



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 601 OF 2010

MESHACK MOCHAUE MOCHOGE
LEAH MUMO MOCHOGE.....PLAINTIFF/APPLICANT

VERSUS

JAPHETH GALAGATI SHAMALADEFENDANT/RESPONDENT

RULING

1. Kiage and Company counsel for the plaintiff/applicant has filed a Notice of Motion dated the 21/7/11. Although the firm states that they are for the defendant/applicant it is clear on record that Kiage and Company is for the plaintiff. They filed a plaint in Court dated the 24/11/10. The application is brought under order 2 Rule 15 (1) (b) and (d) and 51 Rule 1 of the Civil procedure Rules, section 3A of the Civil Procedure Act seeking the following orders;

- a) That the defendants defence be struck out for being scandalous, frivolous or otherwise an abuse of the process of the Court.
- b) That judgment be entered as prayed in the plaint.

The application is founded on the following grounds.

- i. That the defendant's defence is not bona fide and does not raise any triable issues.
- ii. That the defendant defence and consist of bare denials and is merely evasive calculated to delay just conclusion of the matter
- iii. That the defendant's defence is improperly before Court having been filed prior to appearance being made.

2. The application is supported by the affidavit of 1st plaintiff Meshack Mochoge dated the 21/7/11. He

states that the 2nd plaintiff authorized in to swear his affidavit. The plaintiffs avers that by a written agreement dated 25/1/10 the plaintiff agreed to buy and the defendant to sell to her L.R. 2559/519 to the excised from L.R 2259/161 at the agreed price of 6,150,000/-. The defendant has paid Ksh 3,075,000/- on different dates on the 25/1/10, 25/2/10 and 26/2/10. That as per clause 1.6 of the said sale agreement the defendant had an obligation to give out vacant possession upon payment of the 50% as deposit. The defendant failed to do so and also neglected to release to their advocates the complete documents within the stipulated time despite written notice. That thereafter their advocates issued a completion notice to the defendant specially indicating the deposits on the part of the defendant of his obligations under the agreement and requiring him to remedy the same or refund the sum of 3,075,000/- paid towards the purchase of the suit land. The 1st plaintiff states that the defence on record is scandalous, it consists of mere demands and that their counsel has dismissed them, that no consent of the Land Control Board was required as the suit property is not agricultural land. The applicant has sought the orders prayed in the notice of motion. They attached the sale agreement between them and the defendant dated the 25/1/10 MMM1, evidence of payment MMM2 to M6 and their advocate's letters MM7 and 8.

3. The respondent/defendant filed grounds of opposition dated the 1/11/11. The defendant/respondent states in the said grounds that he is opposing the plaintiff/applicant applicant on grounds that

- 1) That the statement of defence is not scandalous or frivolous otherwise an abuse of the process of this court.
- 2) That the statement of defence raise sustainable and triable issues and is not just for striking out on the manner applied for by the plaintiff or at all.
- 3) That the plaintiff's application to strike out the statement of defence has no merit.
- 4) That the statement of defence is properly on record.

Counsels highlighted their written submissions in Court and some of the issues raised are as follows: By the plaintiff/applicant, that the defence they seek to strike out was filed on the 24/6/2011 and the memorandum of appearance on the 29/6/11 six days after the defence was filed, this is against order 10 Rule 3. That order 10 rule (3) is not ambiguous. That the plaintiff paid ksh.3,075,000/- for the purchase of the land. That once the defence is struck out their judgment should be entered for the plaintiff as prayed in the plaint. Mr. Githuka for the defendant relied on the grounds and argued that their defence is properly on record. That where there defendant fails to serve a memorandum appearance or defence then the Court can entertain an application to strike out. He admitted that their defence was filed on the 24/7/11 and their memorandum on the 29/7/11. That order 6(2) (3) states that a defence shall be filed 7 days after the memorandum of appearance has been filed. That he knows that it un-procedural to file a defence before a memorandum but the defence can be treated as an appearance.

4. I have considered the submissions that were filed by the parties the issue is whether the defence should be struck out. There is no dispute that the defendant filed a defence before their memorandum of appearance, this was un-procedural. I do note the provision of article 159 (2)(d) of the Constitution which states that justice shall be administered without due regard to procedural technicalities. With this in mind I will allow the defence filed and deem it to be properly on record. I also note that a party should not be penalty for the mistakes of his counsel. On whether the defence is scandalous frivolous or an abuse of the court process. I have looked at the defence filed in light of the authority cited by the plaintiff /applicant and I find that it is not a merely denial nor is it scandalous. At paragraphs 3 the defendant raises the issue of consent of the Land Control Board, at paragraph 4 he denies receiving the sum and also states at paragraph 5 that the plaintiff never gave any completion notice. The issues raised in these paragraphs are triable issues and can only be determined at a full hearing. The defendant has also raised the issue of arbitration clause that it was in the sale agreement. I agree that for a pleading to be considered frivolous or vexatious it is one that should appear as one that is not serious or tends to annoy (Mpaka Road Development Ltd Vs. Kana (2004)1 E.A 124). I will therefore give the defendant a chance to be heard on the issues raised. I decline to strike out the defence and enter judgment as prayed. Let the parties fix the matter for hearing once they have complied with the provisions of order 11 of the Civil Procedure rule.

Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 20th day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicants

..... For the Respondent

..... Court Clerk