



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT MILIMANI COMMERCIAL COURTS AT NAIROBI.**

**CIVIL CASE NO. 286 OF 2001.**

**KAMAHUHA LIMITED .....PLAINTIFF.**

**VERSUS**

**STANDARD CHARTERED BANK OF KENYA LTD & 2 OTHERS.....DEFENDANT.**

**R U L I N G.**

1, The plaintiff filed the chamber summons application dated 18<sup>th</sup> September, 2001 which is brought under the provisions of order 6 Rule 13 (1) of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The applicant is seeking for an order that the 3<sup>rd</sup> defendant's amended statement of defence dated 31<sup>st</sup> July, 2009 is struck out. Secondly, the 2<sup>nd</sup> defendant is ordered to execute the transfer on title No. Ruiru/Kiu Block 6/228 in favor of the plaintiff and to do all acts that are necessary to pass a good and valid title to the plaintiff. Alternatively, the registrar of this Court does sign, seal and execute the transfer of title No. Ruiru/Kiu Block 6/228.

2. This application is premised on the grounds stated on the body of the application. These grounds are erraborated in greater detail by the matters deposed to in the supporting affidavit sworn by **John Kiereini Kiriika** on 18<sup>th</sup> September, 2009. Briefly stated, the plaintiff purchased the suit premises from the 3<sup>rd</sup> defendant as evidenced by as a sale agreement dated 6<sup>th</sup> November, 1995 which provided inter alia as follows:-

(a) The purchase price was Ksh. 4.000.000/= (Kenya Shilling Four million)

(b) A deposit equivalent to 10% of the purchase price that is Ksh. 400,000/= was acknowledged as having been paid to the Third defendant by the plaintiff.

(c) The vendor shall transfer the property and give possession thereof to the purchaser forthwith.

(d) The balance of the purchase price namely Ksh. 3,600,000/= shall be payable firstly by two instalments of Ksh. 150,000/= each subsequently by and 33 half monthly instalments of Ksh. 100,000/= each. Each installment shall be satisfied upon the purchaser supplying to the vendor Kenya Breweries beer of equivalent value at wholesale prices prevailing at the time of supply. Each such installment shall be satisfied as aforesaid on the first and the fifteenth day of each month commencing on the 1<sup>st</sup> November, 1995 and thereafter on the fifteenth and the first of each subsequent month. No interest shall be payable unless any installment is delayed in which case interest at 24% shall accrue to the vendor from its due date until it is satisfied.

(e) As security for the balance of the purchase price the purchaser shall deposit the title deeds of the property and a charge in the form R.L.9 which the vendor shall be entitled to register at its own cost at any time.

(f) All the legal costs and all the stamp duty on the transfer (and the said charge if applicable) shall be to the vendor's account and deducted from the balance of the purchase price.

(g) The property is sold in the state and condition it is and the vendor shall not be called to repair or renovate it in any way whatsoever.

3. The plaintiff carried out an official search on the suit premises which revealed that the 3<sup>rd</sup> defendant was duly registered proprietor. The 3<sup>rd</sup> defendant signed the transfer dated 14<sup>th</sup> November, 1995 which was witnessed by the 2<sup>nd</sup> defendant and it was duly registered. The 3<sup>rd</sup> defendant through the 2<sup>nd</sup> defendant acknowledged through a letter dated 19<sup>th</sup> July, 1998 that they had received the purchase price in full and authorized their advocates to release the title documents to the plaintiff. The plaintiff took possession of the premises and proceeded to work on the incomplete building and the applicant avers that they spent Ksh. 2,640,000/= to complete the building which now comprises of three shops on the ground floor and residential houses.

4. The plaintiff was surprised to learn that the suit property was originally owned by the 2<sup>nd</sup> defendant who had borrowed a loan with the Standard Chartered Bank in 1994, and a charge and a further charge were created over the suit premises. The 2<sup>nd</sup> defendant defaulted in the repayment of the loan with the bank, and the bank commenced recovery proceedings which entailed the sale of the suit property. This prompted the plaintiff to file the present suit and by a ruling delivered by **Ochieng- J.** on 16<sup>th</sup> November, 2005 the plaintiff was ordered to pay off the loan due to the bank if the plaintiff wished to retain possession of the suit premises. The plaintiff negotiated with the bank and paid a sum of Ksh. 5.5 million which was demanded by the bank and in return, the bank sent the title documents together with an executed discharge of charge to the plaintiff. The plaintiff was also ordered to pay costs to the bank in the sum of Ksh. 241,860/= which he did.

5. Counsel for the plaintiff submitted that the plaintiff has waited for 20 years to obtain title to the suit premises. The 2<sup>nd</sup> defendant acknowledges there was an agreement to sell the suit property to the plaintiff, but says nothing about the fraudulent issuance of two sets of titles over the same property. It is the second defendant who affixed the seal and signed the transfer of the suit property on behalf of the 3<sup>rd</sup> defendant in favour of the plaintiff thus the defence contains mere denials. It was further submitted that the defence is meant to delay and frustrate the plaintiff from the fruits of its judgment. The defence should be struck out and the 2<sup>nd</sup> defendant ordered to execute the transfer or the Deputy Registrar of the High Court should do so.

6. This application was opposed, **Mrs. Kimiti** learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants; reliance was placed on the replying affidavit sworn by **Karren Wanjiku Thumbi** who is a director of the 3<sup>rd</sup>

defendant. It is contended that the third defendant did not enter into a sale agreement with the plaintiff. The 3<sup>rd</sup> defendant did not also own the suit property, thus the amended defence raises triable issues which should proceed for trial. Further it is contended that the 3<sup>rd</sup> defendant never passed a resolution to sell the property, moreover the 3<sup>rd</sup> defendant cannot be held liable for the acts of the 2<sup>nd</sup> defendant who had no capacity to transact on its behalf. The defendant also exhibited a resolution of 12<sup>th</sup> April, 2009 in which the 3<sup>rd</sup> defendant appointed **Karren Wanjiku Thumbi** and gave her authority to sign legal documents thus the matter should be allowed to proceed for hearing.

7. Both counsel for the plaintiff and the defendants filed very detailed written submissions in support of their respective prepositions. Under the provisions of the Civil Procedure Rules cited in this application a defence which does not disclose triable issues can be struck out. (See the case of; **M/s Ramji Megji Gudka Limited vs. Alfred Morgat Omundi Michira & 2 others CA No. 335 of 2001**, where the Court of Appeal held as follows:-

***“.....in dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which might succeed but it means a defence which raised a triable issue to warrant adjudication by the court ...”***

8. The agreement entered into between the plaintiff and the 3<sup>rd</sup> defendant dated 6<sup>th</sup> November, 1995 is not denied. That agreement was executed by the 2<sup>nd</sup> defendant on behalf of the 3<sup>rd</sup> defendant. Parties also exchanged correspondences to confirm the same. That correspondence was signed by the 2<sup>nd</sup> defendant on behalf of the 3<sup>rd</sup> defendant. Even a transfer was signed in the same manner. However, it turns out that the 2<sup>nd</sup> defendant had fraudulently issued to the plaintiff a fake title because the genuine title had been charged by the Standard Bank to secure a loan. The plaintiff was made to pay the outstanding loan in order to salvage the title from being sold by the bank. This is according to the orders by **Ochieng – J.** dated 16<sup>th</sup> November, 2005 who made the following orders:-

- (a) The application against the 1<sup>st</sup> defendant is dismissed, with costs to the said 1<sup>st</sup> defendant.
- (b) An injunction shall issue forthwith to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from selling, alienating, assigning, transferring, auctioning, advertising or sale; leasing out, occupying or otherwise howsoever from dealing with or interfering with the suit property, title Number RUIRU/KIU BLOCK 6/228, until the hearing and determination of this suit.
- (c) If the plaintiff should redeem the mortgage which was executed by the 2<sup>nd</sup> defendant in favour of the 1<sup>st</sup> defendant, the said 1<sup>st</sup> defendant shall hand over to the plaintiff the title documents together with a duly executed Discharge of Charge, over the said suit property. The plaintiff will then hold the said documents in safe custody until this court determines who is entitled to the said suit property.
- (d) In the event that the plaintiff does not redeem the mortgage within the next SIXTY (60) days from today, the 1<sup>st</sup> defendant shall be at liberty to exercise its statutory powers of sale.
- (e) The costs of the application dated 27<sup>th</sup> February, 2001 shall be paid as follow;
- (i) The plaintiff will pay costs to the 1<sup>st</sup> defendant,

(ii) The 2<sup>nd</sup> and 3<sup>rd</sup> defendants will pay costs to the plaintiff.

(f) All the parties herein are at liberty to apply.

9. Upon evaluation of the defence contained in the 2<sup>nd</sup> and 3<sup>rd</sup> amended statement of defence, it is not denied that the agreement was entered into and a transfer and charge were executed in favour of the plaintiff. Consideration was paid and the defence does not give an explanation of the origins of the fake title documents which were given to the plaintiff. Does this defence raise a triable issue? In the case of **STORES VS. PEPCO DISTRIBUTORS LTD (1987) 2 KAR 89** where the defendant used such generalized denial, Platt, J.A., held that:-

***“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”***

10. The above observations resonate well with the facts of this case. The agreement, transfer, charge and possession of the suit premises were signed and given to the plaintiff. The 2<sup>nd</sup> defendant was the director of the 3<sup>rd</sup> defendant when he executed the documents under the 3<sup>rd</sup> defendants’ seal. I am satisfied that plaintiff’s case as presented in the plaint, the supporting affidavit and the ruling of Ochieng J, all present a clear case for the plaintiff. It is clear that no useful purpose would be served by proceeding to hold a trial on the matters issues raised in the amended defence.

11. Accordingly I have no hesitation to grant the orders sought by the plaintiff’s application dated 18<sup>th</sup> September, 2009 in the following manner:-

1. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s amended statements of defence dated 31<sup>st</sup> July, 2009 is hereby struck out.

2. The 2<sup>nd</sup> defendant to execute the transfer of a title No. Ruiru/Kui Block 6/228 in favour of the plaintiff within 30 days failure to do so the Deputy registrar of this court to sign, seal, execute the transfer in favour of the plaintiff .

3. The plaintiff shall also have the costs of this application as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**Ruling read and signed on this 10<sup>th</sup> Day of January 2011 at Nairobi**

**MARTHA KOOME.**

**JUDGE.**