



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**[MILIMANI LAW COURTS]**

**ENVIRONMENT AND LAND COURT**

**ELC.NO.819 OF 2014**

**REUBEN MUSYOKI MULI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER MUTUA KANYI.....DEFENDANT/RESPONDENT**

**R U L I N G**

The application for determination is the **Notice of Motion** dated **4<sup>th</sup> March 2015**, brought by the Plaintiff/Applicant herein under Order 2 Rule 15 of the Civil Procedure Rules, Sections 1, 1A & 3A of the Civil Procedure Act and all enabling provisions of law. The Applicant/Plaintiff has sought for the following orders:-

***i. That the Honourable Court be pleased to strike out the Defendant's Defence and enter judgement in the Plaintiff's favour as prayed in the Plaint.***

***ii. The costs of this application be provided for.***

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Reuben Musyoki Muli**. These grounds are:-

***a) That the Defendant has withheld the transfer document and title to effectively transfer Agricultural Plot no.004 at Konza Ranching and Farming Co-operative Society Limited in favour of the Plaintiff.***

***b) The Defendant has no reasonable defence to this suit, and his purported defence dated 27<sup>th</sup> June 2014 is illusory, a mere blanket denial, a sham and aimed at delaying judgement with sequel expenses.***

***c) The Defendant's defence is scandalous, frivolous, vexatious and an abuse of process of this Honourable Court.***

In his **Supporting Affidavit**, **Reuben Musyoki Muli** averred that by an agreement made on or about the **10<sup>th</sup> day of April 2013**, between himself and the Defendant/Respondent, it was agreed that the

Defendant/Respondent was to sell to him his Plot at **Kshs.13,000,000/=** which sum he paid to the Defendant/Respondent fully. He further averred that upon executing the said Sale Agreement, the Defendant/Respondent surrendered to him a copy of a **Letter of Allotment** and **Original Plot Allotment Card** of the said plot which had been issued by the **Co-operative Society** and **three passport sized photographs**. He alleged that the Defendant/Respondent has since failed to transfer the said plot to the Plaintiff/Applicant and has withheld the transfer documents.

Further the Defendant has failed to refund the **Kshs.13,000,000/=** and so he is indebted to the Plaintiff/Applicant. It was his contention that he has been informed by his advocate that the **Defence** by the Defendant/Respondent dated **27<sup>th</sup> June 2014**, is **illusory, a sham** and aimed at **delaying the course of justice**. Therefore the Defendant/Respondent has no real Defence to this suit. He also contended that his advocate has advised him that this is a plain and obvious case and the Court should exercise its discretion in favour of the Applicant/Plaintiff. He urged the court to allow his application and strike out the Defendant/Respondent's Defence.

The application is vehemently opposed and **Peter Mutua Kanyi**, the Defendant/Respondent herein, swore his **Replying Affidavit** dated **5<sup>th</sup> May 2015**, and averred that the instant application is full of falsehoods and is meant to mislead this Honourable Court. He admitted that vide the **Sale Agreement** dated **10<sup>th</sup> April 2014**, he sold to the Plaintiff/Applicant **Plot no.004 Konza Ranching Farm & Co-operative Society** at a consideration of **Kshs.5,000,000/=**. Further that the said agreement was executed before **J. A. Makau & Co. Advocates**, but the Plaintiff/Applicant in a blatant breach of the said agreement, did not pay the mutually agreed consideration of **Kshs.5,000,000/= or any single cent**. He further alleged that the Plaintiff/Applicant's failure to pay the agreed consideration rendered the substratum of the said agreement vitiated and voidable. He also alleged that the Plaintiff took advantage of his illiteracy to make him (Respondent) execute an agreement that purports to state that consideration was paid when in actual sense no single cent was paid to him. It was his contention that he is a stranger to the Sale Agreement that the Plaintiff/Applicant has annexed to his application and that the same is a forgery. It was his further allegation that the Plaintiff has not come to Court with clean hands. He also contended that he has a good Defence which raises triable issues. The Respondent/Defendant urged the Court to dismiss the instant application with costs.

The Court directed that the instant **Notice of Motion** be canvassed by way of **Written submissions**. Subsequently the **Law firm** of **A. M. Mbindyo & co. Advocates** for the Plaintiff/Applicant filed their submissions on **16<sup>th</sup> June 2015**, and urged the Court to allow his application. He relied on the case of **Aziz..Vs..Bhatia Brothers Ltd (2009) 1 EA 7**, where the Court held that:-

**“A party who has performed his part of the bargain may be assisted by the Court to enforce the contract against the defaulting party...”**

Applicant/Plaintiff also relied on the **Halsbury Laws of England Volume 44(1) 4<sup>th</sup> Edition(Re-issue) at paragraph 840** where it stated as follows:-

**“Where it is sought to enforce specific performance of a contract, the Court must be satisfied;**

**1) That there is a concluded contract which would be binding at law if all proper formalities had been observed and in particular that the parties have agreed expressly or impliedly on all the essential terms of the contract and,**

**2) That the terms are sufficiently certain and precise that the Court can order and supervise the exact performance of the contract.”**

Applicant/Plaintiff also submitted that he has a case with overwhelming chances of success and it is only just that the Orders sought herein should be granted.

The **Law Firm of D.M. Mutinda & Co. Advocates** for the Defendant/Respondent filed their **Written Submissions** on **7<sup>th</sup> August 2015**, and urged the court to disallow the instant application. The Defendant/Respondent relied on the case of **Blue Sky EPZ Ltd.. Vs.. Natalia Polyakova & Ano.(2007) eKLR**, where the Court held that:-

***“The power to strike out pleadings is draconian and the Court will exercise it only in clear cases where upon looking at the pleadings concerned, there is no reasonable cause of action or defence disclosed. A defence must raise a triable issue”.***

It was submitted that the Defence in issue raises triable issues and the Court should retain it and determine the issues after trial.

The Defendant/Respondent further relied on the case of **Olympic Escort International Co. Ltd & 2 Others..Vs..Parminder Singh Sandhu & Another (2009) eKLR**, where the court held that:-

***“It is trite law that a triable issue is not necessarily one that the Defendant/Respondent would ultimately succeed on. It need only be bonafide.”***

He urged the Court to dismiss the instant application as the Defendant has a genuine and bonafide triable issues which calls for this Court’s determination.

This court has now carefully considered the instant **Notice of Motion** and the annexures thereto. The Court has also considered the Written Submissions, the cited authorities and the relevant provisions of law. The application is anchored under **Order 2 Rule 15** of the **Civil Procedure Rules** which states that:

***“At any stage of the proceedings, the Court may order to be struck out or amended, any pleading on the ground that;***

- a) It disclosed no reasonable cause of action or defence in law or,***
- b) It is scandalous, frivolous or vexatious or,***
- c) It may prejudice, embarrass or delay the fair trial of the action or,***
- d) It is otherwise an abuse of the process of the Court.”***

From the above provisions of law, the Court has discretion to strike out any pleading at any stage of the proceedings. However, the said discretion must be exercised judicially and sparingly. See the case of **Nguruman Ltd..Vs..**

**Shampole Group Ranch & Others, Civil Appeal No.73 of 2004(2007) 2 EA 353**, where the Court held that:-

***“The power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realization that the Court must not drive away any litigant however his case may be from the seat of justice. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is non-starter.”***

In his application, the Plaintiff/Applicant has stated that the Defendant/Respondent herein has no reasonable Defence and the same is **scandalous, frivolous, vexatious** and **an abuse of the process of this Court**. The Defendant on his part has alleged that his Defence raises triable issues which ought to be determined by the Court.

The principles to be considered in determining such an application have

been elucidated in various Judicial pronouncements. In the case of **DT Dobie & Co. (K) Ltd..Vs..Joseph Mbatia Muchina & Another, Civil Appeal No.37 of 1988**, the court held that:-

**“a pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the Plaintiff has got no case at all either as disclosed in the statement of claim or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which was difficult to believe could be proved.”**

The Plaintiff/Applicant has alleged that the Defendant/Respondent's Defence is not reasonable. In the **DT Dobie Case (supra)** the Court described **Reasonable Cause of Action** to mean a cause of action with some chance of success **“when only the allegations in the pleadings are considered.”**

The Defendant/Respondent on his part has denied that he ever received the amount of money stated in the Sale Agreement. He also denied ever signing the Sale Agreement attached to the Plaintiff/Applicant's pleadings. The fact that the Defendant/Respondent has denied receipt of the **Kshs. 13,000,000/=** as alleged by the Plaintiff/Applicant raises triable issues which issues ought to be decided by the Court. The Defendant/Respondent has sought for proof of payment of the stated amount. By merely looking at the allegations in the Defence only, the said Defence has some cause of action with some chances of success. The Defence filed by the Defendant/Respondent therefore has a reasonable cause and this Court cannot find and hold that the said Defence raises no reasonable cause of action.

On the allegations that the Defence herein is **scandalous, vexatious, frivolous** and **is an abuse** of the court process, the Court finds that the Sale Agreement attached to the Plaintiff is not admitted by the Defendant/Respondent

The Defendant/Respondent has denied signing this specific Sale Agreement or receipt of the **Kshs.13,000,000/=** as stated in the said **Sale Agreement**. The said denial by the Defendant/Respondent also raises issues which need to be interrogated by the Court through the calling of evidence. The Court finds that the Defence herein as filed by the Defendant/Respondent is not scandalous, not vexatious, not frivolous or even an abuse of the court process. The Defendant/Respondent has tried to exonerate himself from the claim lodged by the Plaintiff/Applicant. As has been held variously by the courts, striking out of pleadings is a draconian act which should only be resorted to in cases that are hopeless and plainly obvious that it raises no cause of action and is so weak as to be beyond redemption and incurable by amendment. See the case of **Francis Kamande..Vs..Vanguard Electrical Services Ltd, Civil Appeal No.152 of 1996**.

Having carefully considered the Defence herein as filed by the Defendant/Respondent, this Court finds that the same cannot be said to be

hopeless, and plainly obvious that it raises no reasonable cause of action. The Defence herein therefore is not a candidate for striking out.

The upshot of the foregoing is that the Plaintiff/Applicant's **Notice of Motion** dated **4<sup>th</sup> March 2015**, is not merited. Consequently the said application is dismissed entirely with costs to the Defendant/Respondent.

Further, the Court has noted that the suit property is in **Konza** which falls under the **Jurisdiction of Machakos ELC**. For the above reasons, the Court directs that this matter be transferred to **Machakos ELC** for hearing and final determination.

It is so ordered.

Dated, signed and delivered at NAIROBI this 4<sup>th</sup> day of August 2017.

**L. GACHERU**

**JUDGE**

**4/8/2017**

In the presence of

No appearance for Plaintiff/Applicant though served with Notice

No appearance for Defendant/Respondent though served with Notice

Court clerk - Phylis

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court in the absence of the parties and their advocates though served with Ruling Notices.

**L. GACHERU**

**JUDGE**

**4/8/2017**



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