANK LTD* and offered as security the following securities namely: *L.R. NO.NAIROBI/BLOCK 82/267,* which was charged on 2nd March 1989.

A further charge of the same property on 28th June 1991. A second further charge on 21st April 1992. L.R. NO.NAIROBI/BLOCK 126/639 on 26th July 1995. A third further charge over NAIROBI/BLOCK 82/267 on 5th May 1998. L.R. NO. 1160/740 on 19th September 2001 and L.R. NO. NAIROBI/BLOCK 126/640.

Kenline defaulted in servicing the loan. By 22nd May 2003 the accumulated loan plus interest had reached Shs.41,677,228.12. Kenline was completely unable to service the loan. The bank issued Kenline a Statutory Notice to realize the security. Kenline moved to court on 7th October 2003. The parties recorded a consent order in the following terms among others.

In paragraph 4 of the consent order the Bank allowed the Kenline to subdivide the suit property *L.R. NO.1160/740* into 11 subdivisions and sell the subdivisions. Provided that there shall be no discharge registered in respect of any subdivisions unless the full purchase price in respect of such sub-division has been paid in full to the bank. Provided further that the plaintiffs will pay all costs of the subdivisions and will obtain the necessary consents for the subdivisions. And clause seven provided as follows:-

"7" That the sale of the subdivisions by the plaintiffs be completed within 90 days from the 1st day of September 2003 time being of essence."

The 90 days ended on 1st December 2003.

On the 4th December 2003 the defendants entered into a Sale Agreement with the plaintiff for the purchase of LR NO. 2260/775 which was one of the subdivisions of LR NO.1160/740 the subject matter of the Milimani Suit in which a consent order had been entered to subdivide and sell the subdivided parcels by 1st December 2003.

On learning of the intended Sale Contract contrary to the consent order entered into in the Milimani HCCC NO. 198 OF 2003. Hamilton Harris & Mathews Advocates wrote the advocate acting for the defendant on 7th January 2004 warning them that there could no valid sale after 1st December 2003.

The plaintiff on learning that the Sale Agreement entered into with the defendant was null and void due to the defendant's lack of capacity to sell the suit property demanded the refund of the deposit they had paid to the defendant and hence this suit.

The defendant admits to have received the deposit of Shs.2,500,000/= from the plaintiff for the sale of the suit land but alleges that the defendant was entitled to forfeit to itself the deposit paid by the plaintiff in order to mitigate its losses as a result of the plaintiff's breach of the contract.

Mr. Wandaka counsel for the defendant submitted that the plaintiff was induced by letters from the firm of M/S Hamilton, Harrison & Mathews Advocates who were acting for the mortgagee to unilaterally rescind and withdrew from the Sale Agreement and sought a refund of the deposit.

But Miss Lavuna counsel for the plaintiff submitted that the Sale Agreement having been entered into after the expiry date of the consent order in the Milimani HCCC NO. 198 OF 2003 that the suit land had to be subdivided and subdivided parcels to be sold before 1st December 2003 to repay the bank loan which held the suit land as security, the defendant lacked capacity to enter into a Sale Agreement for the Sale of the suit property to the plaintiff. I agree with counsel for the plaintiff that the defendant had no capacity to enter into a Sale Agreement after the expiry of 90 days from the date of the consent order dated 1st September 2003 and therefore the plaintiffs were not in breach of the contract.

The next issue is whether or not judgment should be entered in favour of the plaintiff on admission under Order XII Rule 6. Order XII Rule 6 reads:

"6" Any party may at any stage of a suit, where admission of fact has been made, either on the pleadings, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

To entitle a party to judgment admissions must be clear. Judgment should be given under Order XII Rule 6 only in a very plain case. Mr. Wandaka submits that Order XII Rule 6 does not apply to the circumstances of this case, because there is no admission to entitle the applicant to secure judgment on admission.

For the purpose of Order XII Rule 6 admissions can be expressed or implied either on the pleadings or otherwise e.g. in correspondent.

The defendant admitted to have received the deposit of Shs.2,500,000/= for the purchase of the suit property but claimed that the same was forfeited by the plaintiff due to breach of the contract. But the court having made a finding that when the defendant offered to sell the suit land and entered into a Sale Agreement, it did not have the capacity to do so, the plaintiff did not breach the contract.

The plaintiff only sought a refund of the deposit after it was alerted that there could no valid Sale of the suit land after 1st December 2003.

An admission by necessary implication may also arise where a defendant denies an allegation in the plaint evasively. Nevertheless, the admissions must be clear. **ALLIS VS. ALLEN [1914] 1 CH. at page**

909 TECHNISTUDY 3 ALL ER 632 CA at page 856. **MILLA ON THE CODE OF CIVIL PROCEDURE ACT (ibid)** says:

"**An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal".**

Looking at the matter as a whole it is manifestly plain that the plaintiff has placed evidence by way of affidavit and correspondence before this court showing clear admission of the claim.

Accordingly and for the reasons above stated judgment on admission is entered for the plaintiff against the defendant in the sum of Kshs.2,500,000/= with interest thereon at court rates together with costs.

Dated and delivered at Nairobi this 27th day of July 2006.

J.L.A. OSIEMO

JUDGE