REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 337 OF 2010

ROSE WAMBUI KAMAU...……..……..……1ST
PLAINTIFF

JUDY WAIRIMU KAMAU……..……..2ND
PLAINTIFF

JULIUS KARUGA MACHARIA……..……..3RD
PLAINTIFF

VERSUS

CECILIA MOU CHARLES HARRIS……..
…….DEFENDANT

RULING

[1] Before me is the Defendant's application dated 5th November 2014. The application before makes the following prayer:-

> ***a) THAT this honourable court be pleased to dismiss the original plaint and its amended version, a document prepared without reasonable cause of action.***

The application is essentially asking the court to strike out the Amended Plaint and dismiss this suit. The application is, however, erroneously expressed to be made under Order 2 Rule 15(a) of the Civil Procedure Rules.

[2] The application is premised upon the grounds that the Plaintiffs provided fraudulent and misleading information which threatened to make the sale process endless; that there was breach of the sale agreement and that there was a court order striking out the main argument in the Plaint and thereby masking an inappropriate method to appeal to the court's ruling. The application was supported by the affidavit of Cecelia Mor Charles Harris sworn on 5th November 2014. It was deposed to that on or about August 2009, the Applicant and the Respondents had entered into a sale agreement for the purchase of the suit property known as L.R Nairobi/Block 91/39. But, in the process, the Respondents had acted fraudulently and had purported to take over possession of the suit property, which occupancy was terminated on or about March 2010. Further, it was contended that vide a court ruling dated 20th November 2013, the suit against the Applicant's brother, who was the 2nd Defendant in the Amended Plaint filed on 21st December 2011, was struck out, and that the Respondent have purported to sustain the

suit against the then 2nd Defendant despite the ruling by Havelock, J (as he then was). In seeking to have the suit struck out, the deponent averred that the same did not disclose any reasonable cause of action, and that there had been a fundamental breach of the terms of the sale agreement by the Respondents, necessitating the cancellation of the agreement by the Applicant.

[3] In the submissions filed on 3rd December 2014, the Applicant cited the case of **Jane Wairimu Turanta v Githae John Vickery & Another (2013) eKLR** in support of her request for the suit to be struck out for not disclosing any reasonable cause of action. She further submitted that, in light of the fraud committed by the Respondent and the fact that the suit was dismissed against the 2nd Defendant, there was no valid claim against her. She also relied on the case of **Francis Kang'ethe Warai v Emmanuel Nakitare & Another (2009) eKLR** in support of this disposition.

Respondent opposed application

[4] The Respondent opposed the application and filed Grounds of Opposition filed on behalf of the Respondents dated 14th November 2014. They argued that the application was frivolous, vexatious, an abuse of the process of the court, incompetent and offended the provisions of the law. Further, the application is seeking to determine the suit at an interlocutory stage and to further delay the hearing of the matter. In their submissions dated 17th December 2014, the Respondents submitted that the power of the court to strike out pleadings was discretionary, and as such, the power should be exercised with general care and circumspection, and in consideration of the facts and circumstances of the case. They relied on the cases of **George P B Ogendo v James Nandasa & 4 Others [2006] eKLR** and **D T Dobie & Co. (K) Ltd v Muchina (1982) KLR 1**. It was further submitted that the issues relating to the Memorandum of Understanding as perpetuated by the Applicant in her application and supporting affidavit were the root of the matter and hence should be best addressed and determined at the trial. See **Nairobi HCCC No 337 of 2010 Rose Wambui Kamau & 2 Others v Cecilia Mou Charles Harris & Another.** They stated that no grounds had been concisely stated as required under the Civil Procedure Rules, and more particularly at Order 2 Rule 15(2).

[5] The Respondent beseeched the court to be guided by Article 159(2)(d) of the Constitution, and the overriding objective of this Court under Sections 1A and 1B of the Civil Procedure Act to favour determination of the substantive issues at the trial rather than at interlocutory stage. The Respondent asked the court to presume that the applicable provision of law is Order 3 Rule 15(1)(a) of the Civil Procedure Rules since Order 2 Rule 15(a) which has been cited by the Applicant does not exist in the Civil Procedure Rules.

DETERMINATION

[6] I have considered all the arguments by parties, affidavit evidence as well as the pleadings and the applicable law. I take the following view of the matter. Despite the error on the citation of the provisions of the law under which this application is made, it is succinctly clear that the application is one for striking out pleadings under Order 2 Rule 15(1) (a) of the Civil Procedure Rules. The rule provides as follows;

> ***15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law;***

When a party approaches the court under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, he submits himself to the legal restriction provided in rule 15(2) thereof which states as follows:-

> ***15(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.***

The restriction in subrule (1) (a) serves a useful constitutional purpose: To prevent injustice; by allowing parties as much room as possible to access justice and have their cases determined by a court of law in a hearing as opposed to summarily sending them away from the seat of justice; and at the same time, leaving room for summary dismissal of cases which are a complete demurrer and a waste of court's time. But, such a demurrer should be easily discernible from and in plain eye-sight of the court at a look at the averments in the pleadings without any probing of evidence. See what was reiterated in **Jane Wairimu Turanta v Githae John Vickery** (supra) and the case of **DT Dobie & Co. (K) Ltd v Muchina** (supra) that, striking out of a suit is a summary remedy that must be granted in the clearest case and with extreme caution. Later decisions by the Court of Appeal as well as this court have also insisted that striking out of a suit is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles'' upon a party with the fatal effect of completely shutting out the said party from access to justice. Therefore, such action should be taken sparingly and only in cases which are very clear that they are a total demurrer and a waste of court's precious time. Do the facts of this case fit that criterion?

[7] The Applicant has succinctly laid out factors which made her apply for this suit to be struck out. Among the major issues are: a) The suit against the 2nd Defendant, who also happened to be the brother of the Applicant, was struck out by Havelock, J (as he then was) on 20th November 2014, and as such nothing remained of the case against the Applicant; b) there has been clear breach of terms of the botched sale agreement and purported Memorandum of Understanding herein; c) the Respondents acted fraudulently and even took occupation of the suit premises. On these reasons, she believes that the entire suit has collapsed, and nothing is left of the suit against her. It should be struck out. In the court's mind, an act on the part of the Defendant which gives the Plaintiff his cause of complaint will constitute a cause of action. The foregoing arguments will require intense probing of evidence in order for the court to come to any decisive conclusion. They are not apt grounds or arguments in support of an application under subrule (1) (a) of Order 2 rule 15 of the Civil Procedure Rules. I will, therefore, only consider what the pleadings aver in order to determine the application herein, except, I must be careful not to express any opinions which may hurt a trail that may ultimately be held in this matter.

[8] Let me perform the ritual of looking at the averments in the plaint and the defence as pleaded. The Amended Plaint at paras. 16(a) – (g) states the particulars of breach by the 1st Defendant which give rise to the cause of action against her. It was contended that she reneged on the terms of the Sale Agreement. It was further contended that the Applicant was aware at all times of the vagaries and challenges with regards to the processes of the sale, and that she had however, decided to proceed with the termination of the sale agreement and purported to evict the Plaintiffs from the suit property.

[9] In response to the said allegations made against her in the Amended Plaint, the Applicant in her Amended Defence dated 17th February 2010, and a Counter Claim stated particulars of breach by the Plaintiffs, and sought damages for loss as set out at paragraphs 27 (a) – (h) of the Amended Defence.

[10] The Amended Plaint dated 16th December 2011 is not a complete demurrer as alleged by the Applicant. That does not mean that they will succeed as the Respondent will have to call for evidence and prove his case on balance of probabilities. It simply means, there are *bona fide* issues which should be allowed a determination on merit. Again, I repeat, all the arguments raised by the Applicant will require the court to probe for evidence in order to come to any conclusive decision. They are incapable of supporting an application for striking out a plaint for disclosing no reasonable cause of action. Accordingly, I dismiss the application dated 5th November 2014. I will not make an order for costs given the fact that the application is an action provided in law and was not made in bad faith. Further, and in line with the directions issued by this Court on 8th October 2014, parties must comply with those directions as well as the practice directions of the division within 21 days after which the suit should be set down for hearing. The cross action should equally be prepared for hearings. It is so ordered.

Dated, signed and delivered in court at Nairobi this 27th day of April 2015

F. GIKONYO

JUDGE