



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CASE NO.359 OF 2008

ENKASITI FLOWER GROWERS LTD.....PLAINTIFF

VERSUS

PROTEIN AND FRUIT PROCESSORS LIMITED.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION2ND DEFENDANT

RULING

The plaintiff brought this suit against both defendants in respect of sale of a suit property known as LR. No.1087/1 Thika District, which the plaintiff pleads, had bought from the 1st defendant but which was charged to the 2nd defendant as at the time the Sale Agreements were executed.

The prayers set out against the 1st defendant, are for specific performance requiring the 1st defendant to execute the transfer in favour of the plaintiff in respect of the suit property and if the said 1st defendant does not comply, then the Deputy Registrar of this court should execute the documents on behalf of the 1st defendant. There is also a prayer for damages in addition to or in lieu of specific performance aforesaid.

Both defendants filed defences to the claim but it is the 1st defendant's defence and counterclaim that are in issue in the present application. The 1st defendant filed a defence and counterclaim on 3rd September, 2009.

There is now before me an application by the plaintiff by way of Chamber Summons under Order VI Rule 13(1),b, c, and d of the Civil Procedure Rules seeking an order that the 1st defendant's defence and counterclaim herein dated 3rd September, 2008 be struck out with costs and judgment be entered in favour of the plaintiff against the 1st defendant in terms of the plaint.

The grounds advanced for the said orders are that;

1. The 1st defendant's said defence and counterclaim dated 3rd September, 2008 are frivolous and vexatious as they have no or proper facial foundation or legal basis.
2. The 1st defendant's defence and counterclaim are an abuse of the process of this court and the 1st defendant impermissibly seeks to litigate matters which it had unsuccessfully raised in two previous proceedings to wit High Court Civil Case No.487 of 2005 and High Court Civil Case No. 1207 of 2005.
3. The 1st defendant's defence and counterclaim are calculated to prejudice and delay the fair trial of this suit
4. It is just and equitable to grant the relief.

There is an affidavit in support of the application sworn by Mansukhlal Shantilal Patel, who is said to be the Managing Director of the plaintiff. The application is opposed and there is an affidavit in reply sworn by Patrick Kirono Mwaura who is said to be a Director of the 1st defendant.

The learned counsel for the 2nd defendant has informed the court that the dispute at this stage does not involve the 2nd defendant and therefore does not make any submission in that regard. The learned counsel for the plaintiff and 1st defendant have filed submissions which I have noted. There have been several cases that have been cited which I have also had occasion to go through.

It is now trite law that the orders sought by the plaintiff may be granted if there are no triable issues that have been raised by the defendant.

A defendant who has presented an arguable defence must be given the opportunity to state and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law. – **See *Churanjalal and Company - vs - A.H. Adam Civil Appeal No.22 of 1950***. These are also the same principles that have been enunciated in the case of ***DT. Dobie and Company Kenya Ltd. -Vs- Muchina 1982 KLR 1***.

Because of the decision I am about to make in this ruling, I do not consider it appropriate to address the authorities that have been cited by both counsel in this matter. I wish to observe at this stage however that, High Court Civil Case No.1207 of 2005 between the parties herein addressed more or less the same issues and the submissions by the learned counsel for the 1st defendant that, this matter is still pending in the Court of Appeal has not been seriously controverted.

The validity of two agreements executed by the plaintiff and the 1st defendant is in issue. From the submissions of both learned counsel I am persuaded that, that is a triable issue. The issue of the consent by the Land Control Board is also a controversy that cannot be resolved without calling oral evidence and therefore, it is my considered view that there are triable issues and, however weak the defence and counterclaim of the 1st defendant may be, it should not be driven out of the seat of judgment before a full trial.

I find that the application by the plaintiff lacks merit and therefore dismiss the same with costs to the 1st defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 8th day of November, 2010.

A. MBOGHOLI MSAGHA

JUDGE