



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC NO. 382 OF 2008**

NJOWAMU CONSTRUCTION CO. LTD ..... 1<sup>ST</sup> PLAINTIFF  
STEPHEN NJOROGE MUHINJA..... 2<sup>ND</sup> PLAINTIFF

VERSUS

SAMUEL NGIGI KIARIE ..... DEFENDANT

**RULING**

This is an application by way of Chamber Summons under Section 3A of the Civil Procedure Act and Order 6 Rule 13 (1) (b)(c) and (d) and 16 of the Civil Procedure Rules for orders that the defendant's defence and counterclaim dated 11<sup>th</sup> September, 2008 be struck out as being scandalous, frivolous or vexatious as it may prejudice, embarrass or delay the fair trial of the suit herein, or is an abuse of the process of the court.

The application is supported by an affidavit sworn by Stephen Njoroge Muhinja who is the 2<sup>nd</sup> plaintiff and grounds set therein. The application is opposed and both learned counsel have filed written submissions. The court on 6<sup>th</sup> February, 2009 gave conditions on an injunction application brought by the plaintiff to the effect that the plaintiffs shall pay the balance of the purchase price of Kshs. 4,500,000/= within 21 days to the credit of a interest bearing account in the joint names operated jointly by the advocates on record for both the plaintiffs and the defendant. There was also an order that the plaintiffs be paying Kshs. 20,000/= on account of rent payable to the defendant into the said account. In default of either or both conditions within the stipulated time the orders of temporary injunction issued shall lapse automatically and stand vacated.

The plaintiffs allege that they forwarded the cheque to the advocate for the defendant but the defendant has breached the steps to facilitate the opening of the account. It is clear to me that, if the court intended that the suit be dismissed or struck out in the event of failure of either of these parties to comply with the conditions set out above, it would have said so. That it did not say so means that ,the striking out the suit was not conteplated in that order.

I also bear in mind that the striking out of any pleading is a drastic measure which should be applied sparingly. However weak the defence and counterclaim may be, the defendant should have his day in court. I note that the pleadings herein are closed and that the parties should move forward to comply with the Civil Procedure Rules to facilitate expeditious disposal of this case. The bottom line is that this application lacks merit and is therefore dismissed with costs to the defendant.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 6<sup>th</sup> Day of July, 2011***

**A. MBOGHOLI MSAGHA**  
**JUDGE**