



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL SUIT NUMBER 225 OF 2009**

**SAMUEL KIMONDO THEURI .....PLAINTIFF**

**VERSUS**

**MWANGANGI MUTULA MUTUA.....DEFENDANT**

**RULING**

The application before this court is a Notice of Motion by the Plaintiff dated 28/3/2017 brought pursuant to Section 3A, Order 36 Rule 1(a), (2) and 5 of the Civil Procedure Rules and all the other enabling provisions of the Law. The applicant seeks the following prayers

1. That summary judgement for Kshs. 5,340,000/= be entered for Plaintiff as against the Defendant together with interest.
2. That the costs of both the suit and this application be borne by the Respondent

The application is based on the following grounds which in summary are that the Plaintiff filed this suit in July 2009 seeking judgement as against the Defendant for the sum of Kshs. 5,340,000/= together with interest and costs of the suit. The Defendant filed a Defence on 20th August, 2009 merely denying the claim. On 13th February, 2009, the Defendant admitted to paying the sum claimed through a written agreement which was signed by both parties but failed to honor the agreement.

The application is supported by the affidavits of SAMUEL KIMONDO THEURI, the Plaintiff herein where he deposes that he paid Kshs. 5,340,000/= for the suit land when the Defendant falsely misrepresented himself as its owner. Before he filed the suit the Defendant vide an agreement dated 13th February, 2009 agreed to pay back the said amount which he has failed to honour. He deposed in his further affidavit that in the Sale Agreement dated 23rd January, 2007, the Defendant had represented that he was selling SYOKIMAU FARM LTD Plot Number 12715/164 but later supplied fake documents for SYOKIMAU FARM LTD Plot Number 12715/163 instead. The copies of the Title Document, Agreement of Transfer dated 23rd November, 1998 and a letter from SYOKIMAU FARM LIMITED dated 14th February, 2007 where the Chairman, Secretary and Treasurer sent to the Commissioner of Lands, all turned out to be fake. Further, it later emerged that the rightful owner of the Land known as SYOKIMAU FARM LTD Plot number 12715/163 was DICKSON KINARO KAHORO who had a title to the said land, and visited Plaintiff's premises with police seeking to arrest him. The said DICKSON KINARO KAHORO did write to the Chief Land Registrar complaining about the fake title and it is insincere for the Defendant to deny selling the suit land to the Plaintiff and then annexes a copy of the Sale Agreement in his replying affidavit. He deposes that the Defendant should be compelled to show transfer, title and all documents for SYOKIMAU FARM LTD Plot number 12715/164 if the sale is indeed valid. He further avers that he paid the Defendant other monies for the expenses towards transfer of suit land which were over and above the initial purchase price thus totaling to the amount in the

agreement dated 13th February, 2009.

The Defendant filed a replying affidavit dated 7th March, 2017 where he deposed that the piece of land (suit land) is or was property of SYOKIMAU FARM LIMITED and he has never intimated that he is its registered owner. He avers that in 2007 it is the Plaintiff who approached him seeking his assistance to push through the transfer of the said parcel of land from SYOKIMAU FARM LIMITED to the Plaintiff, which he successfully managed to do. He avers that vide a letter dated 14th February, 2007, the Directors of SYOKIMAU FARM LIMITED wrote to the Commissioner of Land requesting the relevant department to issue the Plaintiff with a title deed. Further that SYOKIMAU FARM LIMITED transferred the suit land to the Plaintiff who paid the consideration or part thereof to them. The Plaintiff also paid the land rates to the Municipal Council of Mavoko and Land Rent to the Ministry of Lands, and he was not involved in the process. He further avers that the plaintiff/applicant has misrepresented to court that he is the registered owner of the suit land and yet he (applicant) is the owner as evident in the Search from the Ministry of Lands. He deposes that he never agreed to refund any monies to applicant and the purported agreement is a blatant lie.

Parties filed their written submissions and on the 16th May, 2017 the Plaintiff's Counsel highlighted his submission but the Defendant's Counsel was absent.

The Plaintiff reiterated the facts of the Case and also relied on Order 36 rule 1 (a) as provisions of law to guide the court to grant summary judgment. He further relied on the case of **Commercial Bank of Africa Ltd - Vs- David Njau Nduati [2013] eKLR** where the Court quoted in approval the case of **Richard Page and Associates Ltd vs Kapoor (1976 - 86) 1KLR** where the learned Judge held that. *' ..... I recognize this reasoning when I said in Bhundia Properties Ltd Vs East Africa Airways Corporation that; if the Defendant has filed a written statement of defence the court may, in its discretion look at it and see if it discloses an arguable case for the defendant which raises triable issues.*

The Defendant submitted that that the law firm of B M MUNGATA who are the Plaintiff's advocate in this case, acted for both the Plaintiff and Defendant in the matter which is allegedly the cause of action herein. The Sale Agreement herein was drawn and witnessed by the Plaintiff's advocates, and the said advocate is a possible witness to be called by either party to testify in court. This contravenes the provisions of Rule 6 of the Law Society of Kenya Code of Conduct and Ethics for Advocates, poses a real danger of conflict of interest and is prejudicial to the Defendant. They submitted that summary judgement can only issue in a plain and simple case with the instant case not being so. He relied on the case of *Lalji I t/a Vakkep Building Contractors vs. Casousel Ltd [1989] KLR 386* where it was stated that *'summary judgment is a draconian measure and should be given in only the clearest cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist.'*

The Defendant submitted that his defence and replying affidavit raise substantive and triable issues. He further submitted that summary procedure does not call for much evidence and the case must be obvious but in the instant suit, the Plaintiff's supplementary affidavit is full of documents which can only be verified/ tested after a full trial. The Defendant further relied on the case of **the Kenya Power & Lighting Co. Ltd vs. Alliance Media Kenya Limited [ 2014] eKLR** wherein Justice Gikonyo at the last page of his ruling noted that the Court of Appeal states thus: *' ..... We must however hasten to add that a triable issue does not mean one that will succeed. Indeed , in Patel vs EA Cargo Handling Services Ltd [ 1974] EA at Pg. 76 Duffus p. said:- '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 must go to trial for adjudication.'*

## Issues and determination

Upon perusal of the application filed herein including the plaint, defence, supporting affidavits and the submissions, the Court finds that the following are the issues for determination:

- Whether the Defence, replying affidavit and submissions filed herein raise triable issues.
- Whether the Plaintiff is warranted to the summary judgement sought.

The Court notes from the pleadings including the documents filed herein, that it is not in dispute that the Plaintiff and the Defendant were involved in a land transaction relating to SYOKIMAU FARM LTD Plot Number 12715/164. The Court further notes that the Plaintiff alleges that he paid the Defendant for the suit land but the Defendant furnished him with fake documents for SYOKIMAU FARM LTD PLOT Number 12715/163. Further that the documentation the Defendant has furnished in his replying affidavit are fake. The Defendant on the other hand denies signing such an agreement, disputes the figure of Kshs. 5,340,000/= claimed by the Plaintiff and insists the Plaintiff is the registered owner of SYOKIMAU FARM LTD Plot Number 12715/164 having bought it and paid all the relevant land rates and rent. It is noted that the purported Sale Agreement which is the key document to be relied on in this case was indeed drafted and executed by one advocate B M MUNGATA who is currently representing the Plaintiff.

In the Court of Appeal case of **JOB KILACH V NATION MEDIA GROUP LTD, SALABA AGENCIES LTD & MICHAEL RONO [2015] eKLR** it was observed that:

***“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”***

In line with the case above, I find that even though the defence amounted to a mere denial, the defendant's replying affidavit and written submission in opposition to the application for summary judgement raise bona fide triable issue that warrants further interrogation by the court. I note that the law firm of BM MUNGATA who are acting for the Plaintiff's herein, indeed acted for both the Plaintiff and the Defendant in relation to the agreement dated 13th February, 2009 which is the main evidence in support of the application for summary judgement. I concur with the Defendant that the said Advocate is a possible witness to be called by either party to testify in this case, which poses a real danger of conflict of interest and is prejudicial to the Defendant. All these issues raised are best interrogated at a full trial to enable the court make a just determination of the matter.

In the circumstance, the Plaintiff's application for summary judgement must fail. Costs will be in the cause.

Since this is a fairly old matter, parties are urged to comply with Order 11 and set down the case for hearing and final determination.

**Dated signed and delivered in Machakos this 29th day of September 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION.**

Sekento holding brief for Mungata for plaintiff

No attendance for Kulecho for defendant.