



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 108 OF 2004

JOHN NJUGUNA NDUATIPLAINTIFF

VERSUS

OLIVER SEKI.....1ST DEFENDANT

SIDHA INVESTMENT LIMITED 2ND DEFENDANT

RULING

The Plaintiff/applicant hereinafter referred as the applicant has filed a Notice of Motion dated 29/11/2011, under Order 2 Rule 15, Order 51 Rule 1 and 4 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of Civil Procedure Act and all other enabling provisions of the law, seeking the following orders;

1. That this Honourable Court may strike out the defendant's defence filed herein and enter judgment for the plaintiff as prayed for in the amended plaint.
2. That the costs of this application be provided for.

The application is supported by the affidavit of John Njuguna Nduati and is based on the following grounds.

1. That the defendant's defence filed herein discloses no reasonable defence.
2. That the defendant's defence filed herein is scandalous, frivolous and vexatious.
3. That the defendants' are truly indebted to the plaintiff
4. That the defendants' defence filed herein raises no triable issues and consist of mere denials and thus a sham.
5. That the defendants' defence is merely filed to delay fair trial of this suit and is an abuse of the process of the court.

The defendant/respondent though served did not file any response to the application. In brief this is what the applicant depones; that by an agreement entered dated the 4th day of April 2005 the Defendants purported to sell to him (plaintiff) all that property known as L.R. No:209/136/274 along Gregon Road on Nairobi at the agreed price of Kshs.4,000,000/-. The 1st Defendant was paid on behalf of the 2nd Defendants the sum of Kshs. 3,000,000/- in cash on the same said date. Paragraph 3 of the said agreement provided that the 1st Defendant (Oliver Seki) would refund the said sum of Kshs. 3,000,000/= to the plaintiff if the transfer of the property was not effected in favour of the plaintiff by November 2005 together with accrued interest of 10% per month effective from 1st April, 2005; that notwithstanding the breach aforesaid the defendants failed to refund the said sum of Kenya Shillings three Million (Kshs.3,000,000) receipt of which was duly acknowledge by the 1st Defendant on execution of the sale agreement aforesaid; that he has called upon the defendant to pay for the amount aforesaid but all efforts have been in vain and hence the present suit; that he has been advised by his advocate on record that the defendants' defence filed herein raises not tribal issues or bona fide defence and consist of mere denials and thus sham. The same is merely filed to delay fair trial of this suit and is an abuse of the process of the court; that is fair and just that this Honourable Court be pleased to strike out the defendant's defence and enter judgment in favour of the plaintiff as prayed for in the amended plaint dated 28th July 2011.

The defendants filed a joint defence dated 10th November 2008 to the original plaint dated 15th October 2008 denying the contents of paragraphs 3,4 and 5 of the plaint and stated that they shall requesting for further and better particulars from the plaintiff. They also deny the contents of paragraph 6 of the plaint and avers that the alleged agreement was null and void for illegality and the same is not enforceable and aver that he never received any sum of money from the plaintiff. The defendants further aver that the plaintiff gave him several motor vehicles to sell on his behalf, which motor vehicles the plaintiff collected on diverse dates, some had no requisite documents and as such the selling could not proceed; that they never received the said sum as pleaded in paragraph 7 and shall put the plaintiff to strict proof thereof. The defendants deny the contents of paragraph 8,9,10,11,12 and 13 of the plaint and states that the plaintiff was fraudulent and misrepresented to the defendants in the transaction and puts the plaintiff to strict proof thereof. The defendants admits the content of paragraph 14.

The amended plaint that was filed in court on the 23rd of September 2011 amended paragraphs 6 and 9(b) on the date to read 4th and not 1st April. Its contents are basically the same as the original plaint filed in court on the 16th October 2008. The defendants did not file an amended defence to the amended plaint.

The applicant argues that the defendants defence discloses no reasonable defence, that the defendants are indebted to the plaintiff and the defence filed raises no triabal issues and consists only of mere denials.

I have considered the application before me, the defence filed denies the contents of paragraph 6 of the plaint and claims that the agreement was null and void for illegality and the same is not enforceable. The said agreement has been annexed to the application and contains what the plaintiff depones at paragraphs 6, 7 and 8 of the amended plaint. The agreement exhibited was signed by the vendor Oliver Seki and the purchaser John Nduati. The vendor Mr. Oliver Seki represented the company Sidha Investment Limited. In the said agreement the vendor acknowledges that the purchaser has paid Kshs .3million out of Kshs. 4million the purchase price for L.R. No: 209/136/274. It also states the vendor had promised to transfer to the purchaser the property before November 2005 and that if the transfer did not go through the vendor was to refund the total amount paid plus 10% per month with effect from 1st April 2005. It further states that the property was deemed to have switched hands from the vendor on behalf of the 2nd defendant company.

The defendant/respondent did not respond to the application. The defence filed merely denies the plaintiff's claim. Paragraphs 5 introduces a subject which does not relate to the subject matter of the agreement dated 4th April 2005 annexed by the plaintiff which is the basis of his claim. The issue is whether the defense raises no triabal issues and having considered the defence filed I find that it raise no triabal issues as the plaintiff has exhibited the agreement they had which expressly states the terms of the agreement. The defence raised that the alleged agreement was null and void for illegality and the same is

not enforceable does not raise a triable issue, the defendants signed the agreement with the full knowledge of its terms and conditions. The applicant has exhibited the agreement the parties had which is very clear on the amount that was paid and what was to be done in the event that the property was not transferred before November 2005. I therefore find merit on the applicant's application dated 29th November 2011. I do warn myself that striking out a defence is a drastic action, however the defence on record raises triable issues. I therefore strike out the defendants defence dated 10th of November 2008. I enter judgment for the plaintiff against the defendants as follows;

1. That the defendants shall refund the sum of Ksh. Three Million plus interest thereon at the rate of 10% per month from the date of filing suit. The plaintiff has not given reasons why he chose to file suit three years from the time the defendant failed to meet their part of the agreement.
2. The defendant shall also pay costs of the suit.

Dated and delivered this 18th Day of April 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk