



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 210 OF 2009

DUNCAN KABUIPLAINTIFF

VERSUS

SAMUEL BEDE OGEMBODEFENDANT

J U D G M E N T

The Application

1. The Application before court is the Plaintiff's Chamber Summons dated 16/07/2009 and filed in court on 17/07/2009 by which the Plaintiff prays for an order to the effect that the defence filed herein on 10/06/2009 be struck out and judgment be entered for the Plaintiff as prayed in the plaint together with costs of the suit and interest. In the alternative, the Plaintiff prays that paragraph 11 of the Defence be struck out and judgment be entered in favour of the Plaintiff in terms of prayer (c) of the plaint together with costs of the suit and interest. The Plaintiff also prays that the costs of this application be provided for.
2. The application is premised on grounds on the face thereof, and in particular on the ground that the Defendant's defence is not a bona fides answer to the Plaintiff's claim; that paragraph 11 of the defence is offensive as circumstances warranting the frustration of the Agreement had not and have never arisen and that the defence herein is illusory, evasive and a sham as the Defendant has refused to refund to the Applicant his (Applicant's) deposit of Kshs.2,000,000/=.
3. The affidavit in support of the application is sworn by Duncan Kibui, the Plaintiff herein. The Plaintiff avers that on or about 10/04/2010, he entered into an agreement with the Defendant for the purchase of a property in Karen known as LR No. 2259/141 for a consideration of Kshs.8,000,000/= to be paid in phases as follows:-
 - (a) a sum of Kshs.100,000.00 to be paid by the Applicant before execution of the Agreement.
 - (b) a sum of Kshs.1,900,000.00 to be paid by the Applicant on execution of the Agreement and
 - (c) a sum of Kshs.6,000,000.00 to be paid by the Applicant before completion date.
4. The Plaintiff avers that he paid a total of Kshs.2,000,000.00 pursuant to the schedule stated above, leaving a balance of Kshs.6,000,000.00.00 to be paid within 90 days of execution of the Agreement for Sale, on or about 09/07/2008. The Plaintiff also avers that it was agreed between himself and the Defendant that on or before the completion date, the Defendant would avail to the parties' advocates, M/s Mumbi, Mionki & Company Advocates, a duly executed transfer among other completion documents.
5. The Plaintiff also states that before the completion date, he found out that one M/s Anne Karura Kibati had cautioned the suit property on the basis that she had a purchaser's interest, and on raising the issue of the caveat with the Defendant, the Defendant intimated to the Plaintiff that the caveat had been wrongfully registered and that he (Defendant) was taking steps to resolve the issue. From

the further averments in the supporting affidavit, the Defendant had in fact agreed to sell the same suit property to Anne Karura Kibati (Miss Kibati) in or about 08/09/2004 for Kshs.5,000,000/=, but had failed to effect transfer in Miss Kibati's favour hence the placing of the caveat on the suit property by Miss Kibati.

6. It is also the Plaintiff's averment that on discovery of the double deal, he demanded a refund of the sum of Kshs.2,000,000.00 paid to the Defendant under the Agreement for Sale but the amount is yet to be refunded. The Plaintiff also avers that Miss Kibati sued the Defendant in Nairobi HCCC No. 31 of 2009, and that by the Defendant's defence filed therein at paragraph 3 thereof, the Defendant admits entering into an agreement with Miss Kibati for sale of portion No. 4 of LR No. 2259/141.
7. On the basis of the above, the Plaintiff avers that the Defendant has no bona fides defence to the Plaintiff's claim in this suit and wants either the whole of the said defence or paragraph 11 thereof struck out and judgment entered for the Plaintiff as prayed in the plaint. The Plaintiff says that unless judgment is entered for him as prayed, the Defendant would unjustly enrich himself by keeping both the suit property and the deposit paid by the Plaintiff.
8. The Plaintiffs application is opposed vide the Grounds of Opposition dated 23/09/2009 and filed in court on 25/09/2009. The Grounds of Opposition are that:-
 - (i) *The application is frivolous, misconceived and an abuse of the court process.*
 - (ii) *The Applicant is relying on matters which are subjudice and subject of determination of the court.*
 - (iii) *The alleged property in dispute with Ms. Anne Kibati is different from the subject matter herein.*
 - (iv) *The claim for refund of the alleged deposit is misplaced as the Applicant*
 - (a) *has not shown that he paid to the Respondent the deposit or that the Respondent acknowledged receipt;*
 - (b) *has not shown that he paid the sum of Kshs.423,060/= to the then advocates and whether the said sum which is now claimed was utilized for the purpose it was meant;*
 - (c) *has not shown that a transfer agreement or that the sum was paid to Mumbi, Mionki & Co. Advocates.*
 - (v) *has not denied that the property at all times material to the agreement was free from encumbrances until the Applicant colluded with the said Ann Kibati.*
 - (vi) *Has not disproved that title No. 2259/141/4 has never been subject of any other transaction.*
 - (vii) *has failed to see that the failure on the part of the Applicant to effect payment as per the agreement frustrated the agreement.*

The Plaintiff and the Defence

9. The Plaintiff came to court in this suit by filing a plaint dated 24/04/2009 and filed in court on 06/05/2009. The facts giving rise to the suit are set out in the supporting affidavit of the Plaintiff sworn on 16/07/2009 the major details of which I have already set out in the opening paragraphs of this ruling. The Plaintiff avers that before he entered into the Agreement for Sale with the Defendant, the Defendant warranted that he (Defendant) had a good title to the suit property as the registered owner and that the property would be sold to the Plaintiff free from all encumbrances and with vacant possession. The Plaintiff however states that before the completion date, he discovered that the suit property had been cautioned by a third party who had, in the year 2004, also been offered the same suit property for sale at Kshs.5,000,000/=. For the reasons aforesaid, the Plaintiff's deal with the Defendant fell through and when the Defendant failed to either transfer or refund the deposit of Kshs.2,000,000/= paid towards the purchase price, the Plaintiff filed this suit.
10. The Plaintiff avers that the Defendant has no good defence to the Plaintiff's claim and accordingly the Plaintiff prays for judgment against the Defendant for:-
 - (a) *specific performance*
 - (b) *In the alternative to (a) above Rescission of the Agreement for Sale dated 10th April, 2008;*

(c) *A refund of the sum of Kshs.2,430,000.00*

(d) *Damages for loss of bargain*

(e) *Interest on (c) and (d) above at 17% per annum from 10th April, 2008 until payment in full;*

(f) *Any other or further relief that this court may deem just and expedient to grant.*

11. The Defendant filed defence dated 10/06/2009 on the same day and avers therein that he was at all times ready and willing to complete the transfer of the suit property to the Plaintiff save for the collusion between Miss Kibati and the Plaintiff in an attempt to fraudulently deny the Defendant the fruits of the purchase price by placing a caveat on the suit property. The Defendant also avers that he had a good title to the property and denies that the portion of the property the subject of the dispute between the Defendant and Miss Kibati was one and the same as the suit property. At paragraph 11 of the defence, the Defendant avers thus:-

“11. As a consequence, the Defendant states that the contract herein was frustrated by the conduct of the Plaintiff and any deposit made, which is not admitted, were forfeited in accordance with the terms.”

12. The Defendant also denies that the Plaintiff paid a sum of Kshs.430,000/= in legal expenses at that he (Plaintiff) is entitled to interest on deposit made (if any) in terms of the agreement.
13. In answer to the Defendant's defence, the Plaintiff filed a reply to defence on 23/06/2009. The Plaintiff denies the allegations of fraud between himself and Miss Kibati and also denies knowing that the agreement between the Defendant and Miss Kibati was void as pleaded in paragraph 4 of the Defence. The Plaintiff also denies that the contract herein was frustrated by his (Plaintiff's) conduct as pleaded in paragraph 11 of the defence. Further the Plaintiff denies that the Defendant ever served the Plaintiff with a notice of intention to terminate the contract as a result of the Plaintiff's alleged conduct or at all. Finally and with regard to refund of the deposit, the Plaintiff avers that the Agreement for Sale did not contain a forfeiture clause.

The Plaintiff's Submissions

14. The application proceeded by way of written submissions. The Plaintiff's submissions are dated 02/11/2009 and filed in court on the same day. It is the Plaintiff's case that he executed the Agreement for Sale based on the assurances given to him by the Defendant that the Defendant had a good title over the suit property, and that had the Defendant brought to the Plaintiff the existence of the 2004 Agreement between the Defendant and Miss Kibati, the Plaintiff would have had the opportunity of deciding whether or not to proceed with the sale based on true facts. The Plaintiff alleges that the Defendant misrepresented or did not make full disclosures of the true position with respect to the validity of the Defendant's title. It is contended that such non-disclosure went to the core of the Agreement and amounted to breach of contract which breach forced the Plaintiff to elect to rescind the contract and to ask for a refund of the deposit.
15. The Plaintiff also submits that while he was pursuing a refund of the deposit from the Defendant, he (Plaintiff) was served with a court order issued in ELC No. 31 of 2009 (**Anne Karura Kibati –vs- Samuel Bede Ogembo**), a suit that was instituted by Miss Kibati and arising out of the 2004 Agreement of Sale between Miss Kibati and the Defendant. The order obtained by Miss Kibati in ELC 31 of 2009 was to prevent the Defendant herein from selling or transferring the property to third parties. The Plaintiff herein also submits that in or about September 2009, the court confirmed the interim order of injunction in HCCC No. 31 of 2009.
16. The ruling by Nambuye J in ELC 31 of 2009 is one of the authorities relied upon by the Plaintiff in this application. In the said case, the Plaintiff sought the following reliefs:-
- (a) *A permanent injunction restraining the Defendant, whether by himself, his agents, successors or assigns from selling, transferring, disposing or in any other way offering plot No. 4 of the parcel of land known as LR No. 225/141/(original No. 2259/23/2) to any other except by way of transfer to the Plaintiff).*
- (b) *An order of specific performance compelling the Defendant to complete the sale agreement dated 8th September 2004 and transfer plot number 4 or all that parcel of land known as LR No. 2557/14/- original number 2259/2312 in favour of the Plaintiff.*
- (c) *Costs of this suit plus interest*

(d) *And other or further order that the Honourable Court may deem just and expedient.*

17. Together with the plaint in ELC 31 of 2009 the Plaintiff filed an application seeking injunctive orders against the Defendant to restrain the Defendant whether by himself, his agents, servants, successors or assigns from selling, transferring, disposing or in any other way from offering for sale plot No. 4 of that parcel of land known as LR No. 2259/141 original 2259/2312 to any person other than the Plaintiff pending the hearing and determination of the main suit.
18. In support of the application in ELC 31 of 2009, the Plaintiff argued that there was a valid agreement of sale dated 08/09/2004; that the Plaintiff had made some deposit to the Defendant and that the balance of the purchase price was to be paid to the Defendant tendering the completion documents to the Plaintiff, but which documents were never tendered by the Defendant. That transfer, according to the documents availed to court was to be completed within 90 days from the date of execution.
19. The Defendant in ELC 31 of 2009 opposed both the suit and application on the basis that the Plaintiff had failed to perform her part of the bargain and thus was in breach of contract. The Defendant also argued that any injury suffered by the Plaintiff could be compensated by an award of damages and not an order of injunction.
20. After due consideration of the submissions made by counsel, Nambuye J allowed the Plaintiff's application for injunction dated 27/01/2009 as against plot Number 4 of the parcel of land known as LR Number 2259/141 (original 2259/2312) on the ground, inter alia, that the Defendant failed in his obligation to deliver up to the Plaintiff the requisite completion documents and that the Defendant did not demonstrate to the court that efforts were made by him to acquire such documents.
21. In light of the ruling by Nambuye J, in ELC 31 of 2009, it is submitted on behalf of the Plaintiff herein that the Defendant's defence ought to be struck out and judgment entered for the Plaintiff. In this regard, the Plaintiff has framed three (3) issues for determination on this application and these are:

(a) *whether the Defendant/Respondent misrepresented the true facts to the Plaintiff/Applicant*

(b) *whether the Agreement was frustrated and*

(c) *whether the Defence should be struck out*

22. In respect of the first issue counsel for the Plaintiff submits that the Defendant truly misrepresented the facts to the Plaintiff and that this is clear from the Defendant's admissions as contained in paragraphs 3, 4 and 5 of the Defendant's Defence in ELC 31 of 2009 thus:-

"3. The Defendant admits that he entered into an agreement to sell a portion of plot No. 2259/414 to the Plaintiff but denies that the Plaintiff paid the purchase price thereof as required and conditional in the Agreement. The Plaintiff is put to strict proof thereof.

4. The Defendant states that sometime in 2004, he entered into an agreement with the Plaintiff to purchase the said premises whose terms inter alia were:-

(i) *the purchase price was Kshs.5,000,000.00*

(ii) *completion was within 90 days of the deposit*

(iii) -----

(iv) -----

5. The Defendant states that at the expiry of the completion period, time being of essence, the Defendant could not complete the transaction as:

(i) *the balance of the purchase price remained unpaid*

(ii) -----"

23. In this suit, the Defendant at paragraphs 7,8 and 9 of his defence states that he had a good title to the property; he denies that the suit property herein is the same as the subject property in ELC 31 of 2009 and he also denies that there was any misrepresentation on his part to the Plaintiff. In the Agreement for Sale dated 10/04/2008 between the parties herein, the suit property is described as

the leasehold interest comprised in LR No. 2259/141/4. The Plaintiff states that the Defendant has denied an obvious truth and that the Defendant's failure to disclose the existence of the Agreement for Sale the subject matter of ELC 31 of 2009 was deliberate and false and intended to defraud the Plaintiff. The Plaintiff submits that he paid the deposit and legal fees based on these misrepresentations by the Defendant. The Plaintiff contends that this is a clear case of fraudulent misrepresentation of material facts which misrepresentation resulted in breach of the Agreement for Sale.

24. In **Lammers –vs- Kamunge [1991] KLR 345** at p. 359, the Appellant therein who was a resident of the Netherlands offered her house located in Nanyuki for sale at Kshs.600,000/=. Before the sale was concluded, the Respondent misrepresented to the Appellant that the house was badly kept and that the same could not go for the price asked for by the Appellant amounting to Kshs.600,000/=. The Appellant then reduced the asking price to Kshs.450,000/=.
25. When the Appellant later came to Kenya in order to complete the sale, she discovered that the representations made to her by the Respondent concerning the state of the house were false. The Appellant thereafter repudiated the sale on grounds of misrepresentation. The Respondent sued for specific performance of the contract at the same time enhancing the purchase price to Kshs.550,000/= up from Kshs.450,000/= of which Kshs.50,000/= was paid to the advocates appearing for both parties. The completion date of the contract was 30/11/1988 which had already passed by the time the Appellant came back to Kenya to complete the sale. It also came out during the hearing of the case that the Respondent did not in fact have the money to complete the sale.
26. The trial court found for the Respondent and granted an order for specific performance. On appeal, it was held, inter alia
 - (a) *the appellant had taken the Respondent's false representation into consideration in deciding to reduce the price from her original offer of Kshs.600,000/= to 450,000/=*
 - (b) *there was a valid and enforceable contract of sale of the suit premises and the completion date originally agreed upon had been waived by the conduct of the parties so that time was no longer of the essence*
 - (c) -----
 - (d) *to seek an equitable relief like specific performance a Plaintiff must come to court with clean hands.*
27. In the same judgment, Cockar JA stated at page 359 that

*“--- where a contract is repudiated as a result of misrepresentation, if there is a specific claim for refund of monies paid, then the same ought to be allowed”. See also **Kukal Properties Development Ltd. –vs- Maloo & Others [1992] LLR 2779 (CAK).***
28. On whether or not the contract was frustrated as alleged by the Defendant at paragraph 11 of the Defence, counsel for the Plaintiff submits that the doctrine of frustration does not apply unless the performance of the contract is affected by factors beyond the control of the parties. Counsel says that in the instant case, there is no evidence placed before the court by the Respondent to show that the contract was frustrated or that it was frustrated by factors beyond the control of the parties herein. Counsel quoted from the case of **Kenya Commercial Finance Company Ltd. –vs- Ngeny & Another [2002] KLR 2** where it was held that the particulars of a frustrating event must not be merely mentioned in the claim but must be given by the party seeking to rely on the same.
29. At page 9 of the **Ngeny** decision, the court quoted from the **3rd Edition of Words and Phrases Legally Defined Volume 2** and said:-

*“The doctrine of frustration operates to excuse from further performance of a contract where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available or that some future event which forms the basis of the contract will take place and before breach, an event in relation to the matter stipulated (above) renders performance impossible or only possible in a very different way from that contemplated **but without default of either party**” (Emphasis provided by Plaintiff).*
30. It is the Plaintiff's case that the breach of contract herein occurred when the Respondent misrepresented to the Applicant the material facts relating to the actual status of the suit property. The Plaintiff contends that if there had been no such misrepresentation, and that if the Plaintiff had known the true facts, he would not have entered into the Agreement for Sale.
31. The Plaintiff also argues that in the unlikely event that the contract was frustrated, an allegation which the Plaintiff says is not true,

then it was incumbent upon the Defendant to serve a notice upon the Plaintiff bringing to the Plaintiff's attention the fact of such frustration. The Plaintiff says that since the Defendant did not issue such a notice, he cannot now turn round and allege frustration of contract. It is the Plaintiff's contention that the Defendant has brought up this issue of frustration in an effort to avoid liability accruing to him as a result of his (Defendant's) misrepresentation of facts.

31. On the final issue, and that is whether the Defendant's defence should be struck out, counsel for the Plaintiff says that the said defence is a mere denial of the Plaintiffs claim without giving any substantive rebuttals. Counsel also submits that the Defendant's defence in its current form is an abuse of the court process and should therefore be struck out. See **Orbit Chemical Industries Ltd. –vs- The Attorney General [2006] e KLR**. The Plaintiff is asking this court not to maintain the Defendant's limping defence by allowing the case to go to full hearing at the expense of the Plaintiff. In **John Patrick Machira t/a Machira & Co. Advocates – vs- Grace Wahu Njoroge – Nrb HCCC No. 3338 of 1995**, the court struck out the Defendant's defence on the ground that the said defence contained only "*bald denials -----. The effect is that the Plaintiff's case passes uncontraverted.*" So that where the Defendant fails to establish a systematic engagement with the Plaintiff, the defence must be struck out. This indeed is the law.
32. The Plaintiff further contends that the Defendant's defence is not only frivolous, but that it is also vexatious, namely that the defence is without substance, is groundless and fanciful and that it also lacks bona fides. It is the view of the Plaintiff that the Defendant's defence is only intended to waste time of the court and that unless the Defendant is stopped in his tracks right now, the Plaintiff will be put to unnecessary expense.

The Defendant's Submissions

33. The Defendant's written submissions dated 26/11/2009 were filed in court on 27/11/2009. The gist of the Defendant's submissions is that he has a good defence to the Plaintiff's claim on grounds that the only amount paid by the Plaintiff under the agreement of sale is Kshs.100,000/= and that apart from this amount, the Plaintiff has not adduced evidence to show receipt and acknowledgement of Kshs.1,900,000.00.
34. The Defendant also contends that no transfer documents were ever executed in this case and that if any monies were ever paid in respect of the said transfer, which fact is denied by the Defendant, then the amount is still held by the advocate who may have received the same. The Defendant however denies that such payment was ever made to any advocate, and that if it was ever made, the Plaintiff would have made a demand for refund of the same.
35. The Defendant refers to a letter dated 26/03/2008 to Plaintiff from the firm of Mumbi Mionki & Co. Advocates calling for payment of the sum of Kshs.423,060/= being legal fees and other disbursements in respect of purchase of LR No. 2259/141/4. The Defendant contends that the said letter was a mere demand to pay legal fees and that the Plaintiff has not adduced evidence of payment of such amounts. The Defendant also says that the Plaintiff's letter dated 07/10/2008 to M/s Mumbi Mionki Advocates, by which letter the Plaintiff withdrew instructions from the said firm of advocates, which letter counsel says does not mention the sum of Kshs.423,060/= the subject of M/s Mumbi Mionki's letter of 26/03/2008.
36. In his further submissions, the Defendant says that before granting the orders sought, the court must satisfy itself that the claims set out by the Plaintiff are not controverted in any manner by the Defendant. The Defendant says that since there is no admission of any of the Plaintiff's claims save for the sum of Kshs.100,000/=, the court should not grant the orders sought.
37. Regarding the subject property in this suit and in ELC 31 of 2009, the Defendant submits that the subject property in the two suits is different; namely that the suit property herein is LR No. 2259/141/4. On this issue, I want to say as follows. In ELC 31 of 2009, Miss Kibati sued the Defendant for an order of injunction restraining the Defendant whether by himself, his agents, successors or assigns from selling, transferring, disposing or in any other way offering for sale plot No. 4 of the parcel of land known as LR No.2259/141. My reading of these two pleadings suggests and without any doubt in my mind that the suit property in this suit and in ELC 31 of 2009 is one and the same. Referring to plot number 4 of LR No. 2259/141 cannot be said to be different from LR No. 2259/141/4. It is not denied that the Defendant subdivided the original title number 2259/2312 into several portions and that in 2004 he did offer plot number 4 of the new subdivisions for sale to Miss Kibati.

Findings and Conclusions

38. It is not in dispute in this case that the parties herein executed an Agreement for Sale of a property known as LR No. 2259/141/4 on the 10/04/2008 at a consideration of Kshs.8,000,000.00. The Defendant acknowledged payment of Kshs.100,000/= (One Hundred Thousand) money that had already been paid and the agreement provides that the sum of Kshs.1,900,000.00 was to be paid to the Vendor (Defendant herein) on execution of the Agreement. As there are no two dates provided in the Agreement that is to say annexure DK3 to the Plaintiff's supporting affidavit, can it be assumed that the 10/04/2008 was the date of execution of the Agreement and the day on which the sum of Kshs.100,000.00 and Kshs.1,900,000.00 were paid by the Plaintiff to the Defendant? My view of the matter is that this is so, because even the sum of Kshs.100,000/= was not receipted separately.
39. It is also not disputed that by an agreement for sale dated 08/09/2004, the Defendant offered for sale to Miss Kibati portion 4 of LR No. 2259/141 (original 2259/2312) for the consideration of Kshs.5,000,000.00 and also a second property also comprised in the same LR No. 2259/141 that lay adjacent to plot Number 4.
40. Under the Agreement for Sale dated 10/04/2008, the completion date was fixed at Ninety (90) days from the date of the agreement, that is to say from 10/04/2008. Under the same agreement, the Defendant warranted two things:-
- (i) *that he had a good title to the property being the registered proprietor of the suit property*
 - (ii) *that the property which was a leasehold was being sold free from all encumbrances, and in vacant possession.*
41. The question that arises here is whether indeed the Defendant had a good title to the suit property and whether the said property was capable of being sold free from all encumbrances and in vacant possession. While the Defendant contends that both of these questions can be answered in the affirmative, the Plaintiff contends otherwise.
42. After carefully considering the facts of this case, including the two agreements for sale dated 08/09/2004 and 10/04/2008, I find that the Defendant did not have a good title in the suit property that he could pass on to the Plaintiff herein. The same suit property was the subject of the Agreement for Sale between the Defendant and Miss Kibati. That portion was not available for sale to the Plaintiff because by 10/04/2008 the same had already been committed to be sold to Miss Kibati and the Defendant had already received at least Kshs.250,000/= being 5% of the purchase consideration. The balance of the purchase price was to be paid once the Defendant tendered the transfer documents, but the Defendant failed to release the documents. Subsequently, Miss Kibati whose sale agreement with the Defendant was entered into some 4 years earlier, cautioned the suit premises.
43. In light of the above findings, I am persuaded that the Defendant herein misrepresented the facts by telling the Plaintiff herein that the suit property that is to say LR No. 2259/141/4 was available for sale. I agree with submissions made on behalf of the Plaintiff that if the true facts had been placed before the Plaintiff, he would not have entered into the Agreement for Sale with the Defendant. This case is therefore a proper case in which to make a finding that there was misrepresentation of facts by the Defendant for his own advantage. The Defendant was thus in breach of the Agreement for Sale dated 10/04/2008 and this being the case, the Plaintiff was entitled to repudiate the Agreement.
44. Was the contract in this case frustrated as alleged by the Defendant at paragraph 11 of his defence? The law on frustration of contract is now settled and that is that the doctrine of frustration only comes into play when the performance of the contract is affected by factors beyond the parties' control. See the **Ngeny case** (above). Were there such factors in this case? No, there were no such factors. I say so because the Defendant has not pleaded particulars of such frustration apart from simply making allegations of frustration of contract at paragraph 11 of the defence (supra):-
45. It is clear from the averments at paragraph 11 of the Defence that the Defendant's allegation of frustration is a bare and naked statement. Particulars of the Plaintiffs' conduct which the Defendant believes constitute frustration of contract are not given. In any event, for the doctrine of frustration to apply the Plaintiff's conduct alluded to by the Defendant must have been such that it was affected by factors beyond the control of the parties. There is nothing on the facts in this case to show that an intervening event rendered the performance of the Agreement for Sale impossible. The truth is that the Defendant was in breach of contract and that is it. The Defendant misrepresented the facts and by so doing caused the breach.
46. Before discussing the final issue, namely whether the Defendant's defence should be struck out, I want to address the issue of legal fees amounting to Kshs.423,060/=. Counsel for the Defendant referred to the two letters dated 26/03/2008 and 07/10/2008. The letter of 26/03/2008 was a request to the Plaintiff to avail a cheque for the stated amount to Mumbi Mionki & Co. Advocates to

enable the said advocates proceed further with the Transfer. The letter of 07/10/2008 written by the Plaintiff to Mumbi Mionki & Co. Advocates does not mention anything to do with the said sum. All that the letter says is that the Plaintiff had now appointed the Plaintiff's current advocates to act on his behalf, and asked M/s Mumbi Mionki to accord the new advocates all the necessary co-operation.

47. One would expect that since the Transfer was yet to be done, the Plaintiff would show concern for monies paid to M/s Mumbi Mionki & Co. Advocates and not utilized for what it had been paid for. In this regard therefore, I agree with the Defendant's position that the Plaintiff has failed to show that the said sum of Kshs.423,060/= was paid by the Plaintiff either directly to the Defendant or to the firm of Mumbi Mionki & Co. Advocates.
48. I now come to the final issue and that is whether the Defendant's defence herein should be struck out. From all that has been stated above, I am satisfied that there is no option but to strike out the Defendant's defence. The defence is a mere sham; it is bald and naked and because of the circumstances of this case, that defence is not capable of redemption.
49. In the premises, I allow the Plaintiff's application dated 16/07/2009 in terms of prayer 2 thereof and enter judgment for the Plaintiff in the sum of Kshs.2,000,000.00 together with interest thereon at court rates from 10/04/2008 until payment in full.
50. The Plaintiff shall also have costs of the suit and of this application.
51. Orders accordingly.

Dated and Delivered at Nairobi this 12th day of May, 2009.

R.N. SITATI

JUDGE

Read and Delivered in the presence of:-

Mr. Mulei for Mate (present) For Plaintiff

Mr. Anyoke for Mogeni (present) For Defendant

Weche – court clerk