



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 337 OF 2010

ROSE WAMBUI KAMAU 1ST PLAINTIFF

JUDY WAIRIMU KAMAU 2ND PLAINTIFF

JULIUS KARUGA MACHARIA 3RD PLAINTIFF

VERSUS

CECILIA MOU CHARLES HARRIS 1ST DEFENDANT

VICTOR KARUME 2ND DEFENDANT

RULING

1. On 15th October 2012, the 2nd Defendant in this suit filed a Notice of Motion, dated 12th October 2012, seeking Orders that the Amended Plaint dated 16th December 2011 be struck out. The Application was brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as under **Order 2 Rule 15** and **Order 13 Rule 2** *Civil Procedure Rules, 2010*. The grounds upon which the application was based included an allegation that the said Amended Plaint and the Verifying Affidavit contained misrepresentation and falsehood by the Plaintiffs. The 2nd Defendant further put forward the point that the Amended Plaint did not disclose any reasonable cause of action and that no demand was made (of him) prior to commencement of the suit. The 2nd Defendant also maintained that the Power of Attorney given by the 2nd Plaintiff to a Mr. Johnson Kamau contained falsehood and was misleading. Finally, the 2nd Defendant maintained that the Memorandum of Understanding dated 17th July 2009 as between the 2nd Defendant and one Johnson Mangucia, upon which this suit was predicated, was not binding on all the parties to the suit as it was only meant to facilitate rapid performance on the part of the Plaintiffs and was not part of the overall sale agreement.
2. The Affidavit in support of the 2nd Defendant's said Application is defective in that it does not detail as to who is the deponent although the first paragraph of the same details and identifies the deponent as the 2nd Defendant. In any event, the said Affidavit details that the deponent was instructed by his sister, the 1st Defendant, to look for a purchaser for her property situated at Gigiri, Nairobi being Nairobi/Block/91/399 (hereinafter "the suit property"). In that regard, the 2nd Defendant met a Johnstone Kamau who expressed interest in purchasing the suit property and offered Shs. 35 million for it. As the 1st Defendant resided in the United States of America, it would have been some time before she was able to come to Kenya so as to execute the conveyancing documentation. As a result and as Mr. Mangucia was living in rented accommodation, it had been agreed between the deponent and him that he and his wife be allowed

to occupy the suit premises. A Memorandum of Understanding was drawn up as to the possession of the property by Mr. Mangucia and his wife but the same was never executed. The deponent went on to say that Mr. and Mrs. Mangucia moved into the suit property but without the knowledge of the 1st Defendant. Before he did so move in, the deponent stated that Mr. Mangucia transferred Shs. 1 million into his account and promised to pay the balance of the 10% deposit or commitment fee as the agreed purchase price as above. Bizarrely, Mr. Victor Karume, the 2nd Defendant, stated that he had found out that one Mr. Mangucia's daughters, the 2nd Plaintiff, had donated a false Power of Attorney to her father in which she purported to be the registered owner of the suit property. The deponent then went on to say that Mr. Mangucia and his wife began to deny him entry to the suit property. As a result, the deponent became worried and confused since he had no power to proceed with the sale because he was not the registered owner or proprietor of the suit property. He had no power to turn Mr. and Mrs. Mangucia out of the same. As a result when his sister returned from the U.S.A., she discovered that Mr. Mangucia was already occupying the suit property without having paid the balance of the purchase price. She also discovered that the suit property had been altered with a redesign of building plans which he presumed were approved by the Nairobi City Council. He then gave evidence as to his sister discovering the fraudulent Power of Attorney as well as her evicting Mr. Mangucia but the deponent did not detail how he came about such knowledge and, as a result, the same needs be ignored. Further, the impression created by the said Affidavit was that Johnstone Kamau was one individual and Johnson Kamau Mangucia another separate individual.

3. As it turns out from the Replying Affidavit, the said Johnstone Kamau and the said Johnson Kamau Mangucia is one and the same person and he swore the said Affidavit on 9th November 2012. He noted that he was the holder of a Power of Attorney dated 15th October 2009 from Judy Wairimu Kamau, the 2nd Plaintiff herein. He also confirmed that Mr. Victor Karume had got his name wrong in his so-called Affidavit in support of the Application. He confirmed that he had negotiated with Mr. Karume to purchase the suit property at an agreed price of Shs. 35 million. The suit property was being built at the time and Mr. Karume was in charge of construction thereof. He understood that his sister, the 1st Defendant in the U.S.A., was aware and had been consulted with regard to the agreement. Contrary to what Mr. Karume had detailed in his said Affidavit, Mr. Mangucia detailed that the understanding was that the purchasers of the suit premises would pay a 10% deposit of the purchase price, the balance to be paid within 90 days of the Completion date. This position according to the deponent was clearly set out in a letter written by the 1st Defendant to the Purchasers dated 12th June 2009, as well as in the Memorandum of Understanding signed by the 2nd Defendant and the deponent on 17th July 2009 and subsequently the Sale Agreement dated 9th September 2009. To Mr. Mangucia's understanding, the 2nd Defendant was all along acting in consultation with the 1st Defendant and, as per the Memorandum of Understanding, upon payment of the 10% deposit, the Purchasers were allowed to take vacant possession of the suit premises and carry out any repairs, modifications or alterations thereto as they so desired. The deponent also pointed out that, at one stage, the 2nd Defendant had demanded 6 months' rent from the Purchasers describing himself as the "Administrator" of the suit premises.
4. In response to paragraph 12 and 15 of the Supporting Affidavit, Mr. Mangucia stated that all dealings as regards the suit premises were done in good faith and were confirmed in telephone conversations with the 1st Defendant. The deponent denied that the Power of Attorney donated to him by the 2nd Plaintiff was not genuine. It had been properly drawn up by legal practitioners in accordance with the law. Further, the Defendants had appointed their own caretaker at the suit premises who remained within the compound and was in charge of gate access. Mr. Mangucia did not understand why the 1st Defendant, in a bid to frustrate the sale transaction for reasons best known to herself, had purported to terminate the Agreement and evict the Plaintiffs from the suit premises hence the reason for the institution of this suit. Thereafter, Mr. Mangucia detailed some of the issues he felt needed to be tried by this Court as follows:

“a) Was the 2nd Defendant involved in negotiations with the Plaintiffs for the sale of the suit property on behalf of the 1st Defendant leading to execution of the Memorandum of Understanding dated 17/07/2009?

- b) Were the Plaintiffs capable of acquiring possession of the suit property on the strength of the Memorandum of Understanding dated 17/09/2009?**
- c) Did the Plaintiffs acquire possession of the suit property with the full knowledge, authority and/or consent of the 1st Defendant?**
- d) Are the Plaintiffs guilty of fraud, misrepresentation and breach of contract as set out in paragraphs 8 (a) – (h), 12 (a)-(c) and 27 (a)-(j) of the 1st Defendant’s Amended Defence dated 17/02/2012?**
- e) Was the 1st Defendant justified to evict the Plaintiffs from the suit premises and terminate the contract before the lapse of the completion period?**

In view of the above, Mr. Mangucia felt that it was only just and fair that the suit be allowed to proceed to full trial as the striking out of the Amended Plaintiff would be Draconian. He also considered that the participation of the 2nd Defendant was important as the Court would then be able to determine whether the 2nd Defendant had received the 10% deposit plus a further Shs. 750,000/-from the Purchasers, through their advocates. At all times, the 2nd Defendant had been acting as the agent of the 1st Defendant.

5. In response to the Replying Affidavit of Mr. Mangucia, the 2nd Defendant, Victor Karume, swore what he called a “Replying Affidavit in opposition to the Replying Affidavit of the Plaintiff’s”, on 18th March 2013. That Affidavit was filed without the leave of the court but in view of the fact that the 2nd Defendant was acting for himself and a layman, this Court allowed the Affidavit to stand in evidence detailing that the Plaintiffs would have a further chance to reply thereto if they thought so necessary. At paragraph 3 of his said Replying Affidavit , the 2nd Defendant took issue with Mr. Mangucia on the taking of possession of the suit property. He maintained that such did not arise because the Plaintiffs had not completed paying in full for the same as had been agreed with the vendor, the 1st Defendant. He maintained that Mr. Mangucia had tampered with the Memorandum of Understanding which was not part of the Sale Agreement which document did not allow the Plaintiffs into possession of the suit property without the owner’s consent prior to completion. He further reiterated that, in his opinion, the Power of Attorney donated by the 2nd Plaintiff to Mr. Mangucia was misleading and fraudulent as the 2nd Plaintiff had never been registered as the proprietor of the suit property, a fact which she had stated in the said Power of Attorney. He also reiterated that Mr. and Mrs. Mangucia had taken possession of the suit property without revealing such to the 1st Defendant and had locked themselves therein refusing to answer telephone calls from the deponent. In response to paragraph 14 of the Plaintiffs’ Replying Affidavit, Mr. Karume reiterated that he felt that the 1st Defendant had “acted in justice” in evicting the Plaintiffs from the suit property as, he maintained, it was still hers and because the Plaintiffs had not purchased the same having not paid the full purchase price. He considered it the 1st Defendant’s duty to prevent and stop Mr. and Mrs. Mangucia from further destroying or altering the buildings contrary to the approval of the City Council of Nairobi. Finally, Mr. Karume stated that he had never received the 10% of the purchase price as had been alleged in the Replying Affidavit of the Plaintiffs. He had received only Shs. 1 million in 4 cheques in the name of the 1st Defendant and he realised that such had been intended to cover up the fact that Mr. and Mrs. Mangucia had taken possession of the property. I must confess to have been a little confused not only in relation to the contents of Mr. Karume’s so-called Replying Affidavit but also as regards the Affidavit that he had sworn in support of the Application. Both those Affidavits, in my opinion, detailed the events surrounding the purchase and sale of the suit property but has very little to do with the reasons why the 2nd Plaintiff wished to have the Amended Plaintiff struck out as against him.
6. The 2nd Defendant filed his submissions herein on 3rd June 2013. He commenced the same by giving a brief background pointing out yet again, his suspicions as regards what he termed a false Power of Attorney donated by the 2nd Plaintiff to Mr. Mangucia. He summarised that an application supported by a false document was bound to fail. He laid before Court the authorities of **Katamba v Kabigyema Uganda High Court Revision No. 42 of 1998 (Mbarara)**

(unreported), Gladys Nalwoga v Edco Ltd & 2 Ors Uganda High Court Revision No. 05 of 2012 (Kampala) (unreported) and HCSC No. 170 of 1994 (Meru) (unreported). The 2nd Defendant's submissions thereafter rambled somewhat in setting out what his role was in the case which should have been put before Court by Affidavit. Further, the 2nd Defendant spent 2 pages addressing the Court as to amendment of pleadings to which I saw no relevance bearing in mind that the Plaintiffs had already received leave from the Court to amend their Plaint. However, the 2nd Defendant did point the Court to what he termed the amended Memorandum of Understanding which had been against his conscience. He maintained that the same had been amended to legitimise the contents of the Plaint. He further pointed to the provision in the Sale Agreement dated 9th September 2009 which stated on page 4:

“This Agreement constitutes the entire agreement of the parties with regard to its subject matter and supersedes and cancels all previous negotiations and agreements.”

I think what the 2nd Defendant was trying to convey before Court was the fact that the Memorandum of Understanding as regards possession of the suit property, had been dated prior to the said Sale Agreement and its provisions had then been overtaken by events more particularly the Sale Agreement itself. Further, the essence of the 2nd Defendant's submissions was that he had been the victim of fraud as the altered Memorandum of Understanding had played a key role in shaping the Plaintiffs' claims as against the Defendants.

7. Thereafter the 2nd Defendant referred this Court to the website <http://legal-dictionary.thefreedictionary.com/Fraud> by Gerald N. Hill and Kathleen T. Hill. The quotation therefrom would seem to have gone as follows:

“Inherent in fraud is an unjust advantage over another which injures that person or entity. It includes failing to point out a known mistake in a contract or other writing (such as a deed), or not revealing a fact which he/she had a duty to communicate.... Constructive fraud can be proved by a showing of breach of legal duty (like using of the trust funds held for another in an investment in one's own business) without direct proof of fraud or fraudulent intent. Extrinsic fraud occurs when deceit is employed to keep someone from exercising a right, such as a fair trial, by hiding evidence or misleading the opposing party in a lawsuit.”

Unfortunately for the 2nd Defendant, pages 6, 7 and part of 8 of his submissions before Court contained a detailed account of his role in the sale of the suit property transaction. Again such does not form part of submissions and should have been contained in an affidavit. As regards the proof of fraud, the 2nd Defendant referred to the Court to another Ugandan authority being **Ruhangi & 2 Ors v Standard Chartered Bank Ltd & 2 Ors HCCC No. 885 of 1999 (unreported)**.

Again, unfortunately, the 2nd Defendant did not available copy of this authority to the Court. However he was able to quote from the aforementioned *Succession Cause No. 170 of 1994 (Meru)* which involved how a Grant to administrate the property of a deceased had been obtained fraudulently as a result of the making of false statements or concealment from the court of something material. Thereafter, the 2nd Defendant listed what he said were the separate elements which constituted fraud that the Plaintiffs had perpetrated as regards the suit property as follows:

“(1) Altering documents and inserting/deleting information of material facts, among them:

- a. **Claiming that my sister's property (Nairobi) LR91/399, is owned by the Plaintiffs and using this information falsely, to falsify the legitimacy of a power of attorney to set in motion the process for purchasing the same property;**
- b. **Altering the original lawyers' sale agreement, and deleting sections that describe the state of the property and its condition, to mask the illegitimate attempt to convert a residential property into a motel, a business venture, without any legitimate approvals, neither from the 1st Defendant nor the City Council (now County Government of Nairobi);**

- c. **Falsely trying to coerce the inclusion of this Defendant's name into a Sale Agreement, when there was no need for his inclusion, and in that signaling questions that later surface in the establishment of the false role of the MoU;**
- d. **Altering the then MoU, which had been questioned against the moral of "vacant possession of the property upon completion", and then was abandoned, and then to attempting to use it in justifying the validity of the Plaintiff;**

(2) Knowingly and intentionally engaging in all the above issues, contrary to the law and Sales Agreement;

(3) Being intent on deceiving the Defendant, as shown by the conduct of the sale Agreement, explained earlier (demonstrated by the coercion, falsification of delays, alteration of documents – not one, but several of them)

(4) Reliance on the information given by the Plaintiffs and with this trust the Defendant believed the Plaintiff, to the extent possible, and in good faith, given that:

- a. **I relented and let them move into the property before they even finished paying the final party of the down-payment; and right after that, they became difficult;**
- b. **In trust, the 1st Defendant allowed an extension of the then lapsed Sale Agreement, without understanding what a gimmick it was, to have find out that it was not going to take two days to get the title transfer authority ready, but another 3 months;**
- c. **To find out that the extend Sale Agreement had another replacement Purchasers, in lieu, given reasons other than that Plaintiffs could not raise the necessary finance, in time to complete the sale;**

(5) Injuries caused by the sale process are enormous, and it cannot be enough to detail the extent of damage, morally, socially and financially. The financial cost of the claim cannot suffice to recoup the overall moral and financial losses this case has unleashed to my family".

The Court remains somewhat confused as regards the submissions of the 2nd Defendant. On the whole they seem to set out what is the Defendants' case in answer to this suit brought by the Plaintiffs. There is no reference whatsoever to the Notice of Motion and why the Amended Plaintiff should be struck out as against the 2nd Defendant.

- 8. The Plaintiffs' submissions were filed herein on 12th June 2013. They commenced by detailing the Application before Court and the Affidavits in support and against the same. They also detailed what the Plaintiffs termed the brief facts of the matter. Reading through the Plaintiffs' version of events, I find that part of the facts quoted in the submissions did not appear in the Replying Affidavit of Mr. Mangucia and as a consequence must be looked at with considerable reservation. However at sub-paragraph f) on page 4 of the Plaintiffs' submissions, they set out the issues they saw that had been raised in the Plaintiffs' Amended Plaintiff and which they considered were triable as follows:

"f) The issues raised in the Plaintiffs' Amended Plaintiff are triable thus the matter should be heard on merits at a full trial. Some of the issues to be tried are:

- i. **Was the 2nd Defendant involved in negotiations with the Plaintiffs for the sale of the suit property on behalf of the 1st Defendant leading to execution of the Memorandum of Understanding dated 17/07/2009?**
- ii. **Were the Plaintiffs capable of acquiring possession of the suit property on the strength of the Memorandum of Understanding dated 17/07/2009?**

- iii. **Did the Plaintiffs acquire possession of the suit property with the full knowledge, authority and/or consent of the 1st Defendant?**
 - iv. **Are the Plaintiffs guilty of fraud, misrepresentation and breach of contract as set out in paragraphs 8 (a)-(h), 12(a)-(c) and 27(a)-(j) of the 1st Defendant's Amended Defence dated 17/02/2012?**
 - v. **Was the 1st Defendant justified to evict the Plaintiff's from the suit premises and terminate the contract before the lapse of the completion period?**
 - vi. **The participation of the 2nd Defendant in the instant matter is important as the court would be able to determine whether the 2nd Defendant by receiving the 10% deposit plus Kshs.750,000.00 from the Purchasers (through their Advocates), was actually acting as an agent of the 1st Defendant who is also his sister".**
9. The Plaintiffs then went on to submit as regards the law in connection with the striking out of pleadings referring particularly to **Order 2 Rule 15**. The Plaintiffs referred the Court to the *opus classicus* in relation to amendment of pleadings being the case of **D. T. Dobie & Co (Kenya) Ltd v Muchina (1982) KLR 1** as well as to the case of **George Ogendo v James Nandasa & 4 Ors HCCC No. 91 of 2002**. The Plaintiffs submitted that the circumstances surrounding the case as set out in the Amended Plaintiff would not warrant the same being struck out even as against the 2nd Defendant. It maintained that the Court would be able to establish the role played by the 2nd Defendant as regards the sale of the suit premises; whether he was acting as the agent of the 1st Defendant; whether his actions induced the Plaintiffs to enter into the sale transaction and/or occupying the suit premises; whether he was guilty of misrepresentation and finally, whether the 2nd Defendant was liable for all or any of the Orders sought in the Amended Plaintiff. The Plaintiffs maintained that the only ground relating to the striking out of the Amended Plaintiff as put forward by the 2nd Defendant was that no demand was made of him prior to the commencement of this suit.
10. The Plaintiffs submitted rather pedantically that the 2nd Defendant had put forward in his Application the words:

“therefore, the amended plaintiff does not disclose any reasonable cause of action”.

instead of using the words (according to the Plaintiffs):

“it discloses no reasonable cause of action”.

The Plaintiffs maintained that the 2nd Defendant was notified of the intention to have been enjoined in the suit following the Plaintiffs' Application filed in Court on 27th May 2011 seeking to amend the Plaintiff and have the 2nd Defendant enjoined in the suit as a Co-defendant. The Application had been served upon the 2nd Defendant by registered post and he had not bothered to oppose the same when the Orders sought were granted by Court on 17th October 2011. Finally, the Plaintiffs submitted that ground (c) of the Application before Court would offend the provisions of **Order 2 Rule 15 (2)** of the *Civil Procedure Rules, 2010* in that no evidence could be admissible under **subrule (1) (a)** thereof. Again, the Court was not quite sure what the Plaintiffs were getting at by this submission other than the Court should take no cognizance of the Affidavits of the 2nd Defendant when deciding upon the Notice of Motion under **Order 2 Rule 15**.

11. The Court necessarily has to take into consideration that the 2nd Defendant is a layman and consequently unfamiliar with the nuances of the Civil Procedure Rules. It is with such litigants in mind that *Article 159 (2) (d)* was included in the Constitution to the extent that justice shall be administered without undue regard to procedural technicalities. Similarly, the Rules Committee took such into account by the inclusion in **Order 51 of Rule 10 (2)** which reads:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

It is with these provisions in mind that this Court must look at the 2nd Defendant’s Application as a whole rather than get embroiled with technicalities as raised by the Plaintiffs at paragraphs 14 to 17 of their submissions. As I have commented above, the 2nd Defendant has not helped himself so far as his Application before Court is concerned by going into the extensive and detailed facts of the transaction as between the Plaintiffs and the 1st Defendant. It is not for this Court at this stage, to go into the whys and wherefores of what happened as between the parties, that is the subject of the full trial of the suit in due course. As a result, I find that the authorities supplied by the 2nd Defendant to this Court are irrelevant to his Application. All the three authorities deal with matters in relation to falsehoods and fraud as regards the parties in those suits. They have no relevance to an Application to strike out pleadings. This Application by the 2nd Defendant is brought primarily under **Order 2 Rule 15 sub-rule (1)** of the *Civil Procedure Rules, 2010* which provide that:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The Applicant, therefore, has to satisfy the Court that the pleadings which he 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 applicant also has to show that the pleadings or suit as in this case as against him, are an abuse of the process of the Court and as such should be dismissed. Do the applications, therefore, fall within the purview of the conditions set out in the Order? According to Person, J in **Drummond Jackson v British Medical Association (1970) 2 WLR 688** at p. 676, the definition of a cause of action was determined as:

“A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.” (Underlining mine).

Have the Plaintiffs, therefore, shown that it has a *prima face* case as against the 2nd Defendant? The principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** are clear that if the pleading does not disclose *any reasonable cause of action* or defence or that the pleading is scandalous, frivolous and vexatious, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed. In the matter, 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.”

12.I have perused at length the Amended Plaintiff dated 16th December 2011. It is correct that by the said amendment, the 2nd Defendant was enjoined to the suit. At paragraph 7, the Plaintiffs maintain that the 2nd Defendant was acting on behalf of the 1st Defendant at all material times

while the latter was away in the United States of America. They also maintained that the receipt of monies paid as regards the transaction was acknowledged by the 2nd Defendant. It is also alleged that the Plaintiffs took possession of the suit premises upon the representation of the 2nd Defendant but with the knowledge of the 1st Defendant. The remainder of the Amended Plaintiff makes little or no reference to the 2nd Defendant and it's only at paragraph 20 that the Plaintiffs claim against the Defendants jointly and severally an order for specific performance or, in the alternative, general damages for breach of contract, special damages that total Shs. 3,500,000/- and a refund of Shs. 4,250,000/-. This pleading is repeated in the prayers of the Amended Plaintiff. Essentially, the Plaintiffs' cause of action is in contract and the prayer for specific performance and/or damages relate to the contract. But what is the contract? At paragraph 5 of the Amended Plaintiff it details that the 1st and 2nd Plaintiffs together with one Maryann Wanjiru Kamau offered to buy and the 1st Defendant accepted to sell the suit property together with the buildings fixtures and fittings erected thereon at a consideration of Shs. 35 million. It then goes on to state that the parties executed a Sale Agreement on or about 9th September 2009.

13. I have perused that Agreement which was attached to the Replying Affidavit of Mr. Mangucia dated 9th November 2012. There is no mention anywhere in that document of the 2nd Defendant. Similarly, the letter of offer dated 12th June 2009 is addressed by the 1st Defendant to the Plaintiffs, again there is no mention of the 2nd Defendant. The Plaintiffs made a lot of the Memorandum of Understanding dated 17th July 2009. It appears that this document was drawn up by the 2nd Defendant and indeed signed by him as well (I presume), by Mr. Mangucia on behalf of the 1st and 2nd Plaintiffs. There is no mention of the 3rd Plaintiff. I am unimpressed by this document and in view of the clause in the Agreement for Sale dated 9th September 2009 superceding and cancelling all previous negotiations and agreements such is extremely dubious evidence of the 2nd Defendant's participation in the contract for the sale and purchase of the 1st Defendant's property. In my view, the 2nd Defendant was not a party to the sale and purchase transaction, he was merely acting as an agent for his sister, the 1st Defendant, a fact confirmed by Mr. Mangucia in his Replying Affidavit dated 9th November 2012.
14. I find that there is no cause of action brought against him as per the Amended Plaintiff. He was not a party to the contract being the basis of the Amended Plaintiff and upon which the Plaintiffs' action is brought. The Plaintiffs have submitted that he was an integral part of the negotiations particularly with regard to the Purchasers being allowed possession of the suit property upon payment of the 10% deposit amount. That is as may be but it is not a cause of action against the 2nd Defendant and I see no reason why he cannot be called by the Plaintiffs and/or the 1st Defendant, as a witness at the hearing of this suit in due course to relate his part in the negotiations.
15. As a result, I allow the 2nd Defendant's Notice of Motion dated 12th October 2012 and I order that the Amended Plaintiff dated 16th December 2011 be struck out as against him. The 2nd Defendant will have the costs of his application as against the Plaintiffs.

DATED and delivered at Nairobi this 20th day of November, 2013.

J. B. HAVELOCK

JUDGE