REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 32 OF 2011

JAN & JOSH COMPANY LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

The application by way of Notice of Motion before this Court is dated 27th May 2011, and is brought by the Plaintiff/Applicant. The Plaintiff is seeking orders that this Court strikes out the Defence filed by the Defendant on 6th April 2011, and that judgment be entered for the Plaintiff in terms of Prayers (a), (b) & (c) of the Plaint dated 31st January, 2011. In the alternative the Plaintiff is seeking an order that summary judgment be entered in favour of the Plaintiff for the sum of Kshs.12,220,000.00 as prayed for in prayer (d) of the Plaint dated 31st January, 2011.

The main ground for the application is that the Defendant does not have any valid defence to the Plaintiff's claim in the suit filed herein, and the Defence should be struck out with costs. The Plaintiff avers that the Statement of Defence filed on behalf of the Defendant does not raise any triable issues, and that that the Defendant having admitted to being in breach of contract, does not have any defence in law to the Plaintiff's claim herein.

The facts that leading to the application are found in the supporting affidavit sworn on 27th May 2011 by Joshua Kiilu, a Director of the Plaintiff Company. In summary, the Plaintiff entered into a sale agreement with Defendant dated 26th October 2010 to purchase the property known as L.R. No. 15065/54 (L.R. No. 79073) situated in Karen (hereinafter referred to as the suit property). The said property had earlier been charged in favour of the Defendant by one Idah Kagendo Kirauni by way of a charge dated 17th March 2009 for the sum of Kshs.7,000,000/= to secure advances made to a borrower known as Samdove (K) Ltd.

The Purchase Price under the said sale agreement was Kshs.14,500,000/= and the Plaintiff stated that its Advocates duly paid the deposit of Kshs.2,000,000/= to the Defendant's Advocates by a letter dated 29th September 2010 and according to the sale agreement. The Plaintiff also stated that it paid the balance of the purchase price of Kshs.12,500,0000/= on 1st December 2010 by way of RTGS transfer, which balance was to be paid by the Plaintiff on or before the Completion date under the terms of the said sale agreement.

The Plaintiff further stated that under the said agreement the Defendant was then to furnish the Plaintiff with various completion documents, but instead the Defendant by its Advocate's letter dated 1st December 2010, and without a notice to rescind the Agreement as required under the 1989 Law Society Conditions of Sale purported to cancel the sale agreement despite the purchase price of Kshs.14,500,000/= having been paid in full. Further, that in a further attempt of repudiating the sale agreement, the Defendant purported to refund the purchase price of Kshs.14,500,000/= to the Plaintiff's Advocate's account. The Plaintiff having refused to accept the said repudiation of the Agreement now claims specific performance of the said agreement for sale against the Defendant. The Plaintiff also averred that the Chargor's equity of redemption had been extinguished in law, and the Defendant could not allow it to redeem after the Plaintiff had executed the sale agreement and paid the said purchase price.

The Plaintiff's alternative prayer which is made without prejudice to his claim for specific performance, is based on the Plaintiff's claim that pursuant to the said agreement for sale the Plaintiff obtained an offer to purchase the suit property for Kshs.26,500,000/= from a third Party, namely Property Development & investment Company Limited. The Plaintiff claims that the said purchase has been frustrated by the Defendant's failure to release the completion documents and the Plaintiff is unable to assign its interest to the said prospective purchaser. Further that, by reason of the Defendant's breach, the Plaintiff has suffered loss and damage of Kshs.12,220,000/= which it is seeking as a liquidated claim.

The Plaintiff attached as evidence copies of the sale agreement dated 26th October 2010, documents evidencing the payments of the purchase price made by the Plaintiff as aforesaid, the letter dated 1st December 2010 from the Defendant's Advocates rescinding the sale agreement, the letter of offer from Property Development & investment Company Limited dated 10th December 2010, and a valuation report of the suit property dated 21st January 2011 showing it to be valued at Kshs. 26,500,000/=.

The Defendant has responded in a Replying Affidavit sworn on 20th July 2011 by Purity Kinyanjui, its Head of Debt Recovery Unit, and the Defendant admits to the charge dated 17th March 2009 registered over the suit property to secure sums advanced to the borrower by the name of Samdove (K) Ltd. The Defendant states that the said borrower's loan account fell in arrears and the Defendant consequently made demands of recovery including exercising its statutory power of sale pursuant to section 69 of the Indian Transfer of Property Act. The Defendant has annexed as evidence a letter dated of 2nd May 2010 being the statutory notice by the Defendant to the owner of the suit property. The Defendant thereafter entered into the agreement for sale of the suit property with the Plaintiff dated 26th October 2010.

The Defendant states that the said borrower and the owner of the suit property thereafter made payments in settlement of the monies outstanding in the borrower's loan account, and pursuant to the owner's equity of redemption the Defendant rescinded the sale agreement, and communicated the same to the Plaintiff by a letter dated 1st December 2010.. The reasons advanced by the Defendant for its action is that it had sent the statutory notice to the owner of the suit property by registered post, but subsequently discovered that the same

had been returned unclaimed. The Defendant annexed as evidence copies of the postage envelopes for the respective letters received back.

The Defendant averred that in the premises, the agreement for sale with the Plaintiff been entered into prematurely, and the same was invalid and void under the 1989 Law Society to the Law Society Conditions of Sale for want of service of the statutory notice of sale. Further, that the Plaintiff was entitled upon the said rescission to a refund of the monies paid under the agreement for sale, and no more.

The Defendant admits refunding the entire monies paid by the Plaintiff pursuant to the agreement for sale in the sum of Kshs.14,500,000/=, and states that by accepting the said refund, the Plaintiff has accepted the rescission and waived any objection or rights that could have emanated from the invalid agreement for sale. The Defendant also avers that the Plaintiff is not entitled to the orders sought in the application as the Defendant has a reasonable defence raising triable issues, and if the purported offer made to the Plaintiff in the resale of the property was real, there was material and/or fraudulent non-disclosure by the Plaintiff, namely the higher value of the property which the Plaintiff was aware of, in breach of Section 55(5) (a) of the Indian Transfer of Property Act.

Detailed written submissions were filed by both parties, and their Advocates reiterated the parties' respective arguments at the hearing of the application on 12th March 2012. The Plaintiff's Advocate in his written submissions dated 23rd January 2012, and in oral submissions made at the hearing argued that the Defendant had not raised any triable issues as it was estopped under section 120 of the Evidence Act from resiling the representations they made in the sale agreement, and in particular that it had become entitled to exercise its statutory power of sale under the relevant laws. The Advocate also submitted that the agreement for sale had not been lawfully rescinded by the Defendant as no notice had been given as required condition 25 of the 1989 Law Society's Conditions of Sale to which the sale was subject. The Advocate also relied on the decision of **Kinyanjui & Another vs Thande & Another (1995-98) 2 EA 159** in this regard.

The Plaintiff's Advocate in addition argued that under section 60 of the Transfer of Property Act and following the decision in **Mbuthia vs Jimaba Credit Finance Corporation & Another Civil Appeal No. 111 of 1986,** the Chargor's right to redeem the suit property was lost and extinguished when the sale agreement was signed on 26th October 2010, and further that under section 69B (2) of the Transfer of Property Act the Plaintiff was under no legal duty to verify whether or not the statutory notices had been sent. The Advocate also relied on **Captain Patrick Kanyagia & Rosemary Wambui Kanyagia vs Damaris Wangechi & 2 Others, Civil Appeal No. 150 of 1993** for the contention that they were purchasers in good faith without notice of any right or title if any, of the owner of the suit property.

On the offer to purchase the property made by a third party and the averments by the Defendant of material non-disclosure by the Plaintiff in this regard, the Plaintiff's Advocate submitted that section 55(5)(a) of the Transfer of Property Act did not apply to the exercise of a statutory sale under section 69 of the Act, and if the said section was to apply at all it would have applied at the time of the execution of the sale agreement on 26th October 2010, and on that date there was no offer in existence to purchase the suit property. The Plaintiff submitted that having paid the full purchase price it had already acquired rights to the suit property, and was entitled to offer the same for sale to a third party.

The Defendant's Advocate written submissions were dated 9th March 2012 and he relied on the decisions of the Court of Appeal in **D.T. Dobie & Company Ltd vs Muchina, Civil Appeal No. 37 of 1978** and in **Ramji Megji Gudka vs Alfred Morfat Omundi Michira & 2 Others (2005) eKLR** for the contention that the power of the court to strike out pleadings should be used sparingly and cautiously and only in the clearest of cases, and that a defence with merit which raises a triable issue warrants adjudication by the court.

The Defendant's Advocate submitted that it had by its defence raised triable issues, which the Advocate enumerated with various supporting authorities as follows: whether the Defendant's statutory power of sale had arisen; the legality and validity of the agreement of sale and transfer entered into by the Plaintiff and Defendant; whether the Plaintiff is entitled to the remedies of specific performance and damages and the defence of estoppel; and whether the sale agreement between the Plaintiff and Defendant was validly rescinded and refund of the purchase price accepted by the Plaintiff. The merits and demerits of the arguments and authorities cited in this regard by the 1st Defendant's Advocate cannot be considered at this stage, but at the main trial if it is found by this Court that the aforementioned issues are indeed triable issues.

The Defendant's Advocate also submitted that the application for summary judgment was incompetent since under Order 36 of the Civil Procedure Rules such an application can only de sought under in a claim for liquidated demand or recovery of land by a landlord, yet the claim in the present suit is for specific performance and damages. Further, that such an application under Order 36 Rule 1(1) of the said Rules ought to be made when a defendant has made appearance and not filed defence, yet a defence had been filed in the present case. In addition, the Advocate also submitted relying on the decision in **Lucy Momanyi T/A L.N. Momanyi & Company Advocates vs Nurein M. A. Hatimy & Another (2003) eKLR** that summary judgment can only be entered where a Defence does not raise any triable issues, and also when the points of law raised can be argued with relatively short argument, and relied on the decision in and **Elijah Kipngeno Arap Bii vs Samwel Mwehia Gitau & Another (2009) e KLR** in this regard**.** The Advocate contended that this was not the case in the present application.

I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The application is brought under the provisions of Order 36 Rules 1(1)(b) and 2, Order 2 Rules 15(1) (a)(b)(c) and (d), and Order 51 Rule 1 of the Civil procedure Rules, as well as section 3A of the Civil Procedure Act. The first issue for determination is whether the Defence filed herein should be struck out for reasons that it raises no triable issues and that the Defendant has admitted to the breaching the sale agreement between the parties. Order 2 Rule 15 (1) of the Civil Procedure Rules, makes provision for the striking out of pleadings as follows:

"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. "

It is also settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

"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."

It is evident from the foregoing arguments by the parties that triable issues have been raised by both the Plaintiff and Defendant, particularly the issues of validity of the sale agreement entered into by the parties, and if valid, whether there was a breach and/or rescission of the same. These issues cannot be decided at this interlocutory stage without the benefit of further evidence and detailed examination and submissions on the same, and can only be decided upon after a full trial. It is therefore the finding of this Court that the Defence merits adjudication by this Court.

For admission to justify striking out aDefence, it must 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.** After perusal of the Defence dated 6th April 2011, I established that the Defendant in Paragraph 10 of the same expressly denied and put the Plaintiff to strict proof of the contents of paragraphs 12 and 13 of the Plaint dated 31st January 2011, which are the material paragraphs where the Plaintiff claims the alleged breach of rescission without notice and refund of the purchase price. The only paragraphs admitted by the Defendant in the said Defence are descriptive paragraphs of the parties, the charge and sale agreement referred to herein. I am therefore unable to find that there has been admission by the Defendant of breach of the sale agreement in its Defence.

On the issue whether the prayer for summary judgment can issue, Order 36 Rules 1 and 2 provide as follows:

1. (1) In all suits where a plaintiff seeks judgment for—
(*a*) a liquidated demand with or without interest; or

(*b*) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

In **Richard H. Page and Associates Ltd vs Ashok Kumar Kapoor (1976-80) 1 KLR 1394** it was held by Chesoni J. (as he then was) that the ordinary time for making an application for summary judgment is after the Defendant has appeared, and when the defence has not been filed, but such an application may be made after the defence has been filed, in which case the Plaintiff must satisfy the Court that the delay is justifiable. It was also held by the Court of Appeal in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd. (1985) KLR 695** that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure.

I also agree with the Defendants submission that the prayer sought is not not a liquidated demand within the meaning of Order 36 Rule 1(1)(a). The Court of Appeal in the above-cited case also held that a sum does not become liquidated just because it is claimed, but only if it is agreed or the events on which it is based reveal it can be calculated independently of the sum claimed. If the ascertainment of the sum claimed requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages at large. In the present suit the sum of Kshs.12,220,000/= claimed in prayer (d) of the Plaint dated 31st January, 2011 is claimed as special damages whose particulars are given in paragraph 16 of the said Plaint, and which require to be proved. The sum does not therefore qualify as a liquidated demand.

The Plaintiff's application dated 27th May 2011 is therefore hereby disallowed for the reasons given in the forgoing.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____21st _____ day of ____May_____, 2012.

P. NYAMWEYA

JUDGE