



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 120 OF 2009

S & S INVESTMENTS LTD.....PLAINTIFF

VERSUS

VELOS INTERPRISES LTD..... DEFENDANT

RULING

The application by way of Notice of Motion before the court is dated 4th March 2010 and is brought by the Plaintiff/Applicant. The Applicant is seeking orders that this Court strikes out the Defence filed by the Defendant on 11th December 2009, and that interlocutory judgment be entered for Plaintiff as prayed for in the Plaint. The grounds for the application are that the Defence is scandalous, frivolous and vexatious; will prejudice, embarrass and delay the fair trial of this suit and is an abuse of due process of the Court. Further, that the Defendant has admitted liability in its Defence and that it is just and proper that the Defence be struck out.

The Application is supported by a Supporting Affidavit sworn on 5th July 2011 by Suresh Kumar Sofat, a Director of the Plaintiff, wherein he states that the Plaintiff agreed to purchase a parcel of land being a subdivision of L. R. No. 10272, Nairobi from the Defendant, by an Agreement of Sale dated 22nd December 2006. The Plaintiff states that while it has fulfilled its obligations, the Defendant has not completed its covenants and that as a result of this failure the Plaintiff filed this suit on 23rd March 2009 seeking judgment for specific performance amongst other Orders/Declarations.

The Plaintiff further states that the Defendant filed its Defence to the claim on 11th December 2009 which Defence does not disclose any Defence, and has admitted the claim in its Defence and is only asking for more time to enable it perform its part of the agreement. The Plaintiff has annexed a letter dated 13th February 2009 that made time of the essence of the contract and states that the Defendant failed to complete the sale within the time stipulated. Also annexed to the affidavit is a copy of the said Sale Agreement dated 22nd December 2006, and a bundle of correspondence between the Plaintiff's Advocate and the Defendant's Advocates on the efforts made to obtain a separate Title Deed in favour of the Plaintiff of the aforesaid land.

The Defendant's reply is in a Replying Affidavit sworn on 9th November 2011 by its Director, Ramesh Sheth, wherein he admits the Defendant sold the Plaintiff the portion of land as stated, and applied for sub-division of the mother title L.R No. 209/16025 which was pursued and a Deed Plan finally issued.

Further, that the Deed Plan was handed over to the Plaintiff's Advocates for preparation of the transfer, but that in the process registering other sub-divisions the mother title was misplaced at the land's office. The Defendant states that its Advocates have been pursuing the title, and has a good defence to the Plaintiff's claim for specific performance, in that it has not deliberately refused to do the process but there are matters beyond its control that hinder finalization of the transfer

The Plaintiff in a Rejoining Affidavit sworn by its Director Suresh Kumar Sofat on 18th November 2011, denied ever receiving the said Deed Plan, and annexed copies of letters dated 24th August 2009 and 2nd September 2009 sent by the Defendant to their Advocate and to the Plaintiff's Director respectively, indicating that the Original Deed Plan had been sent to the Defendant's Advocates. The Plaintiff also stated that steps to obtain a Title Deed by the Defendant were only made after the suit has been filed, yet the Defendants agreed to sell the subject property free of encumbrances and with a proper legal title deed.

The Defendants however reiterated in a further Replying Affidavit sworn on 20th January 2012 by Kevin Mogeni, the Defendant's Advocate, that the original Deed Plan over L.R. 209/10272 was delivered to the Plaintiff's Advocate. The Defendant has annexed as evidence a letter dated 2nd October, 2009 from the Defendant's Advocate forwarding the said original Deed Plan to the Plaintiff's Advocate, and a letter acknowledging receipt of the same from the Plaintiff's Advocate dated 7th October, 2009. The Defendant further averred in the said Further Affidavit that it was evident from the correspondence between the parties that the Plaintiff and the Defendant were to collaborate in one way or another to obtain title to the parcel sold to the Plaintiff. Further, that the Defendant's Advocate in good faith prepared a Statutory Declaration and enclosed all relevant documents which he handed to the Plaintiff to apply for a replacement title. The Defendant's Advocate also annexed a copy of letter dated of 24th May, 2010 forwarding the said documents to the Plaintiff.

Counsel for Plaintiffs and Applicants reiterated their arguments at the hearing of the application on 28th November 2011. The Plaintiff's Advocate submitted that the original Deed Plan was handed to the Plaintiff after the suit was filed, and that after having been told that it was going to be more expensive to obtain a new title deed by the Plaintiff's Advocates in the letter dated 7th October 2009, the Defendant never reverted back. The Plaintiff's Advocate also submitted that the said letter never indicated any collaboration between the parties. The Plaintiff's Advocate further submitted that the Defendant has been in breach of contract, they have taken no steps to comply, have not been reasonable and that most importantly time was of the essence. The Advocate relied on the authority of **William Kazungu Karisa v Cosmas Angore Chanzera (2006) eKLR** for the position that when a specific date is mentioned in the performance of a contract, then time becomes of the essence and completion must be within that date as it becomes a condition which goes to the root of a contract.

The Defendants Advocate argued that the questions of whether the Defendant has willfully delayed completion, and whether there was variation of terms including that of time being of the essence by the correspondence between the parties, are triable issues to be tried at full hearing. The Advocate relied on the Court of Appeal decision in **Coast Projects Ltd v M.R Shah Construction (K) Ltd (2004) 2 KLR 119** that a judge should not deal with the merits of the case in an application to strike out a defence, without the benefit of discovery or oral evidence tested by cross examination in support of his arguments.

I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, and hence this power to strike out pleadings should be used sparingly and cautiously. In **D.T. Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1** Madan, J.A. stated as follows at p. 9:-

“No suit ought to 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. 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 a case before it.”

I will start by considering the issue of whether there has been admission by the Defendant in its Defence. For such admission to justify striking out the Defence, it must be a clear and unequivocal admission of the Plaintiff's claim. I am in this respect guided by the decision of Ringera J (as he then was) in **Intercountries Importers and Exporters Ltd v Nairobi City Council (2002)1 KLR 9**. I find after perusal of the said Defence that the Defendant has clearly denied any breach of contract and has notified the Plaintiff of the gist of its defence. I also agree with the Defendant's submissions that I cannot delve into the merits of the defence presented at this stage, and can only do at the full trial, subject to the Defendants showing that they have an arguable case.

On the issue of whether an arguable case has been shown by the Defendants, after perusing the sale agreement dated 22nd December 2006 and the correspondence between the parties produced as evidence, I note that parties continued with negotiations as to the procurement of the title deed after time was made of essence in the letter dated 13th February 2009 sent by the Plaintiff's Advocate to the Defendant's Advocate, and after the filing of the Plaint on 23rd March 2009. This correspondence continued until the date of filing of the Defence on 11th December 2009. The argument has been raised by the Defendant that this had the effect of varying the sale agreement, and even if not expressly pleaded in the Defence, the Defendant is allowed by the rules of pleading to amend its Defence and should be given the opportunity to present their case in court. I cannot at this stage delve into the legal effects of the said correspondence if any on the sale agreement, and find this to be a triable issue that justifies a full trial.

For these reasons the Applicant's application dated 4th March 2010 is hereby disallowed.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of ____March____, 2012.

P. NYAMWEYA

JUDGE