



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

**Civil Case 61 of 2009**

**DAVID WARUIRU NGOTHO.....PLAINTIFF**

**VERSUS**

**BETTY M. ABONYO OYUGI.....1<sup>ST</sup> DEFENDANT**

**DAVID OGOT OYUGI.....2<sup>ND</sup> DEFENDANT**

**DOREEN ARIBETA OYUGI.....3<sup>RD</sup> DEFENDANT**

**BEATRICE AKINYI AMENYA.....4<sup>TH</sup> DEFENDANT**

**SAMUEL AYODO OGANGO.....5<sup>TH</sup> DEFENDANT**

**CHRISTOPHER ONYANGO AYODO.....6<sup>TH</sup> DEFENDANT**

**ARTHUR ODUOR OYUGI.....7<sup>TH</sup> DEFENDANT**

**DOUGLAS OYUGI.....8<sup>TH</sup> DEFENDANT**

**JOSHUA ONYANGO OYUGI.....9<sup>TH</sup> DEFENDANT**

**JOB OKUNA OYUGI.....10<sup>TH</sup> DEFENDANT**

**MARY AKUMU OYUGI.....11<sup>TH</sup> DEFENDANT**

**RULING**

L.R. No. 209/3092 situate in the city of Nairobi on which there are several Maisonettes (units) is registered in the name of the late Hezekiah Nelson Oyugi. By an agreement dated 20<sup>th</sup> June 2005 between the plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant sold to the plaintiff Maisonette Nos. 5 and 6 for Kshs. 5 million each. By another agreement dated 13<sup>th</sup> July 2005 between the plaintiff and the 3<sup>rd</sup> defendant, the 3<sup>rd</sup> defendant sold Maisonette No. 3 and 4 also for Kshs.5 million each. In the agreements it is claimed that all the widows of the deceased had agreed that the 1<sup>st</sup> defendant was the beneficial owner of unit Nos.5 and 6 and the 3<sup>rd</sup> defendant is the beneficial owner of unit Nos. 3 and 4 and together with the other defendants who are also beneficiaries of the deceased's estate they had authorized and given their written consents to the sales.

The plaintiff claims that pursuant to those agreements, he paid the entire purchase price of Kshs.20 million to the two widows and was given possession of all those units. However, in breach of those agreements the defendants, claiming that the 1<sup>st</sup> and 3<sup>rd</sup> defendants had no legal capacity to sell the units, forcefully evicted the plaintiff and his tenants from

those units in 2008 thus causing the plaintiff loss and damage. The plaintiff therefore claims a refund of the purchase price of Kshs.20 million and a further sum of Kshs.2 million being 10% penalty for breach of contract as stated in the said agreements.

On their part, the defendants assert in their respective defences that the 1<sup>st</sup> and 3<sup>rd</sup> defendants had no capacity to sell the units. Besides lack of privity of contract between them and the plaintiff the 2<sup>nd</sup> and 4<sup>th</sup> to 11<sup>th</sup> defendants deny authorising the 1<sup>st</sup> and 3<sup>rd</sup> defendants to sell the units and contend that they had no capacity to give such authority as the grant of the letters of administration to the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants in respect of the deceased's estate had not even been confirmed to authorize distribution of the estate. The 1<sup>st</sup> and 3<sup>rd</sup> defendants also claim to have received only Kshs.2 million and Kshs.3.2 million respectively which should be set-off against the rent of Kshs.5.2 million the plaintiff has received from the units.

The plaintiff sees these defences as a sham intended to waste valuable judicial time. He has therefore filed an application under **Order 6 Rules 13(1)(b) and (c)** seeking to have them struck out and judgment entered in his favour as prayed in the amended plaint. The application is based on the grounds that the defences are scandalous, frivolous and vexatious and that they do not disclose any triable issue. In the affidavit in support, the plaintiff admits that though the units are registered in the deceased's name he bought them from the beneficiaries with the consent of all the defendants.

The purpose of the powers given to the court to strike out pleadings under **Order 6 Rule 13** of the **Civil Procedure Rules**, sometimes referred to as summary procedure, is to expedite litigation and save both judicial time and harassment of as well as unnecessary expenses to the parties. In the words of Lord Buckley said in **Carl- Zeiss- Stiftung Vs Rayner**, [1969] 2 ALL ER 897 at p. 908:-

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**“...the summary procedure of striking out is to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. ... The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation.”**

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However, because the powers under this procedure are draconian, coercive and drastic, and because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. In the old English case of **Dyson Vs AG** [1911] 1 KB 410, Lord Justice Fletcher Moulton succinctly made this point in the following words at page 419:-

**“To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat ... without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.”**

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Lord Herschell reiterated the same point in **Lawrence – Vs Lord Norreys** 15 AC 210 at page 219.

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**“It cannot be doubted that a court has an inherent jurisdiction to dismiss an action which is an abuse of the process of court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved.”**

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This is also the law in our country. There are numerous local decisions including **D.T Dobie & Company (Kenya) Limited – Vs – Muchina (1982) KLR 1** expressing the same view.

In this case the plaintiff alleges that the defences are scandalous, frivolous and vexatious. Having examined the defences in this case, I cannot find anything scandalous about them. They are also not frivolous or vexatious. I concur with Ringera J's statement in **Dr. Murry Watson –vs- Rent –A- Plane Ltd & 2 Others. NRB HCCC No. 2180 of 1994** that:-

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**“... a pleading is not scandalous unless it alleges indecent, offensive, or improper acts, omissions or motives against an adversary which are unnecessary in the proof of the action pleaded.” And that a pleading is frivolous if it is “lacking in seriousness and tending to annoy. A frivolous claim is ex post facto vexatious for nobody can fail to be vexed by a frivolous allegation against him.”**

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In **Mpaka Road Development Ltd Vs Kana [2000] LLR 1011 (HCK)**, he said more or less the same thing:-

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**“I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would not be sustainable 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 matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious.”**

I do not wish to say anything that may prejudice the hearing of this suit. All I need to say is that, having considered the matter, I find that the defences are not scandalous, frivolous or vexatious. To the contrary I think they raise serious triable issues which should go to full hearing. Consequently I dismiss this application with costs.

**DATED and DELIVERED this 31<sup>st</sup> day of March, 2010.**

**D. K. MARAGA**  
**JUDGE.**