REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 402 of 2014

MERCY KARIMI NJERU…….....……1ST PLAINTIFF/APPLICANT

POLLY KAARI NJERU……...….....….2ND PLAINTIFF/APPLICANT

VERSUS

KISIMA REAL ESTATE LIMITED …….....…DEFENDANT/RESPONDENT

RULING

Vide a Notice of Motion dated 3/3/2015 the plaintiffs/applicants herein seek from this court summary Judgment to be entered against the defendants in the sum of Kshs 1,900,000 one million, nine hundred thousand only jointly owed to the plaintiff's by the defendant together with interest at the prevailing commercial rates.

The application is supported by the affidavit sworn by Mercy Karimi Njeru, the 1st plaintiff/applicant also sworn on behalf of the 2nd defendant. Ms Karimi avers that their claim as set out in the plaint is for payment of Ksh 1,900,000. She claims that Ksh 920,000 is owed to her by the defendant as refund of full purchase price paid to the defendant for purchase of all that parcel of Land known as plot 464 being a portion of Reference number 343/3 measuring 0.0454 Ha Situate at Lukenya, within Mavoko Municipality, and Kshs 930,000 owed to the 2nd plaintiff by way of refund of full purchase price paid to the defendant for purchase of all that parcel of Land known as plot 465,being a portion of Reference number 343/3anda further refund of Kshs 50,000 being the legal fees paid to the lawyers representing both plaintiffs.

The plaintiffs signed similar contracts with the defendant for purchase of the their respective plots which agreements are both dated 7th February 2014 pleaded in the plaint and admitted at paragraph 2 of the statement of defense.

Prior to the signing of the said agreement, the plaintiffs made full payment for the purchase price of the two plots. Having met their part of the bargain of the contract, it was upon the defendant to furnish the plaintiffs with completion documents within 90 days from 7th February 2014 the date of the signing of the agreement.

The plaintiffs aver that 90 days lapsed on 7th May 2014 without the defendant meeting its obligation of

furnishing the completion documents to the plaintiffs. The plaintiff's advocate then issued the defendant with a 21 days' notice to complete the contract.

The defendant ignored the said Notice and also failed to complete its part of the contract. As a result, the plaintiffs took the option of rescinding the contract in writing. The said contract entitled them to refund of all sum paid on account of purchase of their respective plots with interest accrued if the vendor breached the agreement. The plaintiffs also stated that through a letter dated 28/08/2014 the defendant purported to seek more time to complete the process. The plaintiffs' advocate responded that the contract had been rescinded and there was nothing to extend. The plaintiff countered that once a contract has been rescinded the same became null and void.

The application is opposed by the defendant through the replying affidavit sworn by Rahab Gichungi, the defendant's Commercial Manager. She avers that the defendant has a plausible defence as to why the title deed has never been processed in favour of the plaintiffs and that the defence has also shown that the plaintiff acceded to wait for the process to be completed.

The defendant argued that for the summary judgment to be entered on admission the same must be clear and unequivocal which is not the case herein. The defendant claims that by seeking the striking out of its defence, the plaintiffs are avoiding the real issues being decided by the court. The deponent also deposed that the court ought not to close a honest party from having its day in court just because the defendant opted to file the true position as opposed to creating untruthful defense.

The application was canvassed by way of written submissions. The plaintiffs submitted that it is trite law that when an application for summary judgment has been made the court has to satisfy that the defense filed if any as read together with the replying affidavit does not raise triable issues. If the defense raised triable issues the court shall depending on the circumstances of the case grant either conditional or unconditional leave to the defendant to defend.

The plaintiffs also submitted that their claim for summary judgment is premised on the agreement for purchase of land signed between the parties which agreements have been admitted by the defendant under paragraph 2 of the defence. The plaintiff claims that the line of defense adopted by the defendant is an afterthought justification to delay in furnishing the completion documents. The plaintiffs further stated that the defendants never raised the issue of delay being caused by the now alleged confusion at the Ministry of Lands and the National Land Commission when the plaintiffs notified the defendant of the default to complete the agreement within 90 days.

The plaintiffs also submitted that they exercised the option to rescind the agreement which became null and void and that therefore the defendant has no further recourse under the contract. The plaintiffs argued that the pleadings at paragraph 4 of the defense that the contract was for defined period of 90 days which lapsed before issuance of the Notice to rescind by the plaintiff is not correct. The plaintiff cited the case of **WELRODS LIMITED VS DASS T/A WELD –ON SUPPLIES (1988) KLR, STARLINE GENERAL SUPPLIES LTD VS DISCOUNT CASH & CARRY LTD(2006) EKLR where the court held that:**

"1. with a view to eliminating delays in the administration of justice, the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure subject to there being bona fide triable issue which would entitle a defendant leave to defend.

2. ……."

The defendant submitted that the court has power to enter summary judgment as sought but that the admission must be expressly clear or impliedly clear and unequivocal. The defendant stated that it entered into separate agreements with each plaintiff individually and separately therefore the plaintiffs hereto ought to have filed independent suits and not a joint suit. The defendant also argued that Ksh 50,000 was meant to be utilized and not to be held by the defendant or its agent. The defendant admitted that it received the purchase price and that the process of issuing the title deeds is almost over. The defendant

maintains that the plaintiffs were advised of the delay but they decided to seek refund of their payment. The defendant explained that the delay beyond the 90 days was occasioned by factors beyond its control and hence the same cannot be used against them.

The defendant asserts that it has set in motion processes to have titles issued in favour of the plaintiffs and that if the refund is ordered then the two plots will need a re-transfer back to the defendant. The defendant also stated that it was not party to the legal fees claimed by the plaintiffs. The defendant urged the court to be persuaded by the decision in the case of **Peter Thuranira Ndubai vs Kirrinya Mwedia Mwithimbu HCCC No. 388 of 2011** where the court held that courts must be slow in granting final orders at an interlocutory stage before hearing the parties substantively. The defendant also relied on the case **of Carton Manufacturers Ltd vs Prudential Printers Ltd HCC 517 of 2012** where the court held that the fact that interest to be levied on the undisputed amount was unknown was enough to have the matter put to full hearing.

Having set out the respective parties' positions as above, It is my most considered view that the sole issue for determination is whether on the facts and circumstances of this case whether the court should enter summary judgment in favour of the plaintiff against the defendant.

The primary applicable law concerning summary judgment is found in Article 159 (2) (c) of the Constitution which enacts that:

In the exercise of judicial authority, the courts shall ensure that justice is done without undue delay. Thus, a matter that ought to be determined expeditiously ought not to be archived in court.

In addition, under Section 63 (e) of the Civil procedure Act, the court may, in order to prevent the ends of justice from being defeated make such interlocutory orders as may appear to the court to be just and convenient.

Further, Sections 1A and 1B of the Civil Procedure Act too oblige this court to ensure just, fair, proportionate e and expeditious administration of justice to the parties before it.

The procedural law under Order 36 rule 1 of the Civil Procedure Rules on summary judgment provides that:

1. ***In all suits where a plaintiff seeks judgment for –***

a. ***a liquidated demand with or without interest; or***
b. ***the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***

A plain reading of the above rule shows that a court will grant the plaintiff summary judgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence.

The Court of Appeal stated in the case of **ICDC VS DABER ENTERPRISES LTD (2000) 1 EA 75** that:

> ***"The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross***

examination."

The above principles were restated by the Court of Appeal in the case of **HARIT SHETH T/A HARIT SHETH ADVOCATES V SHAMAS CHARANIA CIVIL APPEAL NO. 252 OF 2008 [2014] eKLR,** in determining an appeal from the High Court where the court entered summary judgment in favour of the respondent for KShs.32 million, with interest at court rates from the date of the suit, as well as costs, the court held:

> ***"The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION Vs DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.(emphasis mine)(See also CONTINENTAL BUTCHERY LTD V NDHIWA, (1989) KLR 573). (Emphasis added)***

In *DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTD* Civil Appeal No. 232 of *1997*, the Court of Appeal had earlier stated as follows regarding summary judgment:

> ***"The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant vs Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions…"***

Regarding what constitutes triable issues, in ***KENYA TRADE COMBINE LTD V SHAH, Civil Appeal No. 193 of 1999,*** **the Court of Appeal stated as follows:**

> ***"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."(emphasis mine).***
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> ***The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues. (See DEDAN KING'ANG'I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE & CO LTD, Civil Appeal No 79 of 2002. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. (See MOMANYI V HATIMY & ANOTHER, (2003) 2 EA 600). That is precisely the reason why the defendant is entitled to unconditional leave to defend."***

From the above decisions, it is clear that where there are no triable issues disclosed, the court cannot sustain a defence on record. ***The principles set down in D.T. Dobie & Co Ltd – Vs – Muchina &*** Another (1982) KLR 1 are clear that ***if a pleading does not disclose any reasonable cause of action or defence it ought to be dismissed…….No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption… A court of justice ought not to act in darkness without the full facts of the case before it.***

In the instant case it is not disputed that the defendant has filed a statement of defense. In that defense the defendant has admitted receiving the purchase price from the plaintiffs for the subject plots. The defendant has however denied that it breached the contract. It states that if here was any breach then the said breach was caused by factors beyond its making and specifically due to the confusion between the

Ministry of Lands and the National Land Commission. The defendant also contend that the said contract was for a defined period which lapsed before the plaintiffs issued a notice to rescind the contract hence the penalties emanating from the agreement cannot be enforced against the defendant. It is further contended that the defendant has now obtained approval from the relevant authorities and that it is in the process of obtaining individual titles for each plot.

The question therefore is whether, on those facts, this court would find that there was an admission of the claim or that there is no triable issue capable of being ventilated through a full hearing.

The Court of Appeal in **JOB KILACH V NATION MEDIA GROUP LTD, SALABA AGENCIES LTD & MICHAEL RONO [2015] EKLR** 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 ***GUPTA V CONTINENTAL BUILDERS LTD[1976-80] 1 KLR 809***, the court, when dealing with an appeal from an award granted on a motion for summary judgment, and in considering the weight to be given to the defendant's defence, Madan JA stated that:

> ***"If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily."***
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> ***11. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company v. Amalgamated Trade & Services LLR No 103 (CAK) this Court stated:***
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> ***"As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment." (Emphasis added)***
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> ***A bona fide triable issue needs not to be one that must succeed."***

In **Lalji t/a Vakkep Building Contractors vs Casousel Ltd (1989) KLR Nyarangi,** Platt JJA and Kwach, Ag JA) held:

> ***"……A trial must be ordered if a triable issue is found or one which if fairly arguable is found to exist."***

From the foregoing, I hold the view that the court cannot grant summary judgment to the plaintiff, I am satisfied that there are triable issues which need to be determined by the court at a full trial.

In AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR Gikonyo J held:

> ***"[19] There are sound legal and policy consideration which are responsible for the approach***

taken by the law on this subject; arising from the right of access to and to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above."

In my view the defendant should be given the opportunity to defend the suit. The defendant has denied that it is in breach of the said contract which is the subject matter of these proceedings and explained why it could not finalize the transaction within the required time. It further claims that the process of completion is underway. In my view the issues raised in the defence require judicial examination to determine whether or not there was breach of contract and whether or not the plaintiff is entitled to the prayers sought in the plaint. Those, in my view, are bona fide issues which ought to be allowed to go to trial.

It is the plaintiffs' contention that the defense is plain and obvious. The plaintiffs claim that the defendant admitted under paragraph 2 of its defence that they entered into a contract with both plaintiffs the subject matter of this proceedings. In my view the defense herein is not plain and obvious; the plaintiff is seeking a refund on the basis that the defendant did not meet its part of the contract which is denied by the defendant. In **Harit Sheth T/A Harit Sheth Advocates vs Shamas Charania** (Supra) the court observed thus:

"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In CHOITRAM Vs NAZARI, (1984) KLR 327, Madan JA (as he then was) stated as follows regarding admissions:

"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…"

See also ***MOMANYI V HATIMY & ANOTHER, (2003) 2 EA 600).***

Summary judgment has also been termed as a draconian measure which should be given only in the clearest of cases. In my view this is not a clear case to warrant summary judgment. See D.T Dobie case (supra).

*In the instant case, the admission by the defendant is not plain, obvious and clear to warrant summary judgment being entered against the defendant. T*his court employs the principle that the right to be heard is a fundamental right that must not be denied to enable the defendant to ventilate its position. In my *humble view, the defendant should* be given an opportunity to defend the suit and claim by the plaintiffs against it.

Entering summary judgment against it when the defence as filed raises a triable issue will have the effect of striking out the defence as filed and therefore ousting the defendant from the judgment seat, contrary to the constitutional imperatives on the right to access justice as contemplated in Article 48 of the Constitution and as a result deny it the right to a fair hearing under Article 50(1) of the Constitution and which right cannot be limited by dint of Article 25 of the Constitution, particularly when it is clearly established that the dispute herein can be determined by application of the law.

In the end, I find no merit in the application dated 3/3/2015 and proceed to dismiss it with an order that each party bear their own costs.

Dated, signed and delivered in open court at Nairobi this 29th day of June, 2015.

R.E.ABURILI

JUDGE