



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION, MILIMANI**  
**WINDING UP CAUSE NO 356 OF 2009**

**ABDIRIZAK AHMED MOHAMED .....1<sup>ST</sup> PLAINTIFF/APPLICANT**  
**ABDIRAHMAN FARAH MAALIM.....2<sup>ND</sup> PLAINTIFF/APPLICANT**  
**ALI NOOR DUBE.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KHEIRA MAALIM OMAR.....DEFENDANT/RESPONDENT**

**RULING**

Before the court is an application by Chamber Summons dated 8<sup>th</sup> July, 2009 and expressed to be taken out under Order VI Rule 13 (1) (b), (c), and (d) of the Civil Procedure Rules and all enabling provisions of the Law. The Plaintiffs/Applicants thereby seek orders that the statement of defence dated 19<sup>th</sup> June, 2009, be struck out with costs to the Plaintiff and that the Defendant do pay the cost of the application. The application is supported by the annexed affidavit of ABDIRIZAK AHMED MOHAMED, and based on the grounds that –

- a) The statement of defence filed in these proceedings is a sham, frivolous, vexatious and amounts to gross abuse of the court process.
- b) The statement of defence does not answer the Plaintiffs claim
- c) On 1<sup>st</sup> November, 2007, the defendant entered into a valid sale with a third party in which she sold LR 36/11/4 situated in Eastleigh, Nairobi, for the sum of Ksh110,000,000.
- d) The sum of Kshs 74,095,110, had already been paid to the defendant prior to the execution of the sale agreement.
- e) On 31<sup>st</sup> January, 2008, the Defendant entered into a lease agreement for the demise of the property
- f) On 6<sup>th</sup> February, 2008, the Defendant executed the transfer of the property to a third party pursuant to the sale agreement.
- g) Between 31<sup>st</sup> January, 2008 and 26<sup>th</sup> June, 2008 the Defendant, despite selling the property received the sum of Kshs 40,000,000 from the Plaintiffs.

h) The Defendant's conduct, apart from being fraudulent *ab initio* is inequitable and amounts to unjust enrichment.

Opposing the application, the Respondent swore a replying affidavit on 1<sup>st</sup> February, 2010, in which she avers that her defence is not a sham, and neither is it frivolous, vexatious, nor an abuse of the court process. She deposes that the said defence answers the Plaintiff claims and raises triable issues. She denies all allegations of fraud and unjust enrichment and avers that the Plaintiffs were not the only tenants of the property. She further states that the lease was for 10 years and that Kshs 40,000,000 was paid as a premium to secure this term and that it was not a deposit. She also avers that under the lease the said sum was not recoverable.

Each of the parties filed written submissions. After considering the pleadings and the written submissions, I find that the Plaintiffs entered into a lease agreement with the Defendant on or about 31<sup>st</sup> January, 2008. The preamble to the lease agreement provides that the applicants would be referred to as "**The Tenants**", which expression would refer to them as "**tenants and representatives of all the other tenants who, like them, were in occupation of the leased premises**". Therefore, even though only the Plaintiffs signed the lease agreement, it was understood by all the parties that they did so for and on behalf of themselves and all the other tenants.

The Plaintiffs' claim is based on the ground that although the tenants signed a lease for the suit property through the Plaintiffs, the said property had already been sold to a third party and therefore it was improper for the Defendant to lease the same property to them while it had already been sold to the third party. On her part, while the Defendant states that the tenants were aware of the fact that the property had been sold to the third party, it is her case that by subsequently signing the lease with the Plaintiffs, the sale to the third party was thereby rescinded. Unfortunately her position does not tally with the sequence of events.

The record is clear that the agreement for sale between the Defendant and New Look Estate Ltd was dated 1<sup>st</sup> November, 2007. The lease itself was dated 31<sup>st</sup> January, 2008, which indeed was after the date of the sale agreement. If the matter had rested there, it would have been possible to argue that, indeed, the tenants had information that the signing of the lease rescinded the sale agreement. But the matter did not end there. By an Indenture dated 6<sup>th</sup> February, 2008, between the Defendant and Prestige Housing Ltd, the property was transferred to the latter entity. If, by the lease, the sale agreement was rescinded, then it would have been superfluous for the defendant to execute an indenture after the lease had been signed between the parties. By so doing, the Defendant cast a doubt as to her credibility and sincerity in the entire transaction. Her argument overlooks one salient factor - that the purchaser of the property was not privy to the lease agreement and therefore could not be bound by the terms thereof. It implies that she was not giving the tenants value for their money. Her conduct betrays her and it looks like she was out only to make money from the tenants.

The Defendant contends that the Kshs 40,000,000 which she obtained from the tenants was to secure the period of the lease. Although in paragraph 6 of the defence she denies that the sum of Kshs 40,000,000 was to secure the fixed term of 10 years, and states that the said deposit was meant to secure the full performance of the contract, these assertions contradict clause 3 of the lease which provides, *inter alia*, that the sum of Kshs 40,000,000 was paid specially to secure the full lease period, which was for only 10 years.

For the above reasons, I find that the Defendant does not have a good cause to retain the Kshs 40,000,000 since the transaction between the parties was frustrated by the sale of the property to a third party, and therefore the defendant is not offering any consideration for keeping the Kshs.40 million. Consequently, she does not have a good defence with which to resist the Plaintiffs' claim. Her denials are just general denials which cannot sustain a defence to the Plaintiffs suit. Her defence is accordingly hereby struck out with costs to the Plaintiffs. She will also pay the costs of this application.

Orders accordingly.

**Dated and Delivered at Nairobi** this 21<sup>st</sup> day of October, 2010

**L NJAGI**

**JUDGE**