



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
**CIVIL SUIT (ELC) NO.209 FO 2009**

**SAFENET INVESTMENTS LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RUNDA GARDENS DEVELOPMENT LTD.....DEFENDANT/APPLICANT**

**R U L I N G**

1. By a chambers summons dated 7th July, 2009, Runda Gardens Development Ltd, (hereinafter referred to as the defendant) seeks to have the originating summons filed against it by Safenet Investment Ltd (hereinafter referred to as the plaintiff) struck out as being incompetent, misconceived, and otherwise an abuse of the process of the court. The defendant also seeks to have the caveat entered by the plaintiff on 19th September, 2008 against the defendant's property known as LR No.20091 (hereinafter referred to as the suit property), removed and or withdrawn.

2. The application is supported by an affidavit sworn by a director of the defendant Peter Mburu Burugu, and grounds which have been stated on the face of the application. In a nutshell, the defendant contends that it has not entered into any agreement with the plaintiff for sale of the suit property, nor has it received any payment for the suit property from the plaintiff. The defendant contends that the contract pursuant to which the caveat was registered and upon which the plaintiff's suit is founded, was not signed by the defendant as required under Section 3(3) of the law of Contract Act Cap 23 of the Laws of Kenya. It is maintained that the contract was entered into by one Juma Muchemi a former shareholder and director of the defendant who did not have the authority of the company to enter into any sale transaction or commit the company.

3. The plaintiff objects to the application through a replying affidavit sworn by a director of the plaintiff, Stephen Mukua Kamau. The director swears that the defendant duly executed the agreement and the same was duly forwarded by the defendant's counsel to the plaintiff's counsel, and that a sum of Kshs.38,372,924/64 was paid to Juma Muchemi and Partners Ltd or directly to suppliers, or to the contractors for the Nakuru Project, with the full knowledge of the defendant. The plaintiff having learnt that the defendant was offering the property for sale to 3rd parties, had a caveat registered against the suit property. It is maintained that neither the resignation of Juma Muchemi nor the sale of Juma Muchemi's shares in the plaintiff's company was brought to the plaintiff's attention. The plaintiff maintained that the defendant's refusal to sign the sale agreement was motivated by the fact that it had received higher offers of the suit property.

4. In support of the application Mr. Mutungi who appeared for the defendant argued that Juma Muchemi could not commit the defendant as his resignation as a director and shareholder of the defendant took effect from the date of his resignation. Therefore the plaintiff did not have a registrable interest in the suit property by the time they submitted the caveat for registration. It was contended that there being no signed written agreement between the parties, there was no enforceable contract as required under Section 3(3) of the Law of Contract Act.

5. Mr. Ochuo who appeared for the plaintiff objected to the application. He pointed out that an advocate of the High Court acted for the defendant in the transaction, and that there was no evidence that the advocate had no instructions. Mr. Ochuo also submitted that the sum of Kshs.38 million that was paid as deposit was not returned by the defendant although the defendant refused to sign the agreement. It was argued that the plaintiff had the right to protect its interest by lodging a caveat against the suit property.

6. Counsel argued that there was nothing unusual about the ex-parte orders as the court had powers under

Section 57(8) of Registration of Titles Act, to deal with the matter ex-parte. Counsel further argued that Section 3(3) of the Law of Contract Act cannot be used by the defendant as an engine for fraud, as the defendant had received the deposit, not returned it, and not signed the sale agreement. The defendant could not therefore rely on the statute. It was pointed out that no proceedings had been taken out against the firm of J.N. Njagi Advocates who were alleged to have acted without instructions. Mr. Ochuo distinguished the authorities which were relied upon by the defendant maintaining that they were not applicable to the present case.

7. I have carefully considered the application, the affidavit in support and affidavit in reply, as well as the submissions made by counsel and the authorities cited. The application before me being one for striking out pleadings, this court is guided by the case of D.T. Dobie vs Muchina [1982] KLR 1 where it was held inter alia:

“As the power to strike out pleadings is exercised without the court being fully informed of the merits of the case through discovery and oral evidence, it should be exercised sparingly and cautiously.”

8. In this case, the facts which have been laid before me, show that there were negotiations concerning sale of the suit property, and that certain payments were apparently made pursuant to the negotiations. Juma Muchemi who was formerly a director of the defendant appears to have played a key role in these negotiations. The issue whether Juma Muchemi had the authority to enter into a legally binding contract on behalf of the defendant, is one that can only be determined after a full trial when all the evidence is before the court. This court cannot ignore the correspondences laid before it showing that the firm of J.M. Njagi was acting for the defendant and did give certain directions regarding the payments made. The issue as to whether the firm of J.M. Njagi & Company advocates had authority to act for the defendant's company is also one which requires evidence for determination.

9. The plaintiff has come to this court under Order XXXVI Rule 3B of the Civil Procedure Rules. That Section allows a person who has lodged a caveat against a particular parcel of land, upon being served with a notice by the Registrar, to apply to the court to extend the caveat. I am satisfied that the plaintiff has raised pertinent issues which require to be addressed by the trial court. I do not find it necessary to address the authorities which were cited as that may lead to addressing substantial issues which will be the preserve of the trial court. I therefore find no merit in this application for striking out. Accordingly, the application is dismissed.

Dated and delivered this 15th day of October, 2010

H. M. OKWENGU  
JUDGE

In the presence of: -  
Ms Ndumia for the plaintiff/respondent  
Advocate for the defendant/applicant absent  
Kosgei - Court clerk