REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 287 OF 2013

TAJ MALL LIMITED.....PLAINTIFF

VERSUS

HELLEN NJAMBI MBUGUA.....DEFENDANT

RULING

1. Before me is the Notice of Motion dated 8th April, 2014 seeking to have the Plaint in this suit struck out. The reasons for which the Defendant made this application are that; the parties entered into a contract for purchase of Plaintiff's Maisonette C7 located on L.R. No. 9116 which the Defendant claims to have paid for in full. She contended that the interest sought by the Plaintiff in his claim was neither agreed upon nor captured in their agreement. That at the time of receiving payments, the Plaintiff never invoked any claim for breach of contract and that the sale is complete and the agreement cannot be unilaterally varied by one party.

2. In response to the application, the Plaintiff filed grounds of opposition contending that; the application is misconceived and an abuse of this court's process; that the application lacks merit and is frivolous and vexatious; that the application is fatally defective for failure to comply with mandatory provisions of the law and specifically Order 2 Rule 15 (1) (a) of the Civil Procedure Rules; the Defendant has brought the application to court as an afterthought purely meant to prejudice embarrass or delay the fair trial of the action; that the Defendant in the application has not shown or proved any grounds to support any allegation that the suit is an abuse of the process of the court and that the Defendant is attempting to litigate the suit by way of affidavit evidence instead of awaiting the hearing of the suit on merit in court. The Plaintiff therefore urged the court to dismiss the application.

3. I have considered the depositions of the parties herein together with their submissions which were basically a reiteration of their averments. I have also given due consideration to the authorities cited in support of the parties' respective positions. The power to strike out pleadings has been held to be a draconian measure which ought to be employed only as a last resort and only in the clearest of cases. Lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment upon the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than terminate cases or defence of parties on purely technical grounds.

4. The Plaintiff contended that the Plaint is frivolous and vexatious and does not raise triable issues for the reason that it claims for an interest which was not agreed upon by the parties and that the transaction between the parties had been completed. To succeed in this application, the Defendant must demonstrate that the Plaint is frivolous and vexatious or that it is not bona fide or it may prejudice, embarrass a fair trial. Ringera J (*as he then was*) in **Mpaka Road Development Limited v. Kana (2004) 1 E.A. 124** stated as follows:-

> ***"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."*** (Emphasis mine)

5. Black's Law Dictionary defines triable issues as "***subject or liable to judicial examination and trial***." and "Bona fide" in the following terms:-

> ***"[Latin in good faith"] 1. Made in good faith; without fraud or deceit. 2. Sincere; genuine."***

6. The application was brought under Order 2 Rule 15 of the Civil Procedure Rules. One of the grounds upon which the application was predicated upon was that the Plaintiff's claim does not disclose any triable issue. The application was supported by a Supporting Affidavit of Helen Nambi Mbugua sworn on 8th April, 2014. One of the grounds of opposition put forward by the Plaintiff was that the application was in breach of Rule 15 (2) of Order 2 which bars applications seeking the striking of pleadings for failure to disclose a reasonable cause of action or defence from being supported by any evidence. That sub rule provides:-

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

7. That subrule is in mandatory terms. In the case of **Kyanzavi Farmers Ltd –vs- Middle East Bank Kenya Ltd HCCC No. 388 of 2011 (UR)** wherein I stated thus:-

> ***"In the case of Olympic Escort International Co. Ltd & 2 others –vs- Perminder Singh Sandhu & another (2009) e KLR the Court of Appeal when considering an application made under our former Order VI Rule 13(i)(a) held that:-***
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> ***'We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.'***
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> ***I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are***

under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

I am in agreement with that position of the law and I apply the same here. That being the case, the application is fatally defective and cannot stand.

8. In any event, the Plaintiff is contending in the suit that contrary to the agreement between the parties, the Defendant failed to pay the balance of the purchase price as and when it fell due thereby attracting an interest of 17% per annum and penalty on late payment at the rate of 1% per month. This is an issue which I doubt can be termed to be vexatious or frivolous. It can only be determined on merit.

9. In the circumstances, I find the application to be without merit and I dismiss the same with costs.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 18th day of September, 2015.

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JUDGE