



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 56 OF 2008**

**Z. NYAMU M'ARIMI .....PLAINTIFF**

**VERSUS**

**KIUNGONE INVESTMENTS .....DEFENDANT**

**RULING**

The plaintiff sued the defendant in this case and prayed for an order of “a declaration that the plaintiff is entitled to payment of balance of purchase price or alternatively transfer of the title deed of L.P. No. Nkuene/Kithunguri/364 to the plaintiff plus damages for the breach of agreement.” The plaintiff in his plaint pleaded that on 30<sup>th</sup> April 2007 he entered into an agreement of sale with the defendants whereby the defendant agreed to buy from the plaintiff the suit property for a consideration of Kshs. 1.4 million. The defendant paid Kshs. 410,000/= to the plaintiff but failed to pay the balance of Kshs. 990,000/=. That they failed to make that payment despite the fact that the suit property had been transferred to them. The defendant denied the plaintiff’s claim and further stated in its defence that the plaintiff was not the legally registered proprietor of the suit property. The defendant in its defence also stated that the plaintiff was facing a criminal charge before the Meru Chief Magistrate Court being Criminal Case No. 687 of 2007 for the offence of making a document without authority contrary to section 357 (a) of the Penal Code. After the filing of that defence the plaintiff has now filed a Chamber Summons dated 15<sup>th</sup> October 2010. The same is brought under order XXXV Rule 1 of the Civil Procedure Rules (now amended) which is now order 36 rule 1 of the Civil Procedure Rules 2010. The plaintiff by that Chamber Summons seeks that summary judgment be entered against the defendant as prayed in the plaint. In his supporting affidavit, the plaintiff reiterated that he sold and transferred the suit property to the defendant but that the defendant failed to pay the full purchase price and remained with the balance of the purchase price of Kshs. 990,000/=. The defendant opposed the application. In its replying affidavit, the defendant averred that that plaintiff fraudulently obtained the transfer of the suit property in the year 2006 from a person known as Guantai Mbogo. That person Guantai Mbogo, according to the replying affidavit died in 1972. The defendant attached a copy of the death certificate of Mbogo which indeed shows that he died in 1972. The defendant also annexed a charge sheet of Meru Criminal Case No. 687 of 2007 where the plaintiff was charged with the offence of making a document without authority contrary to section 357(a) of the Penal Code. The particulars of the offence are relevant to this matter and I will reproduce them for that reason.

**“ZABERIO NYAMU M’ARIMI:- on the diverse dates between 5<sup>th</sup> day of December 2005 and 31<sup>st</sup> March 2006 at Meru township in Meru Central District within Eastern Province jointly with others not before court with intent to deceive or defraud without lawful authority or excuse made a certain document namely transfer of land form Nkuene/Kithinguri/364 in the names of the late Guantai Mbogo purporting to be transferor of land form issued and signed by the late Guantai Mbogo.”**

It will be seen that the criminal charge the plaintiff is facing in the afore stated criminal case is relevant to this case because the plaintiff is charged with the offence of making a document without authority of the suit property. The plaintiff did not make any response by affidavit with regard to the averments of the defendant in respect of that criminal charge. In an application for summary judgment, the court is guided by the principle that where a defendant raises even one triable issue, the defendant is entitled to be granted the right to defend the suit. This was well set out in the case **Moi University vs. Vishva Builders Limited** Civil Appeal Case No. 296 of 2004 where the Court of Appeal extensively examined the various court’s decisions where that principle have been upheld as follows:-

**“The law is now settled that if the defence raises even on bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs. 185,305,011.30/=. We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one trial issue would be sufficient – see H.D. Hamsani vs. Banque Du Congo Belge [1938] 5 E.A.C.A. 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-**

**In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.**

**And finally, in Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1KLR 359 at p. 365 this court said:-**

**However, we have accepted that the application that was before the learned judge was an application for summary judgment under order XXXV rule 1 and 2. We must now consider when the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this court’s decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this court stated:-**

**With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.**

**If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.**

**That decision was made in 1977. In 1997, this court again confirmed the same principle in the case of Dhanjal Investments Limited vs Shabana Investments Limited, Civil Appeal No. 1232 of 1997 (unreported) where it stated:-**

***The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited [1952] 19 E.A. 77, and followed in the Court of Appeal for Eastern African in the case of Souza Fiqueredo & Co. vs. Moorings Hotel [1952] E.A. 425, that if the defendant shows a bona fide triable issue he must be allowed to defend with conditions.”***

I make a finding that the defendant raises a triable issue which entitles it the right to defend this case. The issue is whether plaintiff has capacity to sell the suit property to the defendant. Consequently, the Chamber Summons dated 15<sup>th</sup> October 2010 is dismissed with costs to the defendant. The plaintiff in my view made the application for summary judgment when he knew that the defendant relied on the criminal charge as its defence. The plaintiff ought not therefore to have sought summary judgment. It is because of that finding and in keeping with the provisions of order 36 rule 8 (2) that I make an order that the costs of the Chamber Summons dated 15<sup>th</sup> October 2010 shall be paid to the defendant forthwith after taxation by the taxing master of this court.

**Dated, signed and delivered at Meru this 18<sup>th</sup> day of May 2011.**

**MARY KASANGO  
JUDGE**