



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 613 of 2009

**FOUNDATION FOR GOOD GOVERNANCE (PTY)
LIMITED.....PLAINTIFF**

VS.

**CRESCENT ROAD PROPERTIES
LIMITED.....DEFENDANT**

RULING

1. By way of a Notice of Motion dated 21st December 2011 and expressed to be brought under Order 36 Rule 1 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act, the Plaintiff/Applicant seeks orders for summary judgment to be entered for the Plaintiff against the Defendant as prayed in the Plaintiff.
2. The application is based on grounds set out on its face and is further supported by an affidavit sworn by Kiiokavila on 21st December 2011.
3. The Plaintiff's case is that the Defendant offered it property known as L.R. No. 209/2169 for purchase pursuant to a sale agreement dated 28th February 2008 at a consideration of Kshs. 59 Million. The Plaintiff paid Kshs. 5,950,000/- being 10% of the purchase price on 29th February 2008, a further Kshs. 14,050,000/- on 3rd March 2008 and yet a further payment of Kshs. 20 Million on 5th August 2008. Plaintiff has annexed copies of the respective cheques and requisition to prove payment. In October 2008, the parties mutually agreed to rescind the agreement on condition that the Defendant would refund to the Plaintiff the sum of Kshs. 40 Million less a penalty of Kshs. 2 Million. On 30th October 2008, the Defendant refunded a sum of Kshs. 20 Million but has failed to pay the balance of Kshs. 18 Million.
4. In reply, the Defendant through a replying affidavit sworn by Roselyn WambuiMbugi on 16th March 2012 states that an application for summary judgment can only be filed before filing of defence and not after. The defendant also alludes to a counterclaim it intends to lodge against the Plaintiff. It further claims mesne profits on account of having vacated tenants from the premises in anticipation of

completion of the sale. Further, it is claimed that part of the funds from the Plaintiff emanated from a third party organization and the only money from the Plaintiff amounting to Kshs. 20 Million has since been refunded. The defence is not therefore a sham and raises triable issues.

5. I have carefully evaluated the application on the basis of the material placed before me and on the basis of the rival submissions by counsel for the parties.

6. Order 36 Rule 1(1) of the Civil Procedure Rules, 2010 contemplates that an application for summary judgment can only be lodged where the Defendant has appeared but has not filed a defence. This necessarily portends that no application seeking summary judgment is sustainable under this Rule the moment a defence is filed. This position was confirmed in the case of **Neptune Credit Management Limited vs. KarimBadrudinSuderji HCCC No. 449 of 2009** where **Odunga J** even went further to hold that where a defence is filed, an application for summary judgment should be struck out without even going to the merits of the application. The learned judge held further that the only recourse in that event would be for the applicant to apply for the defence on record to be struck out and judgment entered accordingly.

7. I fully concur with the above legal position. In the circumstances, I make the finding that the court's further venture into the merits of whether or not the defence filed raises a reasonable cause of defence to the Plaintiff's claim can only be prompted by an appropriate motion seeking to strike out the defence if the Plaintiff has reason to believe that the same does not raise any cause of action.

8. In the result, the Plaintiff's Notice of Motion dated 21st December 2011 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7th DAY OF JUNE 2012.

J.M. MUTAVA
JUDGE