



NO. 16/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 328 OF 2012

GAKURU KANYANJA..... PLAINTIFF

VERSUS

JOHN MURIITHI WAIGANJO DEFENDANT

R U L I N G

1. The Plaintiff filed plaint dated 30th August 2012 claiming specific performance for Defendant to transfer **LR No. Donyo Sabuk/Komarock Block 1/21145** or refund of the amount paid so far plus costs and interest.
2. The Plaintiff's claim is based on sale agreement dated 23th March 2010 in which he was buying subject matter at **Kshs.2 million**. He alleges to have paid **Kshs.1.650 million** leaving a balance of **Ksh.350,000/=** of purchase price.
3. On being served with summons, the Defendant filed Defence and Counter Claim dated 21st September 2012 which principally agrees that a deposit was paid but the Plaintiff failed to pay the balance within 4 months agreed after execution of the agreement. In the Counter Claim he seeks judgment for the Plaintiff to pay the Defendant 10% of the deposit paid.
4. It is on the aforesaid defence and Counter Claim, the Plaintiff filed Amended Motion amended on 12th October 2012 seeking to strike out the Defence filed on the ground that the same is;
 - i. Scandalous, frivolous or vexatious;
 - ii. it may prejudice, embarrass or delay the fair trial of the action;
 - iii. it is otherwise an abuse of the process of the court.

The Plaintiff further seeks the judgment to be entered as prayed in the plaint plus costs.

5. The application is supported by the affidavit of **Gakuru Kanyanja** sworn on 28th September 2012 and a Supplementary Affidavit sworn on 16th October 2012.
6. The application is opposed by the Respondent/Defendant by way of grounds of opposition dated 23rd November 2012.
7. The Plaintiff/Applicant reiterates the content of his plaint particularly paragraphs 3 and 5 and alludes to the content of the agreement and concludes that the Defendant having received **Kshs.1.65 million** from the Plaintiff, he (Plaintiff) ought to get summary judgment to recover land as prayed in the plaint.
8. The Defendant/Respondent's case is that the Plaintiff has failed to show that the Defence and Counter Claim have failed to disclose an arguable case. The Respondent submits that among the issues raised in the Defence and Counter Claim is that the Applicant failed to make good part of

- his bargain in the sale agreement and the breach resulted to the agreement being voidable.
9. He submits further that if aforesaid issue is upheld, then the Applicant's claim in the plaint will be defeated.
 10. The Respondent contends further that this is not a straight forward case as the standard for striking out pleadings demands.

He cites the Authority of **Mpaka Road Development Ltd. Versus Kana** which held that;

“...matter would only be scandalous if it would be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, e.g. imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to any.”

11. The Respondent argues that, applying the above tests and definitions in the Respondent's Defence and Counter Claim, it is the Applicant who breached a condition of the agreement thus resulting to the Respondent avoiding the agreement. He concludes by contending that indeed the above is a triable issue that needs the court to address itself for this matter to be settled. He seeks the Motion to be dismissed.

The issues for determination:

1. Does the Defence and Counter Claim raise a triable issue?
2. Should the court strike out the defence and the Counter Claim?
3. What is the order as to costs?

12. The Agreement entered on the 22nd March 2010 principally stated that the purchase price was to be paid as follows:-

Clause (3) Kshs.1 million on execution of agreement and the balance on 22nd June 2010.

The Plaintiff paid last part of deposit on 19th July 2010 **Kshs.150,000/=** and to date he has not paid the balance **Kshs.350,000/=**.

13. On the face of the agreement, it would appear that the Plaintiff/Applicant is the one who defaulted the agreement.
14. The Defendant, therefore, raises the issue of entitlement of payment to him 10% of the deposit paid in line with the agreement entered herein.
15. The court has to investigate as to whether in view of the aforesaid averment, the Plaintiff is entitled to specific performance even before clearing the balance or it is the Defendant who is entitled to payment of 10% of the deposit. In the Authority of **Nyati (2002) Kenya Ltd. Versus KRA (2009) eKLR** cited by the Defendant, the court held;

“drastic remedy of striking out pleading, or part of pleading, cannot be resorted to unless it is quite clear that the pleading objected to, disclose no arguable case...the rule is applicable only in plain and obvious cases.”

In our instant case herein, it is apparent that Defence and Counter Claim disclose triable issues and that this is not a plain and obvious case for striking out the pleadings.

16. The court thus finds that the Motion lacks merit and dismisses the same with costs.

Further, the court will be urging the parties to have matter transferred to the subordinate court in line with Practice Directions of 28th July 2014.

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of NOVEMBER, 2014.

CHARLES KARIUKI

JUDGE