



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 138 of 2009

PETER PAUL MUTHOKA.....PLAINTIFF

VERSUS

FRANCIS KIBIBA LELO (alias FRANCIS KIIO LELO).....DEFENDANT

R U L I N G

1. The Plaintiff has sought by **chamber summons dated 27th August, 2009** brought under **Order VI, rule 13(1) (b) (c) and (d)** of the then **Civil Procedure Rules (the Rules)** an order to strike out the statement of defence filed by the Defendant, and further, that judgment be entered in his favour in terms of prayers 1, 2, 3, 4 and 5 of the plaint. **Section 3A** of the **Civil Procedure Act, Cap 21 (the Act)** which saves the inherent power of the court to make any order in the interests of justice is also cited.
2. The grounds for the application on the face thereof are that the statement of defence contains nothing but mere denials and is thus a sham; that the defence is scandalous, frivolous or otherwise an abuse of the process of the court; that the defence is calculated to prejudice, embarrass or delay the fair trial of the action; and that the issues raised by the parties' pleadings can be determined without necessity of a full trial.
3. The supporting affidavit sworn by the Plaintiff refers to the transaction between him and the Defendant for sale of the suit property for a consideration of KShs. 120,000/00, which consideration was to be paid **in cash** as per the terms of the sale agreement of 16th October, 2004. The Plaintiff further depones that in breach of the terms and conditions aforesaid, the Defendant paid the consideration **by cheque**, and, that due to the said breach, he cancelled the transaction. Further, that the suit property is agricultural land to which the provisions of the **Land Control Act, Cap 302** applied, and that since he has never applied for, or been a party to an application for, land control consent, any agreement for sale is void for all purposes under the provisions of the said Act. It is the Plaintiff's case therefore that the statement of defence filed by the Defendant is a sham, frivolous, an abuse of the court process and is filed merely to prejudice or delay the fair trial of this case.
4. The Defendant on his part opposed the application vide a replying affidavit in which he depones that upon payment of the consideration by cheque to the Plaintiff, the Plaintiff acknowledged the payment and issued the Defendant with a receipt thereto, and that therefore he is not in breach of the contract. He also depones that the Plaintiff's suit is bad in law as the suit land is subject to the provisions of the **Land Adjudication Act, Cap 283**.
5. The application was canvassed by way of written submissions. The Plaintiffs submissions were filed on 17th June 2010 while those of the Defendant were filed on 26th July 2010. I have duly considered the submissions, including the cases cited.

6. To succeed in this application the Plaintiff must demonstrate that the Defendant's defence is scandalous, frivolous or vexatious, or that it may prejudice, embarrass or delay the fair trial of the action, or that it is otherwise an abuse of the process of the court. On the other hand it is incumbent upon the Defendant to show that he has a fair defence and that he should be allowed to defend the suit. In other words, the Plaintiff must demonstrate a *prima facie* case while the Defendant must demonstrate a *bona fide* defence. Leave to defend must be given unless it is clear that there is no real issue to be tried, or that the facts or law do not raise a doubt on balance that the Plaintiff is entitled to judgment.

7. What makes a pleading frivolous, vexatious or scandalous? **Ringera, J** as he then was, in **Mpaka Road Development Limited vs. Kana (2004) 1 E.A. 124**, stated as follows at page 165 -

“A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is *ipso facto* vexatious.”

This position was earlier stated in the **Supreme Court Practice 1995, Vol. 1 (Part 1) (London, 1994)** at page 343 as follows -

“... ‘the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to the modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.’” (Bowen, L J in *Knowles vs. Robert (1888) 38 Ch. D.263*, (p.270).

8. It is also stated in *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Ed. by I. H. Jacob (London: Sweet & Maxwell, 1975) (at p. 144)* -

“Any scandalous matter in any pleading or endorsement of the writ may be ordered to be struck out or amended. For this purpose, allegations in any pleading are scandalous if they state matters which are indecent, offensive or are made for the mere purpose of prejudicing the other party....”

9. Has the Plaintiff in the present application satisfied the requirements of Order VI, rule 13(1) (b) (c) and (d) of the Rules?

10. The Plaintiff has pleaded his case in the plaint in fair detail. The Defendant on the other hand has generally denied the averments contained in the plaint and only raised a point of law as to this court's lack of jurisdiction to determine this suit, which point he has not pursued. In law, a mere denial, or a general traverse, will not amount to a proper defence. A defence must raise triable issues. The Defendant's defence does not raise any triable issue. It consists largely of denials rather than a systematic engagement of the Plaintiff on the assertions in the plaint. By not engaging the Plaintiff's claim, the statement of defence must be held to disclose no reasonable defence. It amounts to an abuse of the process of the court.

11. Section 3A of the Civil Procedure Act has no application where there is a specific provision of the law or procedure dealing with the matter at hand. In the present case, such provision is Order VI, rule 13(1) of the Rules.

12. In the event I will allow the Plaintiff's application. The Defendant's defence is struck out and judgment entered for the Plaintiff as prayed in the plaint. There will be orders accordingly.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 9TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER
2012**

ASIKE-MAKHANDIA
.....
JUDGE