



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 3 of 2013

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ELC CIVIL CASE NO. 3 OF 2013
(Formerly Mombasa H.C.C.C. No. 621 of 2011)

KILIFI RESORTS LIMITED.....PLAINTIFF

VERSUS

NORTHERN LIGHTS LIMITED.....DEFENDANT

RULING

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1. What is before the court is the Plaintiff's Notice of Motion dated 23rd May 2012 and the Defendant's Notice of Motion dated 14th June 2012. The parties agreed to argue the two applications together. The parties also agreed to dispose of the applications by way of written submissions.

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Background

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2. The facts pertaining to this case are that the Plaintiff agreed to sell to the Defendant land reference number 22056 situate in South of Kilifi town measuring 120.7 hectares (hereinafter the suit property) at a consideration of Kshs. 210,000,000.00. According to the Agreement for Sale dated 6th August 2010, the Defendant was supposed to pay a deposit of Kshs. 10,000,000.00 on the signing of the Agreement, Kshs. 40,000,000.00 within 90 days from the date of signing the Agreement for Sale, Kshs. 50,000,000.00 within 180 days from the date of signing the Agreement for Sale and the balance of the purchase price on or prior to 365 days from the date of signing the Agreement for Sale.

3. Upon signing the Agreement for Sale but before completion of the purchase price, the suit property was transferred to the Defendant on 26th August, 2010 by way of a transfer which was executed by both parties on 16th August, 2010.

4. The Plaintiff in his Plaint dated 30th November, 2011 is seeking for the cancellation of

entry number 3 in the Title of land reference number 22056, Cr No.28568 which is an entry in favour of the Defendant for failure by the Defendant to pay the full purchase price.

The Plaintiff's case

5. By way of a Notice of Motion dated 23rd May, 2012, the Plaintiff is seeking for the following reliefs from this court.

(a) **THAT the Defendant's statement of Defence be struck out.**

(b) **THAT Judgement be entered in favour of the Plaintiff or against the Defendant for cancellation of entry number 3 on the Title for Land Reference Number 22056, CR. No. 28568 an entry in favour of the Defendant and a return of the original Title of Land Reference No. 22056, CR. No. 28568 to the Plaintiff free of encumbrance.**

(c) **THAT the matter be referred to formal proof as regards to General and Special damages.**

5. The application is brought under the provisions of Order 2 Rule 15 (1) (d) of the Civil Procedure Rules and is supported by 9 grounds which are replicated in the Supporting Affidavit of Suleman Abdulrehman Haji Suleiman.

6. In addition to the Supporting Affidavit sworn on 23rd May 2012, the Plaintiff, through its director Suleman Abdulrehman Haji Suleman swore a Further Affidavit in response to the Defendant's Replying Affidavit and in reply to the Defendant's application for injunction on 28th June 2012.

7. The Plaintiff, through the same director swore another Supplementary Affidavit on 17th August 2012. I shall consider the depositions in all these affidavits as though it was one.

8. The main depositions of the three Affidavits by the Plaintiff's director are that vide an agreement of sale made on 6th August 2010, the Plaintiff agreed to sell the Defendant its property reference number 22056 situated in South Kilifi (hereinafter the suit property) measuring 120.7 hectares at a consideration of Kshs. 210,000,000.

9. According to the Plaintiff, it was a term of the Agreement for Sale that the completion date for the sale shall be on 7th August 2011 upon which all the purchase price would have been paid in full for the Defendant to be granted vacant possession of the property.

10. The Plaintiff's director has further deponed that on 16th August 2010, and before the payment of the full purchase price, the Plaintiff transferred the suit property to the Defendant because of assurances from and the trust in one Gulamali Ismail, a Director of the Defendant that all the payments will be made as agreed.

11. The Defendant, according to the Plaintiff, failed to pay the Plaintiff the full purchase price of Kshs. 210,000,000. Consequently, the Plaintiff served the Defendant with a completion notice dated 5th October 2011.

12. It is the Plaintiff's averment that the completion date for the transaction between it and the Defendant was on 7th August 2011 and the completion notice was issued pursuant to the provisions of Sub-Condition 4(7) of the Law Society conditions of Sale (1989) edition.

13. The Plaintiff further deponed that the Defendant cannot take refuge in Mombasa judicial Review Application No. 89 of 2011 because the orders prohibiting any dealings in the suit property in that particular case were issued on 6th September 2011, way after the Defendant had totally neglected and failed to pay the entire purchase price on or before 6th August 2011; that in fact the Judicial Review Application was dismissed with costs on 23rd May 2012 and that the only logical conclusion that can be

drawn from the Defendant's failure to pay the balance of the purchase price is because it was never in a position to raise money to pay the balance of the purchase price.

14. The Plaintiff further deponed that as per clause 6 of the Agreement for Sale, the completion date of the transfer was 21st August 2010. However, the completion date of the transfer is not synonymous with the completion of the purchase as provided for under condition 4 of the Law Society Conditions of Sale (1989).

15. The Plaintiff deponed that this court has powers to grant the reliefs sought by the Plaintiff under the provisions of section 64 of the Registration of Titles Act (now repealed) and the provisions of condition 4 (7) (d) (i) of the Law Society Conditions of Sale (1989); that the Defendant has not filed a counter-claim seeking for final orders of injunction and therefore does not have a basis in law to file an application for an interim injunction.

16. The Plaintiff has finally deponed that it has been and is still in possession of the suit premises and in fact that it has been carrying out farming activities on the said premises; that vacant possession could only be granted to the Defendant after receipt of full purchase price as per special condition number 5 of the Agreement for Sale; that having failed to pay the full purchase price as per the Agreement for Sale and thereafter on demand, the Defendant has no interest in the property as envisaged under section 8 of the Transfer of Property Act.

17. Based on the above depositions, the Plaintiff urged the court to grant its prayers in its application dated 23rd May 2012 and to dismiss the Defendant's application dated 14th June 2012.

The Defendant's case:

18. The Defendant filed its Notice of Motion dated 14th June 2012 and sought for the following orders:

(c) That the Plaintiff by itself, its directors, shareholders, employees, contractors, servants and agents be restrained from entering upon, remaining upon trespassing, erecting bill boards or interfering with the property comprised in Grant CR.28568 L.R.No. 22056 Kilifi until the determination of the suit.

(b) The Plaintiff's suit be struck out with costs.

(c) In the alternative and without prejudice to the prayer for striking out of the entire suit prayers numbers (a) and (b) concerning cancellation of entries and return of the Title be struck out and the claim for general damages and costs to proceed to trial.

17. The application is premised on 14 grounds and the same is supported by the affidavit of Ismail Gulamali, sworn on 14th June, 2012. The Defendant also filed a Replying Affidavit sworn on 14th June 2012 in opposition to the Plaintiff's Application, a Further Affidavit sworn on 12th July 2012 and a Further Supplementary Affidavit sworn on 6th August 2012.

18. The Defendant's director stated in his Affidavits that the Transfer in respect to the suit property was executed by the Plaintiff voluntarily and without any error or mistake.

19. The Defendant's director deponed that when it was served with the completion notice dated 5th October 2011, the Plaintiff had no capacity to do so as there was an order given in Mombasa High Court Miscellaneous Civil Application No. 89 of 2011 against the Registrar of Titles, the Plaintiff, the Defendant and one Suleiman Abdulrehman Haji staying all registrations.

20. It is the Defendant's position that it could not have paid the balance of the purchase price because the judicial review proceedings which had been instituted by a third party in respect for the suit property sought to cancel the registration of the Transfer both in favour of the Plaintiff and the registration of the Transfer in favour of the Defendant that the completion notice which was issued by the Plaintiff pursuant to condition number 4(7) of the Law Society Conditions of Sale is only applicable upon

service of a proper completion notice.

21. The Defendant further deponed that this court has no power under the Registration of Titles Act to order cancellation of entries because firstly, the Defendant is not a non-existent or fictitious person and secondly the entry showing the Defendant as the proprietor of the property was not made fraudulently or by mistake to warrant cancellation.

22. The Defendant further averred that because of the existence of this suit, it cannot pay the balance of the purchase price. The only remedy for the Plaintiff, it was averred, is for the Plaintiff to file a suit for specific performance for the payment of the balance of the purchase price, that the right to rescind the contract under the Law Society Condition No. 11 was overtaken by events after the Transfer was registered in favour of the Defendant.

23. The Defendant finally deponed that if it pays the balance of the purchase price while this suit is still in existence, it stands the risk of losing both the full purchase price and the suit property.

24. The Defendant also raised the issue of the Plaintiff's lack of authority to institute the current suit and the issue of the plaintiff putting up bill boards on the suit property which, according to the Defendant amounts to interference with the suit property.

25. I have summarised the Plaintiff's and the Defendant's cases as I see them. The parties filed written submissions which, in my view reinstated the position captioned in their respective affidavits and which I do not wish to reiterate here, save to state that I have considered them.

26. In determining as to whether I should grant to either of the parties the reliefs they have sought in their respective Applications, it would be important, nay mandatory, for the court to interpret the contract that was entered into between the Plaintiff and the Defendant and make a finding on the parties' respective rights and obligations.

27. In doing so, this court cautions itself that it is not supposed to re-write or re-negotiate contracts for the parties. This court is guided by the long chain of legal authorities and principles that have been laid down in so far as determining the rights and obligations of parties in a contract.

28. In L'Estrange -Vs- F. Grancob Ltd. (1934) K.B. 394; Scrullton L.J. At Page 403 had this to say about contracts:

“When a document containing contractual terms is signed then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the documents or not.”

29. In his usual flair, Lord Denning had this to say about contracts in Curtis -Vs- Chemical Cleaning & Dyeing Co. Ltd (1951) 1 K.B 805:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exemption clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

30. While in Rufate -Vs- Union Manufacturing Company (1918) L.R. 1 K.B. 592, Scrutton L. J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties “What will happen in such a case” they would have replied “of course so and so will not happen, we did not trouble to say that; it is too clear”. Unless the court

comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.”

31. It is necessary for me to flag out the salient terms of the Agreement of Sale which was entered into between the Plaintiff and the Defendant.

32. According to condition number 3(a) of the Agreement of Sale, the purchase price for the suit property was agreed at Kshs. 210,000,000.00 of which the sum of Kshs. 10,000,000.00 was paid by the Defendant to the Plaintiff upon the signing of the agreement. The Plaintiff acknowledged the receipt of the said amount.

33. The Defendant was subsequently required to pay Kshs. 40,000,000.00 within 90 days from the date of signing of the agreement and a further sum of Kshs. 50,000,000 within 180 days from the date of signing the Agreement for Sale. The balance of the purchase price was to be paid by the Defendant on or prior to 365 days from the date of signing of the Agreement of Sale.

34. It would appear from the pleadings by both parties that a total of Kshs. 80,000,000.00 was paid by the Defendant for the suit property leaving a balance of Kshs. 130,000,000 which was to be paid on or before the lapse of 365 days from 6th August 2010 when the Agreement for sale was signed. According to the Plaintiff, the ***“Completion date for the Sale”*** transaction was to be on or before 7th August, 2011. The defendant does not deny that indeed that is the date that it should have made the payment of the balance of the purchase price. The balance of the purchase, as I have stated above was Kshs. 130,000,000.00 which amount has not been paid to date.

35. Condition number 4 of the Agreement of Sale provided that the sale was subject to the Law Society Conditions of Sale (1989 Edition) with an amendment to condition number 2 (9) relating to the interest payable. The Plaintiff and the Defendant agreed that the interest payable was 10% per annum.

36. Condition number 6 of the Agreement of Sale was framed as follows:

“The completion date for the transfer shall be on or prior to 21st August, 2010 (completion Date)”.

36. It was further a term of the Agreement of Sale that the completion was to take place at the offices of Sachdeva & Co. Advocates who were the advocates for both parties in the transaction on which day the said advocates were to deliver to the purchaser completion documents which included the original Title of the suit property (free of encumbrances), the Transfer documents duly signed amongst other documents.

37. It is not in dispute that the Transfer was executed by both parties before the completion date for the transfer as stipulated in condition number 6, that is 21st August 2010. The Transfer document which has been annexed on the Defendant's Further Affidavit sworn on 12th July 2012 shows that it was executed by the parties on 16th August 2010 and registered on 26th August 2010 at 3 pm.

38. The agreement that was entered into between the Plaintiff and the Defendant is not the usual Standard Agreement of Sale of land where parties exchange documents upon the payment of the full purchase price or on the professional undertaking of the purchaser's advocates. In this particular case, the parties agreed to have the transfer registered in favour of the Defendant and the full purchase price to be paid within 365 days. The Agreement of Sale did not provide for what would happen in the event the purchaser does not make the full payment of the purchase price after the 365 days.

39. It is not in dispute that on 5th October 2011, the Plaintiff issued to the Defendant a completion notice pursuant to the provisions of condition 4(7) of the Law Society Conditions of Sale (1989) for the payment in full within 21 days of the balance of the purchase price in the sum of Kshs. 130,000,000.

40. The Defendant did not make the payment after that notice was served on it, and its response for failure to pay the balance of the purchase price upon being issued with the completion notice was because of a court order which had been issued in Mombasa High Court Miscellaneous Application No.

89 of 2011 (JR). The said order has been annexed on the Defendant's Supporting Affidavit sworn on 14th June 2012.

41. The Order in Mombasa Miscellaneous Civil Application number 89 of 2011 was granted on 2nd September 2011 and extracted on 6th September 2011 by Hon. Lady Justice Odero. Paragraph 3 of the order states as follows:-

“That the leave hereby granted do operate as a stay of any further dealings in respect of the said property known as L.R. No. 22056, CR. No. 28568.”

42. It is the Defendant's case that a party can only serve a completion notice pursuant to condition 4(7) (b) if he himself is ready, able and willing to complete. Due to the existence of the court order, the Defendant has taken the view that the Plaintiff was not able to complete the Agreement because both parties had been disabled by the prohibitory orders in the judicial review proceedings. Consequently, the Defendant has argued that condition 4(7) (d) of the Law Society Conditions of Sale which requires the Defendant (Purchaser) to return the documents and procure the cancellation of any entry relating to a contract in the register applies only if the purchaser fails to comply with a valid completion notice.

43. The Plaintiff has countered this argument by arguing that if indeed the order of the court was an impediment to the completion of the agreement, then the Defendant should have issued a completion notice pursuant to condition number 4 (7) (g) of the Law Society Conditions of Sale.

44. The question that arises from that argument in this, why would the Defendant, who was already in custody of the completion documents, and whose name had already been registered as the proprietor of the suit property issue a completion notice to the Plaintiff.

45. The Plaintiff has not offered an explanation as to why it did not issue a completion notice immediately after the lapse of the 365 days from the date of signing the Agreement of Sale, that is on 7th August, 2011. The Plaintiff had to wait until 5th October, 2011 to issue to the Defendant a completion notice by which time a third party had filed the judicial review application in which the court prohibited any dealings in the land.

46. I agree with the Defendant's advocates submissions that as at 5th October, 2011 neither the Plaintiff nor the Defendant had the capacity to complete the transaction due to the existence of the prohibitory order that was in place. The Defendant would have been contemptuous of the court order of 2nd September, 2011 if it had gone ahead to comply with the completion notice of 5th October, 2010.

47. Condition 4 (7) (d) of the LSK conditions of Sale which requires a purchaser who does not comply with a completion notice to return all documents delivered to him by the vendor and at his own expense to procure the cancellation of any entry relating to the cancellation of any entry relating to the contract in any register applies only if the completion notice is valid.

48. I have however found and held that the Plaintiff could not have issued the completion notice of 5th October, 2011 in view of the order of the court of 2nd September, 2011 which prohibited in any dealing with the suit property. A fresh completion notice should have been issued by the Plaintiff after the dismissal of the judicial Review Application on 23rd May 2012 to enable it to rely on the provisions of Article 4 (7) of the Law Society Conditions of Sale.

49. Supposing the completion notice of 5th October, 2011 by the Plaintiff was valid, what would be its effect in view of the terms of the Agreement of Sale of 6th August 2010?

50. The Defendant's position on this issue is that the sale of the suit property was completed upon registration of the transfer dated 16th August 2010. Upon the registration of the said transfer, it was argued, the title document became conclusive evidence that the Defendant is the absolute and indefeasible owner of the suit premises and the title cannot be subject to challenge except on the ground of fraud or misrepresentation, which fact has not been pleaded in the Plaintiff.

51. The Plaintiff's take on this issue is that the completion date of the transfer as set out under

clause 6 of the agreement cannot be the same as the completion of the purchase or even the completion date of the purchase. The Plaintiff has relied on the Law Society Conditions of Sale's definition of the word "**completion**" and "**completion date.**"

52. It is the Plaintiff's case that "**the completion of the purchase**" is provided for under condition 4 of the Law Society Conditions of sale (1989), which, according to the Plaintiff, involves the exchange of documents with the money. Having failed to pay the money, the Plaintiff urged, the Defendant totally failed to complete the purchase and therefore he has no interest in the property as envisaged under Section 8 of the Transfer of Property Act.

Condition 2 of the LSK condition of Sale defines "**completion**" to mean "*completion of the purchase as provided for by condition 4.*"

53. Condition 4 of the Law Society Conditions of Sale states that "*completion shall, unless otherwise agreed in writing between the parties or their advocates and the advocates for any mortgagee, take place at the office of the vendor's advocate or, if required by the vendor at least 5 working days prior to the completion date, at the office of the vendor's mortgagee or his advocate.*" The condition then explains what would ordinarily happen on the completion date.

54. Did the Plaintiff and Defendant agree on the completion date so as to exclude the definition in clause 4 of the Law Society Conditions of Sale? The Plaintiff and the Defendant agreed that the completion date for the transfer would be on or before 21st August, 2010. It was not a term of the Agreement for Sale that the full purchase price shall be paid on the completion date. The sale of the suit property was completed when the parties exchanged documents and the transfer was registered in favour of the Defendant. This was a few days after the date that the parties had agreed in writing to be the "*completion date.*"

55. Pursuant to clause 4(7) (b) of the Law Society Conditions of Sale, a party is obligated to serve a completion notice on the defaulting party "**if the sale shall not be completed on the completion date**". I have already found and held that the *completion date* in the current transaction was specifically provided for as 21st August, 2010. Indeed, the events that were to occur on the completion date were further agreed upon by the parties and none of the parties is alleging that any of those events did not occur on the said date. Consequently, condition 4(7) of the Law Society Conditions of Sale is not applicable in this case.

56. Freedom of contract operates to allow parties to enter into their own bargain. The Law Society Conditions of Sale operate as general conditions that can be included or excluded by the parties.

57. Condition 8 of the Law Society of Conditions of Sale addresses the issue of interest on purchase money. The said condition contemplates two situations, firstly, it provides for what will happen where completion is delayed beyond the *completion date* by an act or default of either party and secondly it provides for what would happen if the payment for the purchase price is not paid on the agreed date.

58. I have already found and held that the completion in the current transaction was never delayed by an act of either party. What has happened is that the purchaser has refused or failed to pay the balance of the purchase price on the date agreed by both parties. In the circumstances, it is my view that condition 8 (4) of the Law Society conditions of Sale is the only condition that comes to the aid of the Plaintiff. That sub-condition provides as follows:

"If any payment provided for in the special conditions is not paid on the date agreed, on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment."

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56. The above sub-condition contemplates a situation where parties

complete a transaction pursuant to the Agreement of Sale but the full purchase price is not paid in full. That is what happened in the present transaction. Indeed, sub-condition 8 (4) of the Law Society Conditions of Sale is in conformity with the equitable doctrine of Specific Performance which deals with the enforcement of the rights and obligations of parties in the sale of land.

57. Specific Performance is an equitable remedy that compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that, under the circumstances, justice will be done between the parties.

58. Specific Performance grants a party to a transaction what he actually bargained for in the contract. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved. The remedy of Specific Performance therefore presupposes the existence of a valid contract between the parties to the controversy.

59. The Agreement for Sale dated 6th August, 2010 between the Plaintiff and the Defendant is definite and certain. The Plaintiff voluntarily agreed in writing to have its Title transferred to the Defendant before the payment of the full purchase price. The Plaintiff is not alleging fraud or misrepresentation on the part of the Defendant. In the absence of the evidence or a plea of fraud or misrepresentation on the part of the Defendant, this court has not legal standing to cancel the title which has been transferred to the Defendant by the Plaintiff.

60. The Plaintiff has taken the position that this court has jurisdiction to grant the reliefs sought by the Plaintiff under section 64 of the Registration of Titles Act and the Provisions of condition 4 (7) (d) (i) of the Law Society Conditions of Sale (1989).

61. Section 64 of the Registration of Titles Act is only applicable where judgement or an order of the court exists. In such a situation, the court may direct the registrar to cancel, correct or substitute any entry in the register so as to give effect to the judgement or order. No such judgement or order exists in the current suit. I have already held that condition 4(7) of the Law Society Conditions of Sale is not applicable in the current suit, and even if it was, a proper completion notice should have been issued after the Judicial Review Application was dismissed by the court.

62. The Registration of Titles Act provides the circumstances under which a title may be cancelled and or rectified by the court or the Registrar of Titles. Non payment of the purchase price on the due date is not one of the circumstances that the law allows for the cancellation of a title.

62. The Plaintiff has also relied on the provision of section 8 of the Transfer of Property Act, 1882. According to the Plaintiff, the Defendant has no interest in the suit property having failed to pay the full purchase price.

63. My reading of section 8 of the Transfer of Property Act, 1882 is that once a party transfers his interests in land to another person, such property passes forthwith, unless a different intention is expressed or necessarily implied.

63.A: I am satisfied, firstly, that the parties in this matter have expressed all they needed and wanted to say and it will not make business efficacy to read and imply terms that did occur in the parties minds during negotiations.

64. The Agreement of Sale dated 6th August 2010 was explicit that the Plaintiff's interest in the suit property was to pass to the Defendant on 21st August, 2010. That interest passed when the transfer was registered in favour of the Defendant on 26th August, 2010. The Plaintiff had the option of retaining the title documents pending the payment of the balance of the purchase but he opted to transfer his interests to the Defendant before payment of the entire purchase. He cannot turn around and say that those interests should revert to him for nonpayment of the balance of the purchase. The Plaintiff's only recourse is to pursue the Defendant for the balance of the purchase with interest from the date when the said balance fell due.

65. The Plaintiff has not prayed for Kshs. 130,000,000 being the balance of the purchase price in

his Plaintiff. In the circumstances, it cannot be true that the Defendant's Defence dated 5th December, 2011 is an abuse of the process of the court and should be struck out.

66. For the above reason, I dismiss the Plaintiff's Application dated 23rd May, 2012 with costs.

67. The Defendant has sought in his Application injunctive orders and the striking out of the Plaintiff's suit.

68. The Defendant has not filed a counter claim as against the Plaintiff. In the absence of a counter-claim seeking for final orders of injunction, this court does not have a basis of granting injunctive orders in favour of the Defendant. In any event, special condition number 5 of the Agreement of Sale is clear that the Plaintiff shall hand over the property in vacant possession to the Defendant on receipt of the purchase price. It therefore behoves the Defendant to meet his side of the bargain before seeking for injunctive orders.

69. The Defendant further prays in his application that the Plaintiff's suit be struck out with costs.

70. In the preceding paragraphs, I have found and held that this court has no legal standing in the circumstances of this case to grant prayers number (a) and (b) of the Plaintiff. The only available remedy for the Plaintiff is to pursue the payment of the balance of the purchase price.

71. The Plaintiff has not prayed for this particular relief. I would have proceeded to strike out the Plaintiff but I have to return to the cautionary words of Justice Madan in **D.T. Dobie & Co. (k) LTD Vs Joseph Muchina (1982) KLR 1** in which he memorably stated that "no suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

72. The striking out of the suit will lock out the Plaintiffs in the pursuit of the balance of the purchase price which the Defendant has admitted that its due and owing. The balance of the purchase price can and should be pursued by way of amending the plaintiff. The Plaintiff's plaintiff can be redeemed by way of amendment. Consequently, I dismiss the Defendant's Application dated 14th June, 2012 with costs.

Dated and delivered in Malindi this **19th** day of **April**, 2013

O. A. Angote
JUDGE

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