REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 44 OF 2015

THOMAS NTHIWA MWANZIA ……PLAINTIFF/APPLICANT

VERSUS

SAMMY KISANGI MUTIE……1ST DEFENDANT/RESPONDENT

OSCAR KALOKI NZUKI……..…2ND DEFENDANT/RESPONDENT

RULING

1. By an application brought by way of a Notice of Motion dated15th October 2015 and filed on the same day under certificate of urgency, the plaintiff Thomas Nthiwa Mwanza seeks from this court orders:

a. Spent
b. That judgment on admission be entered for the plaintiff and against the defendants in terms set out in the plaintiff (sic) and assessment done accordingly to establish its full value.
c. That in the alternative the defendants' statement of defence dated the 23rd day of February 2015 and filed on 27th day of February 2015 be struck out and or dismissed for being scandalous, frivolous, vexatious, constitutes an embarrassment or delay of the fair trial of the action and is otherwise an abuse of the process of the court and judgment be entered for the plaintiff as prayed for in the plaint.
d. Those costs of this application and the suit be awarded to the plaintiff.

2. The application is brought under the express provision of Order 2 Rules 15(1) (b), c and d , Order 13 Rule 1 and 2 , Order 51 Rule 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

3. The Notice of Motion is predicated on 16 grounds on the face of the application and a supporting affidavit sworn by the plaintiff/applicant Mr Thomas Nthiwa Mwanzia sworn on 15th October, 2015 together with several annextures thereto.

4. Principally, the plaintiff/applicant avers that there is sufficient evidence on record by way of an agreement dated 6th July 2013 between the plaintiff and the defendants that the defendants admit that as a result of their acts the plaintiff lost a commercial building valued at over kshs 3,000,000, which plaint, it is contended was clear, plain, readily discernible, obvious on the face thereof without requiring any other evidence to ascertain that the admission had been made; that the said agreement was executed voluntarily hence there is no point going for a full trial since such trial would be merely a repetition of discussion in the said agreement which would be futile as there is nothing left to be

decided.

5. It is also contended that the defendants' defence raises no triable issues and does not disclose any defence to the claim by the plaintiff. That it is a sham, is bad in law and an abuse of the process of court. That the same is frivolous, vexatious and scandalous and therefore it should be struck out. The affidavit by the plaintiff replicates the details as per the grounds in support of the application.

6. The defendants/respondents filed a replying affidavit on 25th November 2015 opposing the application by the plaintiff. However, they never served it upon the applicant and waited until a day to the hearing of the application on 1st December 2015 is when they served it on Mr Arusei Advocate who raised objections at the hearing and also pointed out that the replying affidavit had no date on which it was commissioned.

7. The court after hearing the objection to the affidavit being on record out of time, and as the respondents did not seek leave of court to have the affidavit admitted out of time, the court disallowed the affidavit under Order 51 Rule 14 of the Civil Procedure Rules as it was not served three clear days before the hearing date.

8. The defendants' counsel was nonetheless allowed to submit on points of law only.

9. The application was canvassed orally in court. Mr Arusei counsel for the plaintiff/applicant urged the court to strike out the defence as filed by the defendants and or dismiss it and enter judgment for the plaintiff as prayed with costs. He entirely relied on the grounds, the affidavit in support of the application, the annextures and the several authorities filed in court.

10. In his submissions he prayed that the court should only enter judgment in terms of prayer a, b, and d of the plaint and any other order the court may deem necessary to grant. He was to withdraw prayers c. He maintained that the defendants had conceded in the agreement of 6th July 2013 that the sale was illegal and the court could therefore not sanction an illegality since the 2nd defendant admitted not being the owner of the property which he sold to the plaintiff. That there was a further admission that the plaintiff lost residential property valued at 3 million hence all ingredients of admission of a claim were present and therefore there was no point going to a full trial to replicate the same issues which are clear which in essence is a waste of judicial time and that it would delay fair hearing/trial and deny justice to the plaintiff. He relied on the case of **Ecobank (K) Ltd V Robbin Ltd** where it was held that an admission need not be in the pleadings and that it can be discerned in any other way and that in this case, since the admission in the agreement is clear and unambiguous, the plaintiff/applicant is entitled to a speedy delivery of justice as espoused in Article 159 of the Constitution and Sections 1A, 1B of the Civil Procedure Act.

11. Mr Arusei submitted that the defendant's defence as filed is intended to delay justice for the plaintiff as it is a mere denial and using the court for extraneous purposes to delay a just claim which is an abuse of the court process. He urged the court to rely on all the filed authorities.

12. In response Mr Asiyo advocate holding brief for Mr Nzavi counsel for the defendants submitted that Article 50(1) of the Constitution commands the court to ensure both parties to the suit are accorded a full hearing hence the suit should go on for trial and examination of parties' testimonies. That Article 160(1) of the Constitution creates independence of the judiciary and by this application the applicant is directing the court on what is a frivolous, vexatious and scandalous suit which should be left to the court to decide on its own accord.

13. He also urged the court to rely on the Oxygen principles under Section 1A and 1B of the Civil Procedure Act to allow the defendants a chance to defend themselves. He also relied on Section 3A of the Civil Procedure Act. He concluded that the matters before the court were weighty and deserved a full trial.

14. In a rejoinder Mr Arusei maintained that what was before the court was a fair hearing and that there was no proof that there was no fair hearing. That the plaintiff has satisfied the court on the requirements under Order 13 Rule (1) and 2 of the Civil Procedure Rule. That the defendants had not addressed themselves on the applicable law.

15. I have seriously considered this matter in terms of the application, the grounds, affidavit in support, annextures and the authorities relied on by the plaintiff/ applicant. I have also considered the parties advocates oral rival submissions in court.

16. Before determining the plaintiff's application, it is important to examine the substance of the claim which the plaintiff brought to court for determination by the court.

17. Vide a plaint dated 5th February 2015 and filed in court on the same date, the plaintiff Thomas Nthiwa Mwanzia sued the two defendant's Sammy Kisangi Mutie and Oscar Kaloki Nzuki. It is alleged that on 18th January 2010 the plaintiff visited the offices of Mavoko Land Development Company Limited and met the 1st defendant, an employee of the said company. The 1st defendant introduced the plaintiff to the 2nd defendant who was said to be the rightful owner of plot No. 1593 phase III measuring 0.030 hectares situated in Ngwata Mavoko and the plaintiff agreed to purchase the said plot for a consideration of kshs 140,000 and paid kshs 26,000 in addition, being transfer fees, on signing of the sale agreement. The plaintiff took possession thereof and commenced construction of a four storey commercial cum residential building as per the approved development plans by Mavoko Municipal Council. Upon such completion of the ground floor comprising 8 rooms and 4 single rooms, a common passage way and toilets, a third party without notice came and demolished it on account that the plot belonged to it.

18. On being approached by the plaintiff to explain the situation, the defendants owned up that they had sold a plot which did not belong to the 2nd defendant and they acknowledged by an agreement dated 6th July 2013 that indeed the plaintiff had spend kshs 3,000,000 on development. They also agreed to refund him the purchase price and transfer fees paid to the 2nd defendant and even made part payment thereof.

19. The plaintiff therefore sued the defendants claiming for:

a. The full value of the property demolished on LR plot 1593 Ngwata Phase III Mavoko to be assessed or proved at the hearing.
b. Special damages/expenses subject to proof.
c. General damages for breach of contract.
d. Costs of the suit and interest at court rates .
e. Any other or further orders that the court may deem fit and necessary to grant.

20. The defendants filed a joint defence dated 23d February 2015 after entering an appearance dated the same day on 27th February 2010. The 1st defendant who was alleged to have influenced or played a key role in the execution of the sale agreement between the plaintiff and the 2nd defendant denied the plaintiff's claim against him. He also denied any representation as to ownership of the subject plot 1593 Phase II Ngwata Mavoko as the same was in line with the records held by Movoko Development Company Limited and that it was upon the plaintiff to exercise due diligence to establish true ownership of the property. The 2nd defendant contended that he sold the plot as is where it is basis and he sold the right he held in the plot which the plaintiff was aware of.

21. The defendants therefore contended that the plaintiff's claim was farfetched, non starter and an afterthought and sought for its dismissal. All other averments in the plaint were denied and the plaintiff put to strict proof thereof.

22. On 17th April 2015 the plaintiff filed reply to defence dated 14th April 2015 maintaining what was pleaded in the plaint and contended that the defence was therefore scandalous, vexatious, frivolous

and an abuse of the process of court. The plaintiff also maintained that the 1st defendant misrepresented to the plaintiff that the land was genuinely owned by the 2nd defendant as per the certificate of ownership issued by Mavoko Land Development Company Ltd where the 1st defendant was an employee.

23. With the above background to the cause of action herein, I shall now proceed to determine whether the plaintiff's application on the twin prayers is meritorious. Thus, whether this court should strike out the defence as prayed and enter judgment on admission. Secondly, whether the court should strike out the defence for being frivolous, vexatious, scandalous and otherwise an abuse of the court process.

24. Before I delve into the principles established and applicable for striking out pleadings as was espoused in the **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** case, I must first and foremost, indeed, acknowledge that having examined the sale agreement dated 8th January 2010 and the acknowledgment of 6th July 2013, I am satisfied that both defendants were active participants to the transaction for the sale of the subject plot 1593 Phase II Ngwata to the plaintiff. I also find that indeed there is documentary evidence that the said defendants acknowledged that the 2nd defendant never owned the plot in question and even accepted by an agreement dated 6th July 2013 to refund the plaintiff his purchase price and transfer fees. The 1st defendant too undertook to refund to the plaintiff kshs 46,000/-.

25. However, there is this very disturbing aspect of the suit that I must determine first since it would be futile to strike out the defence however hopeless, only to leave behind even a more hopeless plaint only amenable to being dismissed in limine, which will not serve any useful purpose or at all. Courts of law do not act in vain. In this case, I can foresee a situation where I am likely to act in vain unless i endeavour to see beyond that the parties are seeing.

26. Albeit it is not denied that indeed there was a sale agreement which was frustrated; and that the plaintiff developed the purchased plot only for it to be demolished by the owner of the plot thereof; and that the defendants undertook to compensate the plaintiff for the purchase price and other monies paid for transfer of the plot, strikingly, the plaintiff's prayers in his prayers in his plaint do not disclose a cause of action such that even if this court were to proceed and strike out the defence as prayed for whatever reason and enter judgment on admission, the plaintiff would not be allowed to prove what he had not pleaded.

27. The first prayer by the plaintiff is (1) The full value of the property demolished on LR plot No. 1593 in Ngwata Phase III Mavoko to be assessed or proved at the hearing.

28. Clearly, the full value of the property demolished was disclosed to be shs 3,000,000 as per the valuation report and the agreement of 6th July 2013. Since that full value was known to the plaintiff before institution of suit, the question is why did he choose not to specifically plead it or particularize it in his plaint.

29. The law on pleadings is very clear that they must be clear and specific. In addition, that first prayer discloses a special damage and not a general damage. That being the case, for special damages to be awardable, they must not only be pleaded/specifically claimed /pleaded but strictly proved. Further, where the special damage is not specifically pleaded, the plaintiff would not be permitted to strictly prove what had not been specifically pleaded.

30. In **Waweru V Ndiga [1983] KLR 236** the Court of Appeal was emphatic that:

> ***" Damages for loss of use of a vehicle can be claimed as special damages and not general damages, and the loss suffered should be proved strictly. The respondent in his plaint had claimed the damages, as general damages and had set out no particulars of their loss."***

31. As to what special damages really is, is found in the writings of **Clerks and Lind Sell on Torts**

13th Edition:

> ***"If there be special damage, which is s attributable to the wrongful act, that special damage must be averred and proved. Special damage on the other hand, means, the particular damage (beyond the general damage),which results from the particular circumstances of the case, and of the plaintiffs' claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise of the trial."***

32. From the above authorities, special damages are particulars of specific damages that are alleged to have been sustained in the circumstances of the a particular wrong. To be awardable, special damages must therefore be specifically claimed and strictly proved, for they are not the direct natural or probable consequences of an act complained of and may not be inferred from the act. See also **Blacks Law Dictionary 7th Edition; Ouma V Nairobi City Council [1976] KLR 297; and KBS V Mayenda [1991] 2 KAR 242 Nairobi CA 283/96.**

33. Thus *"Full value of the property demolished"* and "*expenses incurred in undertaking developments"* is not an unlimited claim. The loss and or expenses in undertaking developments must therefore be particularized before an attempt can be made to prove them at the hearing. The above analysis is also applicable to prayer (b) of the "(special damages/expenses subject to proof)."

34. In this case, I reiterate that the plaintiff/applicant couched special damages as if they are unlimited/general damages which the court will determine after hearing the plaintiff assuming the defendant's defence is struck out.

35. Regrettably, the plaintiff cannot be allowed to lead evidence to prove what he has not specifically claimed. In the absence of any specific sum of money pleaded under prayers a and b of the plaint, it would be a futile exercise if this court were to strike out the defendant's defence and proceeded to "assess" damages, which damages ought to have been specifically particularized or quantified such that the court would in essence be entering final judgment for the plaintiff since the claim is for admitted specific damages.

36. Although the plaintiff's counsel attempted to 'withdraw' prayer No. c for general damages, as the matter was not for hearing of the substantive suit but an application to strike out the defence and or for judgment on admission, this court would not be inclined to allow that oral withdrawal of the prayer in the plaint in an application seeking for striking out of the defence.

37. Prayer (c) of the plaint is for general damages for breach of contract. It is now settled law that a party to a contract cannot seek for general damages for breach of contract if those damages can be quantified. In **Joseph Ungadi Kidera Vs Ebby Karigi CA 239/97,** the Court of Appeal per Kwach, Lakha & Owuor JJA put it succinctly that :

> ***" As to the award of kshs 250,000 as general damages, Mr Andere submitted that there can be no general damages for breach of contract. We respectively agree. There can be no general damages for breach of contract."***

38. In the instant case, it is trite that there was a sale of plot agreement which was frustrated by alleged misrepresentation. The defendants owned up and undertook in writing to compensate the plaintiff the loss. That loss is therefore known, to put back the plaintiff in the position in which he originally was before parting with his money towards purchase of the plot that never belonged to the seller. Where there is breach of contract, the plaintiff can enforce the terms of the contract by seeking the specific values admitted therein.

39. From my above analysis and findings, it is my humble view that what would be up for striking out is the plaint which is poorly drawn such that even if the court were to strike out the defence, the plaintiff would not be in a position to persuade this court with any amount of evidence to enable it

enter final judgment in his favour. Further, the plaintiff would not be allowed to seek to amend the plaint after the defence is struck out since that would amount to seeking to obtain justice through the backdoor. In seeking to have the defence struck out, it is assumed that the plaint is clear and perfectly flawless. Otherwise the plaintiff would be chasing a wild goose. I must however state that he is lucky that his application has unraveled the fatalities/defects in his plaint. He therefore has an opportunity to rectify the fatal errors since his suit has not even been certified for the hearing. He is at liberty, if he takes the cue from this ruling, to amend with leave of court, his plaint.

40. For those reasons, I find that it would be irrational and illogical to strike out a defence that is said to be scandalous, frivolous, vexatious and an abuse of the court process and leave on record a plaint which cannot benefit the plaintiff and or benefit from the order of striking out of the defence.

41. Having so found, it would not be appropriate for this court to strike out the defendant's defence and enter judgment based on prayers and or a claim which is not clear in itself and therefore acting in vain.

42. In addition, although the plaintiff maintained that the defence raises no triable issue, in this case, the fact that the plaint itself raises doubt before this court as to whether judgment on admission would serve any purpose, and the fact that the plaintiffs pleadings are not in tandem with the alleged admission. I would hesitate to enter judgment on admission as prayed.

43. Thus, as was correctly set out in **Isaac Awoundo V Surgi Phanki Limited & Another [2011] e KLR** the citing **Moi University V Vishval Builders Ltd CA 296/2014** Court of Appeal was clear that:

> ***" 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 plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was shs 185,305,0011.30. 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 EACA 89. We must however hasten to add that triable issue does not mean one that will succeed. Indeed, in Patel V EA Cargo Handling Services Ltd [1974] EA 75 at page 76 Duffus P. said -***
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> ***" 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 is an issue which raises a prima facie defence and which should go to trial for adjudication."***

44. In my view, the defence filed on record by the defendants is not as frivolous and vexatious or scandalous as the plaintiff would wish the court to believe, having already found that the plaint itself was poorly drafted and therefore the claim incapable of being granted. Summarily, one such triable issue would be whether the plaintiff incurred any expenses in undertaking developments whose value as per his paragraph 10 of the plaint, he will be able to provide and or have it assessed at the hearing; besides what he described as "massive kshs 3,000,000 being the estimated value of the property as at demolition date."

45. In **Postal Corporation of Kenya V Inamdar page 365.** The Court of Appeal stated inter alia:

> ***"……..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……."***

46. However, this is not to say that where, plainly speaking the defence is a sham, then the court cannot strike it out, as was stated in **Continental Butchery Ltd V Samson Musila Ndua CA 35/97** and

Patel V EA Cargo Handling Services Ltd [1974] EA 75 that:-

> ***" But a trial should not be ordered in a case where the court strongly feels it is justified d in thinking that the defences raised are a sham."***

47. In the **Continental Butchery Ltd V Samson Musila Ndua** (supra) case the Court of Appeal stated that :

> *" **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."*** (see also **Dhanjal Investments Ltd V Shabana Investments Ltd CA 1232 of 1997** (unreported) .

48. I must mention that all the cases cited by the plaintiff's counsel are very relevant to the subject of summary procedure and or striking out pleadings which are meant to delay the trial of a suit. However, as I have stated above, the circumstances of this case are unique such that if the court were to strike out the defence then there would not be left any opportunity for the plaintiff to enjoy any fruits as the court would hesitate to enter judgment for a party in a claim which is highly defective thereby defeating the whole essence of striking out the defence as the plaintiff would still, with leave of court have to amend the plaint to disclose a reasonable cause of action. That latter amendment of the plaint after the defence is struck out would be prejudicial to the defendants. A court of law ought not to do an injustice to any party.

49. The upshot of all the above is that I decline to grant to the plaintiff the orders sought in his application. In its place, and espousing the principles of the overriding objectives of the law to have disputes determined without delay and in an effective, efficient and cost effective manner, I exercise the unfettered discretion conferred upon me by the provisions of Section 100 of the civil Procedure Act and Order 8 of the Civil Procedure Rules as well as the inherent jurisdiction under Section 3A of the Civil Procedure Act' and in order to do justice to this case; for the court to determine the real issue in controversy, I grant the plaintiff leave of 14 days from the date hereof to amend, file and serve upon the defendants a duly amended plaint. The defendants have corresponding leave of 14 days to file their amended defence and serve the plaintiff. Costs of the application and for amendments ordered shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 22nd day of March 2016.

R.E. ABURILI

JUDGE

In the presence of Miss Kirui holding brief for Mr Arusei for the plaintiff/applicant

Mr Nzavi for defendants/respondents

Gitonga: Court Assistant