

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO.555 OF 2013

FRANCIS MUNYUAKI MUCHEEPLAINTIFF/APPLICANT

VERSUS

JENEM COFFEE LIMITEDDEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Defendant's Notice of Motion dated 12/6/13 which seeks orders by this court to issue striking out the Plaintiff for disclosing no cause of action and to cancel the Sale Agreement dated 14/2/13.

The application is supported by the grounds appearing on the face of it together with the Supporting Affidavit of Zipporah Mburu. In the said Affidavit, the deponent entered into a Sale Agreement with the Plaintiff/Respondent and one David Gitonga Amuru to sell to them the property known as L. R. No. 209/9369 (hereinafter referred to as the "Suit Property") at a consideration of Ksh. 60 million. She further stated that it was an express term of the Sale Agreement that the purchasers pay the full purchase price upon execution of the Sale Agreement. She further stated that the Purchasers failed to perform their obligation under the Sale Agreement causing the Defendant to issue to them a notification to perform. She further averred that the Plaintiff together with Gitonga Amuru failed to perform their obligation and that the said Gitonga Amuru wrote to the Defendant indicating frustration and indicating his intention to rescind the Sale Agreement. She further stated that the Defendant has since returned a cheque for Ksh. 150,000/- at the request of Gitonga Amuru being the amount he contributed towards the Ksh. 300,000/- paid as deposit. She further stated that they needed the Ksh. 60 million quickly for the purpose of procuring medical treatment for their father one Mr. Joram Njuguna Mburu who is suffering from Diabetes Mellitus and High Blood Pressure. She also indicated that the Defendant has creditors who urgently need to be paid their money. She stated further that the Plaintiff has fundamentally breached the Sale Agreement hence he has no remedy in law. She also stated that since the Co-purchaser rescinded the Sale Agreement, the Suit was rendered incompetent in law. She also stated that the Plaintiff failed to disclose to the court that he had been denied credit by the bank leading to his failure to perform his obligation under the Sale Agreement. She also averred that the Plaintiff was entirely hinged on. "reliable sources" without any documentary evidence and that if failed to particularize any misrepresentation on the part of the Defendant. She further indicated that the Plaintiff cannot keep the Defendant and their Patient's deteriorating situation in abeyance at the expense of baseless allegations.

The Application is contested. The Plaintiff filed his Replying Affidavit sworn on 25/6/13 in which he stated that the Sale Agreement stated that the full purchase price had been paid. He further stated that he and his co-purchaser are not the ones who failed to perform their obligation under the Sale Agreement but that it was the Defendant who breached the agreement by seeking for third parties to purchase the Suit Property without the knowledge of the Plaintiff. He also stated that he did not instruct his co-purchaser to write to the Defendant rescinding the Sale Agreement. He also stated that the refund of Ksh. 150,000/- to his co-purchaser was unlawful. He indicated that he was on his part ready to proceed with the transaction. He also stated that the suit was not incompetent after the rescission by his co-purchaser as he had rights under the sale agreement. He also denied having sought for financing with a bank.

There is no dispute regarding the existence of a Sale Agreement dated 14/2/13 between the Defendant and the Plaintiff and one David Gitonga Amuru in which the Defendant agreed to sell to the said co-purchasers the Suit Property at a consideration of Ksh. 60 million. Both sides agree that the full consideration became due and payable on 14/2/13 which was the date of the Sale Agreement. The

Plaintiff alleges that he is ready to complete the sale transaction but accuses the Defendant of seeking for other third parties to purchase the Suit Property before the Sale Agreement had expired.

In this application, the Defendant seeks to have this suit struck off on the ground that it does not disclose any cause of action.

After careful consideration of the disclosed facts and evidence by way of affidavits, I can see that the rights of the Plaintiff under the Sale Agreement as well as those of the Defendant need to be clarified. The Plaintiff seeks to have his right to purchase the Suit Property asserted. This is the basis of the cause of action which the Plaintiff has. I find that this is not a case which can be determined at this interlocutory stage through the striking out of the Plaintiff. The legal effect of the withdrawal of the co-purchaser and his rescission of the Sale Agreement upon the Plaintiff's rights under the same Sale Agreement also needs to be determined. Again, this cannot be determined at this interlocutory state.

In light of the foregoing, I hereby dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE