



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 90 OF 2015**

**NANCY WANJA GATABAKI.....PLAINTIFF**

**VERSUS**

**MUGA DEVELOPERS LIMITED.....DEFENDANT**

**RULING**

1. This ruling determines the plaintiff/applicant's notice of motion dated 7<sup>th</sup> May, 2015 seeking to strike out the defendant's statement of defence dated 30<sup>th</sup> March, 2015 and filed on 31<sup>st</sup> March, 2015. The motion is brought under the provisions of Section 3A of the Civil Procedure Act and Order 21 rule 15 (1)(b)(c)(d) and Order 51 rule 1 and 3 of the Civil Procedure Rules.
2. The Plaintiff vide her plaint dated 25<sup>th</sup> February, 2015 lodged a claim against the Defendant seeking judgment for Kshs. 10,000,000/= and interest thereon. she claimed that she and the Defendant entered into a written agreement dated 7<sup>th</sup> March, 2012. That it was agreed that as a result of the loss occasioned to the Plaintiff by the Defendant's demolition of the Plaintiff's houses on L.R. No. 28223/2, the Defendant would pay the Plaintiff Kshs. 10,000,000/= made as hereunder:-
  - a. ***Loss of rent for 6 months at KShs. 117,500/= per month Kshs 705,000/=***
  - b. ***Building material for the said houses Kshs6,705,000/=***
  - c. ***Agreed nominal charges Kshs 2,690,000/=***
3. The plaintiff further averred that it was a term of the said agreement that the KShs. 10,000,000/= would be paid in instalments within 90 days from the date of execution of the agreement to wit 7<sup>th</sup> March, 2012. That it was further agreed that in default of payment, the said sum would be recovered summarily from the Defendant. Having failed to make payment, the Plaintiff lodged this claim.
4. In its statement of defence, the Defendant denied the Plaintiff's claim and averred that the agreements of 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> March, 2012 must be read in totality and in conformity with the consent entered on 6<sup>th</sup> September, 2011 in HCCC No. 352 of 2011 for the true meaning and purport of the same to be understood. It was contended that the performance of the agreement of 7<sup>th</sup> March, 2012 was subject to an agreement entered into on 5<sup>th</sup> March, 2012. That the Defendant's performance of the obligation under the terms of the agreement was premised upon the Plaintiff's performance of her obligation as stipulated in the agreement of 5<sup>th</sup> March, 2012. On a without prejudice basis, it was contended that the Plaintiff agreed to execute transfers and/or leases in favour of several persons commonly known as Jacaranda Land Owners and deliver the executed leases to the Defendant's advocates. It was further averred that there were other proceedings pending before court between the Plaintiff and the Defendant relating to the subject

matter herein i.e. **HCCC No. 352 of 2011., Mrs Nancy Wanja Gatabaki v. Muga Developers Limited & 8 Others.**

5. The basis of the application is that the defence is scandalous, frivolous, vexatious and embarrassing and is meant to delay fair trial of this action. In support of the motion, the Plaintiff contended that the obligation of the Defendant was not based on any condition as alleged in the defence; that the agreement is not in any way related to the consent dated 6<sup>th</sup> September, 2011 and that the subject agreement was entered seven (7) months after the consent was recorded i.e. on 6<sup>th</sup> September, 2011. She further contended that there is no citation of the consent or any of its contents in the subject agreement.
6. The defendant did not file any replying affidavit, grounds of opposition or preliminary objection to the plaintiff's application.
7. At the hearing of the application. Learned counsel Mr. Mbuthi Gathenji appeared for the Plaintiff while Mr. Deya appeared for the Defendant. Mr. Mbuthi argued that the subject agreement is unequivocal therefore the defence is a sham. He pointed out that there was no affidavit controverting the application and urged that the application be allowed in view of the lack of opposition. Mr. Deya on the other hand warned that the court should be cautious where it finds that there is at least one triable issue and hesitate to strike out the defence. He stated that a list of documents and a court order issued in HCCC No. 352 of 2011 was attached in support of the defence case. Counsel urged the court to call for HCCC No. 352 of 2011 and consider it while writing this ruling. In response thereto Mr. Mbuthia argued that the court's interest should be in specific traverses that either the money was paid or that this suit is *res judicata* or *sub-judice*. That an affidavit is necessary to reply to the averments and depositions by the Plaintiff. He argued that all pleadings and evidence ought to be put before court and not for the court to fish for the evidence to help the defence. He finally argued that the Plaintiff's claim is based on a written agreement which the Defendant has not denied.
8. The law on striking out pleadings is as clear as is set out under Order 2 Rule 15 sub-rule (1) of the *Civil Procedure Rules, 2010*. The Plaintiff, therefore, has to satisfy the Court that the pleadings which it seeks to have struck out are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit. The threshold of striking out pleadings was set out by the Court of Appeal in **Savings & Loan (K) Ltd vs Kanyenje Karangata Gakombe & another (2015)eKLR** while agreeing with the principles set out in **D.T Dobie & Company Ltd v. Muchina & Another (1982) KLR 1** when it was held:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it.”***

9. It follows therefore that for the Plaintiff's application to succeed, her case must be self-evident. On the face of the record, there appears to have been an agreement whose terms are as alleged by the Plaintiff. However, the defence raises an issue that its obligation therein was subject to other agreements dated 5<sup>th</sup> and 8<sup>th</sup> March, 2012. While I agree with the Plaintiff that the Defendant ought to have attempted to avail the said agreements by way of an affidavit, I must note the circumstances under which there was delay in filing of a response to this application. The Defendant must have been less keen considering its take that this matter was to be transferred to the Commercial Division. Bearing in mind the said denial, it is to my mind impossible to fully understand the controversy unless this court gets the opportunity to scrutinise the two other agreements that are not before this court and which are said to be subject of another suit. That in my view can only be done in a full trial and after full discovery and compliance with Order 11 of the Civil Procedure Rules. There being the need to so scrutinise other pleadings and documents, it is clear therefore that the defence has at least one triable issue, which need not necessarily succeed but is nonetheless arguable.
10. It is worth noting that a court of law cannot enter judgement summarily unless the contention is so clear that no further verification would be necessary. The defendant's defence on record raises

doubt as to whether the subject agreement was not subject to other agreements of 5<sup>th</sup> and 8<sup>th</sup> March, 2012 thereby diluting the self evident agreement filed by the plaintiff, and the fact that pre-trial or discovery has not been completed.

11. It is also trite law that when a pleading raises even one triable issue, the Court cannot strike out the defence. There is at least one triable issue, which would demand that the defence be given a chance to be heard on merit- that is whether the subject agreement was subject to the agreements of 5<sup>th</sup> and 8<sup>th</sup> March, 2012.
12. It is for that reason that I decline to allow the plaintiff's application seeking to strike out the defendant's statement of defence, sustain the defence on record and order that the suit herein be set down for hearing on its merits upon the parties complying with the pre-trial requirements of Order 11 of the Civil Procedure Rules.
13. Accordingly I dismiss the application by the plaintiff seeking to have the defendant's defence struck out and make no orders as to costs.

**Dated, signed and delivered in open Court at Nairobi this 7th Day of December, 2015.**

**R.E.ABURILI**

**JUDGE**