



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 523 OF 2009

MURIITHI WANAJU t/a
 WANJAU & WANJO

ADVOCATES.....PLAINTIFF/APPLCIANT

VERSUS

DR. SAMUEL MUDATI
 GATABAKI.....

.....1ST DEFENDANT/RESPONDENT
 NANCY W.

GATABAKI.....2ND
 DEFENDANT/RESPONDENT

RULING

In the Notice of Motion dated 23rd March, 2010, said to have been brought under **Order XXXV Rule 1 (b) 2 and 3 and Order V1 Rule (b) and (c) (sic)** of the Civil Procedure Rules, the Plaintiff/Applicant prays that;

1. **The Defendant’s joint defence filed on 26th August 2009 be struck out as being frivolous, vexatious and merely intended to prejudice, embarrass or delay the fair trial of this suit.**
2. **That Summary Judgment be entered for the Plaintiff against the defendant as prayed in the plaint.**
3. **That costs of the application be provided for.**

The application is premised on the grounds that the defence is a sham, and raises no triable issues. Also that the Defendants are truly and jointly indebted to the Plaintiff **“to specifically transfer the subdivided portion of Land Reference Number 5980/1 and 3 equivalent to the outstanding legal fees and were so indebted at the commencement of the suit”**. The applicant states, also as a ground, that he is entitled to the sub-plots claimed in the plaint.

The reliefs sought in the plaint in respect of which the challenged defence has been filed are as follows;-

- (a) **A perpetual injunction restraining the 1st and 2nd Defendants, their servants and/or agents or however (sic) from selling alienating, transferring and/or developing in (sic) the property known as Land Reference 5980/1 and 3 in the City of Nairobi**
- (b) **A declaration that the Plaintiff is entitled to the sub**

Plots equivalent to the outstanding legal fees, other cost related thereto plus V.A.T.

- (c) Damages against the Defendants**
- (d) Costs**
- (e) Interest on (c) and (d)**
- (f) Further or other relief.**

To support the application for striking out and summary judgment the applicant relies on his supporting affidavit of 23rd March, 2010, to which is annexed a copy of an undated agreement purportedly made between the Applicant and the Respondents with a view to proving an arrangement between the two parties to the effect that the Respondents would transfer sub-plots carved out of the suit property, valued at 16% of a sum of Kshs. 30,673,188/= said to represent monies owed by the Respondents to some third parties.

The application is opposed on the strength of the Replying Affidavit of Doctor Samuel Gatabaki, (the 1st Defendant) in which he states that the application is **“inept, simplistic, bad in law and lacking in merit.** He depones also that the summary procedure under **Order XXXV** is not available in a suit of this nature, wherein the debt claimed has not been ascertained, the Respondent contending further that a sum of Kshs. 9,000,000/= was paid to and acknowledged by the Plaintiff/Applicant in full settlement of any sums as would have been due to the Applicant from the Respondents.

Counsel for the parties submitted at length at the hearing of the application and despite that the purported agreement, relied on by the applicants, having been challenged in paragraph 6 of the Replying Affidavit as being defective, incomplete in vital details and particulars, arguments were put forth as relates to its enforceability, including, but not limited to the fact that the same contained an arbitration clause, which ought to be given effect in lieu of these proceedings. In my considered view, the agreement, being undated, with no commencement date and being founded on some other agreement of some unspecified date (referred to as a moratorium agreement) is, for all purposes, void for uncertainty. Save for the descriptive parts of the defence sought to be struck out, the Defendants deny all the allegations made against them in the plaint, putting the plaintiff to the strict proof thereof. In particular, they deny the existence of any Advocate/client relationship between themselves and the applicant, the agreement to subdivide and/or transfer portions of any land to the Plaintiff or being indebted to the applicants in any way.

The plaint as filed is very economical on material particulars, contrary to the requirements of **Order V1 Rule 3 (1) and (2)** of the Civil Procedure Rules, which provide as follows;-

“(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain ----a statement in summary form of the material facts on which the party pleading relies for his claim or defence ----and the statement shall be as brief as the nature of the case admits

(2) ---- the effect of any document or the purport of any conversation referred to in the pleading shall if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material”.

The contents of paragraphs 4, 5, 6 and 7 and prayer (b) of the plaint are so vague that one wonders, what other form of defence the Defendants would have filed in reply thereto. The terms of the alleged agreement, said to have been breached have not been specified, neither have the particulars of the legal services rendered, for which the Respondents are alleged to have agreed to pay in kind.

In sum therefore, I find that the present suit does not fall within the thresh hold of summary procedure as clearly spelt out in the celebrated Court of Appeal decision in GURBAKSH SINGH & SONS LIMITED –VS- NJIRI EMPORIUM LIMITED [1985] KLR 695, since quite clearly, the

applicant's claim is not one for a liquidated demand. Although made under **Order XXXV Rule 1 (b)** there exists no landlord-tenant relationship on the basis of which recovery of land is sought for the non payment of rent or breach of covenant. The particulars of loss and/or damage set out in the plaint obviously call for proof by evidence being tendered at a full trial. The Defendant's defence, being in my view a reasonable one, in which the Plaintiff has been put to strict to proof of the allegations made against them, I find that a case for striking out has not been made out and that the Defendants ought to be given unconditional leave to defend the suit.

Accordingly the application is hereby dismissed with costs to the Defendants.

DATED, SIGNED and DELIVERED and at **NAIROBI** this **18TH** day of **NOVEMBER, 2010**

M. G. MUGO
JUDGE

In the presence of:

Miss Bubi Holding fir Mr Kimathi
Mr Ochieng

For the Applicant
For the Respondent