



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.254 OF 2013

GOR CONSTRUCTION AND HARDWARE CO. LIMITED.....PLAINTIFF

VERSUS

MARTHA CHIMWENE.....DEFENDANT

RULING

1. The Plaintiff, **Gor Construction and Hardware Company Limited**, through the notice of motion dated 22nd September 2014 prays for the striking out of the defence filed by **Martha Chimwene**, the Defendant, on their claim for refund of Ksh.1,500,000/= and interests or alternatively that judgment be entered for the Plaintiff for Kshs.1,500,000/= and costs on admission. The application is based on the five grounds on the face of motion which is also supported by the supporting affidavit of **Gordon Orure Raako** sworn on the 22nd September 2014 and a further affidavit sworn on 29th March 2016.
2. The application is opposed by the Defendant through her replying affidavit sworn on the 17th February 2016.
3. The issues for determination are as follows;
 - a. Whether the defence filed raises triable issues in respect of the Plaintiff's claim for Kshs.1,500,000/= and interests thereof, and if not, whether it should be struck out.
 - b. In the alternative, whether the defence filed contains an admission for the Plaintiff's claim of Kshs.1,500,000/= and interest and if so whether judgment should be entered thereof.
 - c. Which party pays the costs.
4. The court has considered the grounds on the notice of motion, the affidavit evidence filed by both parties, the submissions filed by counsel for the Plaintiff and Defendant dated 31st May 2016 and 15th June 2016 respectively and come to the following conclusions;
 - a. That the Plaintiff and the Defendant entered into a sale agreement in January 2013 in which the Defendant was to sell to the Plaintiff land parcel L.R.15 983/66, Kisumu Municipality for Ksh. 5,500,000/=.
 - b. That the Plaintiff paid the Defendant a deposit of Ksh.1,500,000/= on execution of the sale agreement and further Kshs.1,000,000/= on 3rd April 2013.

c. That each party blames the other for failure to complete the transactions under the sale agreement. That the Defendant has already refunded Ksh.1,000,000/= received from the Plaintiff.

d. That before the filing of this suit, the Defendant had variously undertaken to refund the outstanding Ksh.1,500,000/= as borne by the copies of the correspondence exchanged by the parties legal representatives but has not done so todate.

e. That the Plaintiff is entitled to the refund of the Ksh.1,500,000/= by the Defendant being money received under the sale agreement of January 2013 which has since been rescinded and or frustrated pending the determination as to which party is to blame.

f. That the court therefore enters summary judgment for the Plaintiff against the Defendant for refund of Ksh.1,500,000/= pending the hearing and determination of the outstanding issue of interest and damages for breach of the sale agreement, if not subsequently hereinafter agreed upon by the parties.

5. That having found as above, the court issues the following orders in respect of the notice of motion dated 22nd September 2014;

a. That summary judgment is hereby entered for the Defendant to refund Ksh.1,500,000/= to the Plaintiff forthwith.

b. That the outstanding issues of which party is to blame for breach of the sale agreement of January 2013, the party to pay the interests, damages and costs are to be determined through trial unless the parties reaches a settlement before then.

S.M. KIBUNJA

ENVIRONMENT & LAND JUDGE

DATED AND DELIVERED THIS 21ST DAY OF SEPTEMBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Sala for te Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND JUDGE

21/9/2016

21.9.2016

S.M. KIBUNJA J.

Oyugi COURT Assistant

Mr Sala for the Plaintiff/Applicant

Defendant/Respondent counsel absent.

Court: Ruling Dated and delivered in open court in presence of Mr Sla for Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND JUDGE

21/9/2016