REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 63 OF 2012

MONICA MUTHONI MWANIKI.....PLAINTIFF

VERSUS

JEREMIAH KUYA MUTUNKI.....DEFENDANT

RULING

1. The Plaintiff filed a notice of motion dated 20th June, 2012 seeking to have the defence in this suit struck out and judgment entered in her favour in terms of her plaint. The motion is premised on the grounds set out on the body of the application and the supporting affidavit of the Plaintiff. The Plaintiff averred that she entered into a sale agreement with the Defendant on 27th January, 2006 for the purchase of L.R. No. Kajiado/Kitengela/17423 and paid the requisite deposit under the sale agreement. That she was ready and willing to complete payment as per the terms of the agreement but the Defendant breached the terms therein. They then entered into a further agreement on 13th July, 2006 where the Defendant agreed to sell a portion of the suit premises to her and it was a term therein that the Defendant was to avail to her the title deed by 15th August, 2006 without fail. She stated that it was also a term of that agreement that failure to deliver the title deed as agreed attracted a penalty of KShs. 30,000/= per month. On 15th August, 2006, the Defendant was not in a position to deliver the title deed as per clause 3 of the agreement and was thereby bound to pay the Plaintiff a sum of KShs. 30,000/=. She lamented that the Defendant neither executed a transfer in her favour nor obtained the relevant Land Control Board Consent to transfer the property to her and in the circumstances he is not in a position to complete the sale agreement. Her gravamen is that the Defendant without serving a completion notice sold the property to a third party and is not in a position to honour the terms of their agreement. That under those circumstances, the only remedy available is under the contract for him to refund the purchase price paid to him plus the accruing penalty. She stated that the Defendant is bound to refund KShs. 125,000 and a penalty of KShs. 30,000/= per month from 15th August,2006. She stated that the Defence is a sham and constitutes mere denials and ought to be struck out.
2. In response to the application the Defendant filed grounds of opposition dated 27th September, 2012 that; the defence filed by the defendant raises triable issues, there are contested issues of fact which can only be determined upon full trial and that there is no admission in the defence of the claim nor is any alleged admission unequivocal, plain and obvious.
3. The application was canvassed by way of written submissions. It was the Plaintiff's submissions there is evidence of admission in the defence where at paragraph 6 of the defence that he admits that he entered into two contracts with the Plaintiff who undertook to purchase the suit property from the Defendant. The Appellant stated that a judgment on admission is within the discretion of the court and is not a matter of right and submitted that the admission is unequivocal and clear. It was submitted that further unequivocal admissions are in paragraphs 2, 3 and 9 of the defence. That the terms of the sale agreement dated 7th January, 2006, it was clear that it was the

Defendant's duty to sub-divide and transfer the land to the Plaintiff. It was argued that the Defendant's contention that he did not know of the sale agreement dated 13th July, 2006 in undiscerning since he appended his signature to the said agreement.

4. To support her argument, the Plaintiff relied on Order 13 Rule 2 of the Civil Procedure Rules, 2010 and cited **Tausi Assurance Co. Ltd v. NIC Bank Limited (2014) eKLR**, **Equitorial Commercial Bank Limited v. Microhouse Net Limited (2005) eKLR**, **Plantation Fertilizers Limited v. Rioki Coffee (1971) Company Ltd (2006) eKLR** and **Mugunga General Stores v. Pepco Distributors Ltd. (1987) KLR 150 Platt**. In all the cases cited by the Plaintiff, the courts were at par that an admission has to be plain and clear. That is to say that it is not enough for a defendant to aver that it denies the plaintiff's claim. Reasons have to be given for such denials.
5. On the other hand the Defendant submitted that it is undisputed that there existed two agreements but however stated that the Plaintiff failed to honour what they had agreed on and the delay in concluding the transaction was occasioned by the Plaintiff. It was stated further that the defence raises triable issues which calls for determination on merit upon a hearing. It was stated that among the issues were, whether or not the Plaintiff met her part of the bargain, what caused the delay in sub-division of land and whether or not the parties signed the agreement dated 13th July, 2010. It was the Defendant' submission that he did not enter into the agreement dated 13th July, 2010 rather they entered into agreements dated 27th January, 2006 and 5th May, 2006. It was submitted that the Defendant explained why he did not obtain titles within the short period of time. It was contended that the Plaintiff did not file a reply to defence and is deemed to have accepted the contents of the defence. The Defendant cited **D.T Dobie & Company Ltd v. Joseph Mbaria Muchina & Another (1982) KLR 1** to demonstrate that the power to strike out pleadings should be exercised cautiously after considering all facts and on the clearest of cases. It was further argued that a pleading which raises triable issues ought not be struck out.
6. I have given due consideration to the depositions by the parties herein. Two issues fall for this court's determination. The first one is the effect of the Plaintiff's failure to file a reply to defence and secondly, whether or not the defence raises triable issues. Order 6 of the Civil Procedure Rules is the relevant procedure here. **Rule 10(1)** of that Order which is also referred to provides that:-

> ***"If there is no reply to defence, there is a joinder of issue on that defence."***

7. See also **Katiba Wholesellers Agency (K) Ltd v. United Insurance Co. Ltd., Civil Appeal No. 140 of 2002** where this court stated that:-

> ***"...where a defence contains an allegation of fact, and a reply is filed, ...it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations. It is only if the plaintiff does not file any reply that there is joinder of issue on the defence which operates as a denial of all allegations contained in the defence."***

8. In the light of the provisions of **Order 6 Rules 9(1)** and **10(1)** and this authority, the Plaintiff having not filed a reply to defence, there was a joinder of issues with the effect that the Plaintiff denied the breach alleged against her in the defence.
9. The general rule of pleadings is that matters must be specifically pleaded. **Halsbury's Laws of England, Fourth Edition, Vol. 36 par. 48 pg. 38** states:

> ***"The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality."***

10. Black's Law Dictionary defines triable issues as "***subject or liable to judicial examination and trial***." That is to mean that matters ought to be specifically pleaded for judicial examination.
11. Elsewhere in **Diamond Trust Bank (K) Ltd v. Martin Ngombo & 8 Others (2005) eKLR** Ouko

J, (as he then was) held which holding I share:

> ***"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence…<u>The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out</u>." (Emphasis mine)***

12. I am also fortified by the statement of Newbold P in ***<u>Adina Zola and Another, NNO v. Ralli Brothers Limited and Another (1969)EACA 4</u>*** where he stated:

> ***"<u>Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him</u> by the delaying tactics of the defendant. This is clear from the words of Order XXXV, rule 2, which states:-'the court may thereupon unless the defendant by affidavit, or by his own <u>viva voce</u> evidence or otherwise, shall satisfy that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly."***

13. The provision referred to above is equivalent to our Order 36 rule 2 which stipulates that: "***The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit***."
14. I have taken liberty to read through the plaint and the defence. While the Plaintiff alleged that she and the Defendant entered into two agreements dated 27th January, 2006 and 13th July, 2006 and that it was also a term of that agreement that failure to deliver the title deed as agreed attracted a penalty of KShs. 30,000/= per month. On 15th August, 2006, the Defendant was not in a position to deliver the title deed as per clause 3 of the agreement and was thereby bound to pay the Plaintiff a sum of KShs. 30,000/=, the Defendant denied the claim. He stated that he and the Plaintiff entered into agreements dated 27th January, 2006 and 5th May, 2006. The Defendant further expressed that the exercise of sub-division was demanding and that the Plaintiff ought to have known that. He further stated that the Plaintiff failed to honour her contractual obligation and attributed the delay in sub-division to a decision of the County Council of Olkejuado notified to the public on 7th September, 2006 to bar sub-divisions within its jurisdiction pending its review of the County's development policy. My reading of the defence and as stated above is that certain issues arise which issues can only be determined by the case going to full hearing. Amongst the issues which should go for trial include as to whether there was such a decision by the County Council of Olkejuado and whether or not the Plaintiff failed to honour her part of the transaction. Having so said, I find and hold that the defence raise triable issues and ought to be maintained. I find no merit in the application. It is hereby dismissed with costs to the Defendant.

Dated, Signed and Delivered in open court this 22nd day of May, 2015.

J. K. SERGON

<u>JUDGE</u>

In the presence of:

..... for the Plaintiff

..... for the Defendant