



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 17 of 2009

LEONARD MUTISYA.....PLAINTIFF

VERSUS

NANCY GATHONI NJENGA.....1ST DEFENDANT

EXPEDITIOUS GENERAL MERCHANTS.....2ND DEFENDANT

R U L I N G

1. The application before court is the Chamber Summons dated 07/04/2009 brought under Order VI Rule 13(1)(a) of the Civil Procedure Rules seeking to strike out the plaint dated 16/01/2009 and filed in court on 19/01/2009. The application also seeks an order to strike out the Plaintiff's Chamber Summons application dated 16/01/2009 and filed in court on 19/01/2009 with costs to the 2nd Defendant ex-debito justitiae. The application is premised on the grounds that the 2nd Defendant is an agent of a disclosed principal and as such no suit or claim lies against him both as an officer of court and as a statutory creature under the Auctioneers Act. There are other grounds in support of the application, inter alia that the suit contravenes the provisions of the Advocates Act, Cap 16 in relation to the documents relied upon.
2. Since the application is brought under Order VI Rule 13(1)(a) of the Civil Procedure Rules, there is no affidavit evidence, but the same is opposed vide the Replying Affidavit of Leonard Mutisya the Plaintiff herein dated 10/07/2009. The Plaintiff says that he accepted an offer to buy a house, the subject matter of this suit from one Bancy Njenga and not Bancy Gathoni Njenga. He also says that any matters of evidence raised by the Defendant in this case regarding the sale of the suit property by Bancy Njenga to himself are matters that can only be brought into the limelight at a full hearing and not at this summary stages. The Plaintiff prays that the Defendant's application be dismissed.
3. On the 13/07/2009, the parties agreed to proceed with the application by way of written submissions, all of which submissions were to be filed and served on or before 24/07/2009. The matter was listed for mention on 27/07/2009 for taking a ruling date and/or for further orders. On the 27/07/2009, it transpired that only the Applicants had filed their written submissions. On the same day, Mr. Mackenzie from Mackenzie & Co. Advocates informed the court that he was seeking to cease from acting for the Plaintiff due to lack of instructions. He had filed his Chamber Summons application to that effect dated 13/07/09. On the 23/09/2009, the application to cease from acting was allowed by consent and Mr. J.D. Nzuki who had been instructed by the Plaintiff to take over the conduct of the case from Mr. Mackenzie was also present in court. On that day, Mr. Nzioki addressed the court and asked for 14 days within which to file and serve his written submissions. The parties were to highlight the submissions on the 27/10/2009.
4. Come the 27/10/2009, Mr. Nzioki had not filed his submissions. He sent a Mr. Mutai advocate to hold his brief. Mr. Mutai asked for adjournment of the matter for another 14 days to allow Mr. Nzioki time to file and serve his written submissions. The application for adjournment was refused for reasons that are on the record, and the application dated 7/04/2009 proceeded with the highlighting of the submissions.
5. The genesis of this suit is that the suit was commenced by way of a plaint dated 16/01/2009 and filed in court on 19/01/2009. The dispute is about House No. A 143 situate at Umoja One Estate. By a lease agreement dated 1/06/2003, the Plaintiff had rented the house at Kshs.7000/=, but on 03/06/2003, the Plaintiff allegedly bought the same house at a price of Kshs. 1 200 000/= from one Bancy Gathoni Njenga and paid the full purchase price in the three (3) instalments. There is no dispute that the Defendant

is the owner of the suit property, but the Plaintiff says that the Bancy Gathoni Njenga from whom she bought the house is different from the 1st Defendant herein.

6. In the plaint, the Plaintiff avers that on or about 01/06/2003, he entered into a lease agreement with M/s Bancy Gathoni Njenga (landlady) of P.O. Box 7569-00200 Nairobi in relation to the suit property at a monthly rent of Kshs.7000/= only and that on 03/06/2003, he entered into a purchase agreement with the same Bancy Gathoni Njenga to buy the suit property for a consideration of Kshs.1,200,000/=. The purchase price according to the plaint was paid in three (3) instalments of Kshs.600,000/=, Kshs.400,000/= and Kshs.200,000/= on the 5/06/2008 and the 5/07/2003 respectively. The Plaintiff also avers that he paid all the rates due to the City Council of Nairobi. At paragraphs 7 and 8 the plaint the Plaintiff avers as follows:-

“7. The Plaintiff avers that the 1st Defendant is not the same M/s Bancy Gathoni Njenga, but an (sic) fraudulent impostor taking on the identity of the true M/s Bancy Gathoni Njenga, nor is she a proprietor, landlady or agent of the true M/s Bancy Gathoni Njenga in relation to a house in Umoja Estate, Nairobi, House Number – Umoja A 143.”

8. On or about 07/01/2009 without any colour of right, excuse justification or regard to the law, the 1st Defendant through the 2nd Defendant, proclaimed goods of the Plaintiff for alleged rent arrears owed to the 1st Defendant by the Plaintiff amounting to Kshs.672,000/= in relation to the house in Umoja Estate Nairobi, House Number – Umoja A 143.”

7. The Plaintiff alleges that the Defendant’s entry into the suit property as described in paragraph 8 of the plaint amounts to a blatant act of unlawful trespass and the Plaintiff prays for judgment against the Defendant for:—

(a) A declaration that the 1st Defendant has no legal interest in relation to the house in Umoja Estate Nairobi, House Number-Umoja A 143; and that the said proclamation of the Plaintiff’s property was unlawful.

(b) A permanent restraining order against the 1st Defendant and the 2nd Defendant by themselves, their agents or servants, from trespassing the Plaintiff house in Umoja Estate, Nairobi, House Number – Umoja A 143, or impounding, taking or selling any of the proclaimed items or any other properties of the Plaintiff.

(c) An award of damages for the said trespass on the Plaintiff’s house in Umoja Estate, Nairobi, House Number – Umoja A 143 on 07.01.2009, by the 1st Defendant and the 2nd Defendant; as the common law provides.

(d) Costs of suit be borne by the 1st Defendant and the 2nd Defendant.

8. Simultaneously with the plaint, the Plaintiff filed a Chamber Summons application, brought under Section 3A of the Civil Procedure Act, Cap 21, Order XXXIX Rules 2, 3 and 9 of the Civil Procedure Rules and Section 3 of the Distress of Rent Act Cap 293 seeking a prohibitory order of injunction prohibiting the 1st and 2nd Defendants/Respondents from impounding or taking away selling any goods proclaimed by the 2nd Defendant/Respondent on behalf of the 1st Defendant/Respondent for alleged rent arrears. The Plaintiff says that he does not owe any rent to anybody since he bought the suit property way back in June/July 2003 and paid the full purchase price and also says that the 1st Defendant/Respondent herein is an impostor and not the person from whom he (Plaintiff) bought the suit property. The Plaintiff obtained a temporary prohibitory injunction on 19/01/2009 pending inter partes hearing of the application on 3/02/2009.

9. In answer to the Plaintiff’s application, the 1st Defendant swore a Replying Affidavit dated 5/02/2009 and said that she is the one who instructed the 2nd Defendant to distress for rent and wants the suit against the said 2nd Defendant struck out with costs. The 1st Defendant also says that she has never sold the house known as Umoja 1 – A 143 to anybody, hence the distress for rent. The 1st Defendant also avers that the purported payment receipts are all forgeries, and should not be relied upon by the court.

10. The gist of the 1st Defendant’s submissions is that there is no way the suit property could have been transferred without the involvement of the City Council of Nairobi. The 1st Defendant also says that the advocate who is said to have transacted for the Plaintiff and “The other Bancy Gathoni Njenga died some

time in the year 2000, but that this allegation by the Plaintiff/Applicant is not supported by any evidence by the Plaintiff.

The Defendants' counsel submitted as follows: that is to say that —

1. *The suit against the 2nd Defendant should be struck out and/or dismissed with costs to the 2nd Defendant for the reason that the 2nd Defendant is the agent of a disclosed principal and an officer of the court having statutory power to act on behalf of such known principal.*

2. *The Sale Agreement dated 03/06/03, which forms the basis of the Plaintiff's claim does not comply with the provisions of section 3(3) of the Law of Contract Act (Cap 23) in the following ways:-*

(a) *The Sale Agreement is not attested. It purports to have been attested by a firm of Advocates, M/s Gathii & Co. Advocates when the Advocates Act requires that a specific advocate as defined under the Act attests such documents.*

(b) *There is no signature of the alleged person attesting the stamp of the law firm of Gathii & Co. Advocates*

(c) *The addresses of both parties differ in the Sale Agreement and the Tenancy Agreement executed on 02/06/2003. In the Tenancy Agreement the address for Bancy Gathoni Njenga is given as Box 7569-00200 Nairobi while the Plaintiff's address is given as Box 7840-00100 Nairobi. In the Sale Agreement dated 03/06/2003, the addresses for Bancy Gathoni Njenga and Leonard Musembi Mutisya are given as Box 51348 Nairobi and 30862 Nairobi respectively.*

(d) *The receipts from Gathii & Co. Advocates are issued in favour of the Plaintiff without any corresponding receipts acknowledging payment by the 1st Defendant who is the purported vendor.*

3. *Both the Tenancy Agreement (Lease) and the Sale Agreement are not stamped in accordance with sections 19 and 20 of the Stamp Duty Act – Cap 480 Laws of Kenya.*

4. *The Plaintiff has not disclosed any cause of action against the 1st Defendant who is the registered owner of the suit property as per the documents filed herein by the 1st Defendant, and that if the Plaintiff believes that the 1st Defendant is not the person who sold the suit property to him, then the Plaintiff's claim lies in a criminal suit against the alleged con-woman and not against the 1st Defendant.*

5. *The matter herein has been the subject of reports to Buruburu Police Station in November 2005 and September 2008 respectively.*

11. The 1st Defendants counsel cited a number of authorities and urged the court to find that the interim injunction granted to the Applicant herein is detrimental to the 1st Defendant. The court has considered these authorities and in particular **Machakos District Co-operative Union Ltd. –vs- Philip Nzuki Kiilu – Civil Appeal No. 112 of 1997** (Court of Appeal at Nairobi). As in that case, the Plaintiffs claim herein is based on a Sale Agreement dated 3/06/2003. Though the agreement is allegedly signed by the vendor and the purchaser, it is not attested by a witness who was present when the contract was made. All that is seen in the place of the attesting witness is a rubber stamp of the firm of GATHII & CO. Advocates of P.O. Box 2245-00100 NAIROBI.

Section 3(3) of the Law of Contract Act provides —

“Section 3(3): *No suit shall be brought upon a contract for the disposition of an interest in land unless —*

(a) *the contract upon which the suit is founded —*

(i) *is in writing*

(ii) *is signed by all the parties thereto;*

(iii) *incorporates all the terms which the parties have expressly agreed in one document and*

(b) *the signature of each party signing has been attested by a witness who is present when the contract was signed by such a party.”*

12. The Agreement of Sale which is the basis of the Plaintiff's claim was entered into on 3/06/2002, a day after a Tenancy Agreement for the suit property was entered into between BANCY GATHONI NJENGA of P.O. Box 7569-00200 Nairobi and LEONARD M. MUTISYA of P.O. Box 7849-00100

Nairobi. The addresses in the Sale Agreement for the same parties as those in the Tenancy Agreement are P.O. Box 51348 NAIROBI and P.O. Box 30862 NAIROBI respectively.

13. On the other hand, the 1st Defendant produced the following documents to support her claim of ownership to the suit property:—

- *Application for allotment of NCC/USAID Housing Scheme 170 Additional Houses Umoja Housing Estate – dated 14/08/1975 by 1st Defendant.*
- *Bankers cheque No.114957 – Commercial Bank of Africa for Kshs.15,000 Allotment fees dated 14/08/1979 by 1st Defendant*
- *Letter from City Council of Nairobi to the 1st Defendant acknowledging receipt of application letter and Banker’s cheque dated 14/08/1979*
- *Receipt No. 985096 for Kshs.15000/= from City Council of Nairobi dated 14/08/1979 in the name of the 1st Defendant*
- *Allotment Letter from City Council of Nairobi dated 15/03/1982 for House No. A 143 – Umoja to the 1st Defendant.*
- *Receipt Code No. 815080 for Kshs. 10,000/= from City Council of Nairobi in the name of the 1st Defendant dated 20/03/1982.*
- *Receipt Code No. 815080 for Kshs.5010/= from City Council of Nairobi to the 1st Defendant dated 31/05/1982.*
- *Receipt Code 815080 for Kshs.5000/= from City Council of Nairobi to the 1st Defendant dated 06/08/1992.*
- *Letter dated 28/03/1983 from City Council of Nairobi demanding Balance of allotment fee from 1st Defendant.*
- *Receipt Code 815080 for Kshs.5000/= from City Council of Nairobi dated 16/04/1982.*
- *Water Bills for House A 143 – Umoja dated 07/08/2008 and 06/09/2008 in the name of the 1st Defendant*
- *Official Record/Search from City Council of Nairobi confirming ownership of House No. A 143 – Umoja in the name of the 1st Defendant*

14. In response to the application by the 1st Defendant and the submissions made on 1st Defendant’s behalf, Mr. Mutai for Mr. J.D. Nzioki advocate for the Plaintiff submitted that the prayers herein can only be granted if it can be shown that the Plaintiff has no reasonable cause of action against the Defendants. He submitted that the application herein is based on serious and contentious issues of fact which take this case away from the ambit of the provisions of Order VI Rule 13(1)(a) of the Civil Procedure Rules. Mr. Mutai further submitted that there is no evidence placed before the court by and/or on behalf of the 1st Defendant that the advocate who witnessed the transaction might have died by the time the sale transaction was done.

15. Regarding section 19 of the Stamp Duty Act, Mr. Mutai argued and rightly so that mere contravention of the said section does not make a document void since a party in default has a chance to rectify the anomaly. Mr. Mutai also argued that the issue of agency raised by the 1st Defendant is a contentious issue of fact on which evidence should be provided. In summary, Mr. Mutai contended that striking out of pleadings is such a draconian step that it should only be done in the clearest of cases. In the circumstances of this case, Mr. Mutai argued that it is not so clear that this is a case for striking out the pleadings since there may be need for the examination of minute details of all the documents that have been produced by the 1st Defendant.

16. In reply, Mr. K'Opere submitted that the question of agency is a straightforward matter that touches on the 2nd Defendant as is an officer of the court and need not go to trial. Regarding documents Mr. K'Opere submitted that the Plaintiff has submitted no documents that would require further examination. Mr. K'Opere submitted finally that the issue in this case revolves around section 3(3) of the Law of Contract Act and that because the Plaintiff has not satisfied all the parameters of that particular subsection of the law, the Plaintiffs suit is frivolous and vexatious and a good candidate for striking out.

17. I have now considered the pleadings the law and the submissions made. As stated earlier, the whole of the Plaintiff's claim is based on a sale agreement allegedly made between the Plaintiff and the 1st Defendant on 03/06/2003. That Sale Agreement, made a day after the parties had apparently entered into a Tenancy Agreement was not duly witnessed as required by section 3(3)(b) of the Law of Contract Act. This Sale Agreement could only have been valid if the signatures of the parties to the Agreement had been attested by M/s Gathii Advocate. The rubber stamp that appears in the place of the advocate's signature without a signature appearing thereon cannot be said to be an attesting signature. That was a rubber stamp that could have been put there by anybody and such a person apparently did not want to append his signature on the rubber stamp. It follows therefore that even the payment receipts purportedly issued by M/s Gathii & Co. advocates were not genuine receipts. And one may ask – why enter into an Agreement of Sale a day after a tenancy agreement has been entered into? The court is inclined to believe the story given by the 1st Defendant as to how the Plaintiff came to be possessed of the suit property and that she has fought wars with a tenant who has turned out to be a phantom.

18. In light of the above, I agree with counsel for the Defendants that there is no agreement in terms of section 3(3) of the Law of Contract Act which the Plaintiff can enforce against the 1st Defendant. On this point alone, the Plaintiff's suit is no suit. It has no legs upon which to stand, and must therefore fail. There are other issues that were raised by the Defendants counsel, but in view of the finding that there is no valid suit before the court I need not spend any more time dealing with these issues.

19. Accordingly, I strike out the plaint dated 16/01/2009 and filed in court on 19/01/2009 together with the Chamber Summons application dated 16/01/2009 and filed in court on 19/01/2009 with costs to the Defendants ex-debito justitiae.

Orders accordingly.

Delivered and Dated at Nairobi this 15th day of January, 2010.

**R.N. SITATI
JUDGE**

Delivered in the presence of:-

Mr. Nzioki (present) for the Plaintiff/Applicant

Miss Nyoga for K'Opere for the Defendants/Respondents

Weche – court clerk