



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 276 of 2007**

**BEKYA FLORICULTURE LIMITED.....PLAINTIFF**

**VERSUS**

**GIMALU ESTATES LIMITED.....DEFENDANT**

**R U L I N G**

By Chamber Summons dated and filed on 18<sup>th</sup> September, 2007, Bekya Floriculture Limited (hereinafter referred to as the Plaintiff) seeks orders against Gimalu Estate Limited (hereinafter referred to as the Defendant) as follows:

1. That the statement of defence dated 20<sup>th</sup> June 2007 and filed in court on the 28<sup>th</sup> June, 2007 be struck out.
2. That judgment be entered for the Plaintiff against the Defendant/Respondent as prayed in the Plaintiff.
3. Costs of this application and the suit be paid by the Defendant/Respondent.

The application is said to be brought under Order VI Rule 13 (c) and (d) of the Civil Procedure Rules. It is founded on two main grounds:

First, that the defence filed will prejudice, embarrass and otherwise delay the fair trial of the action.

Secondly, that the defendant has no legitimate defence to the plaintiff/applicant's claim and the defence filed is a sham.

The application is also supported by an affidavit sworn by **Yaacov Maimon** the Managing Director of the plaintiff company. The facts as pleaded in the Plaintiff and deposed to in the supporting affidavit are as follows:

By a written agreement dated 6<sup>th</sup> February 2007, the defendant agreed to sell to the plaintiff land known as L.R. No. 167/9 (original No. 167/3/15) South East of Limuru Township measuring 145 acres together with buildings and development erected thereto, (hereinafter referred to as the suit property) at an agreed price of Kshs.100 million.

The terms of the agreement included the defendant giving plaintiff vacant possession immediately upon the plaintiff paying 10% deposit in the sum of Kshs.10 million, which amount was to be paid by the

defendant to the National Bank of Kenya Limited to secure release of the title documents to the suit property which were being held by the bank as security.

In accordance with the agreement, the plaintiff forwarded to the defendant, a bankers cheque for Kshs.10 million drawn in favour of National Bank of Kenya Limited, for onward transmission to the bank.

In breach of the agreement for sale, the defendant failed to pay the sum of Kshs.10 million to National Bank of Kenya Limited and also failed to give possession of the suit property to the plaintiff.

Subsequently, the defendant by a letter dated 13<sup>th</sup> February, 2007 returned the cheques for Kshs.10 million to the plaintiff alleging that it was unable to pay the money to the bank as the bank had failed to confirm the outstanding balance against which payment could be made.

In order to comply with its obligation under the sale agreement, the plaintiff secured financial accommodation from the Kenya Commercial Bank Limited, including the sum of Kshs.10 million which was to be paid as deposit. The plaintiff maintained that the defendant failed to honour its part of the bargain: by failing to pay the bankers cheque for Kshs.10 million to the National Bank of Kenya; failing to give vacant possession of the suit property to the plaintiff; failing to inform the National Bank of Kenya Limited and the International Finance Corporation about the sale agreement involving the suit property and the fact that the sale was for a price of Kshs.100 million, which amount was sufficient to discharge the debt owed to the banks; and unilaterally claiming that the agreement between the parties is invalid.

The plaintiff disputed the defendant's contention that the sale agreement was incapable of performance. It maintained that the defendant had the option of filing a redemption suit against the two banks, if the banks were unreasonably withholding the release of the security. The plaintiff also maintained that the sale agreement did not provide for time to be of the essence, and the defendant could not therefore, rely on the doctrine of effluxion of time to invalidate the agreement.

**Mr. Kairaria** who appeared for the applicant submitted that the mere fact that the property was charged to National Bank of Kenya and International Finance Corporation did not of itself make the sale unenforceable particularly because part of the purchase price was to be used to offset the outstanding debt. In this regard he relied on the case of *Openda -vs- Ahn [1982-88] 1 KAR 294* where he contended an order for specific performance was made in circumstances similar to this one.

With regard to the agreement being invalid due to effluxion of time, **Mr. Kairaria** relying on *Howard & Co. (African Limited) -vs- Button [1964] EA 540* submitted that apart from time not being expressed to be of the essence in the agreement, the delay was occasioned by the defendant and he cannot rely on his own conduct to discharge the contract as that would amount to a self induced frustration.

Relying further on the case of *Sagoo -vs- Dourado [1983] KLR 365*, **Mr. Kairaria** maintained that the defence offered by the defendant was not a reasonable defence but a sham and ought to be struck out. He contended that the alleged variations of the agreement were not fundamental but were negotiations contemplated in clause 12(3) of the sale agreement. He submitted that the court has jurisdiction to grant an order of specific performance as clause 12(2) of the agreement contemplated such an order. He therefore, urged the court to strike out the defence and enter judgment in favour of the plaintiff as prayed.

The defendant responded to the application through a replying affidavit sworn by its director, **Joan Njoki Ndungi**. She reiterated the facts pleaded in the defence admitting that a sale agreement was entered into between the plaintiff and the defendant, and that the agreement included the terms alleged by the plaintiff. She denied that the defendant failed to pay the deposit of Kshs.10 million to National Bank of Kenya Limited, or failed to give physical possession of the suit property to the plaintiff. She maintained that the defendant was not able to give vacant possession to the plaintiff due to factors and circumstances known to the plaintiff. These were: the presence of a standing legal charge from National Bank of Kenya Limited, and a debenture from the International Finance Corporation over the suit property; the bank's refusal to release the title of the suit property; and, the failure by National Bank of Kenya Limited to

confirm the outstanding balance against which payment could be made.

**Joan Njoki Ndungi** swore that the National Bank of Kenya Limited and International Finance Corporation, refused to discharge the property as per copy of a letter dated 29<sup>th</sup> January, 2007 which was exhibited. She deponed that although the parties carried out negotiations and agreed to amend the agreement for sale, the parties did not sign the revised sale agreement as intended. She maintained that the deposit of Kshs.10 million was rightfully returned after the sale agreement between the plaintiff and the defendant became frustrated and incapable of performance, and the 90 days envisaged in the agreement had lapsed. Further, the deponent contended that the plaintiff was not in possession of the balance of the purchase price and that the plaintiff did not disclose to the defendant that it was to borrow this money from Kenya Commercial Bank.

The defendant denied having caused any delay and maintained that the sale agreement was invalidated due to the effluxion of time. Finally, it was deponed that the plaintiff has no rights against the defendant under the agreement for sale as refund was made to the plaintiff in accordance with clause 7.2 of the agreement for sale and that the sale agreement was invalid and unenforceable.

**Miss Kirimi** who argued the application on behalf of the defendant, referring to **Halsbury's Laws of England, Vol.37 4<sup>th</sup> Ed. at page 284** submitted that for a claim to be struck out, the pleadings must be incoherent and making no sense at all. She also referred to **Mulla** on the code of **Civil Procedure, Vol. 2 15<sup>th</sup> Ed. at page 1179** where the power relating to abuse of the process of the court is stated to be confined to cases where the abuse of the process is manifest from the pleadings and that the power of the court to strike out should be exercised with great care and caution.

**Miss Kirimi** referred the court to a passage in the case of ***Linet B. Oyier & Others -vs- Savings & Loan (K) Ltd., HCCC (Nai) No. 891 of 1996***, where **Ringera, J.** (as he then was) stated: ***“the function of the court in its jurisdiction of striking out pleadings under O.VI, Rule 13 of the Civil Procedure Rules, is not to determine whether the action or defence as framed, will or will not succeed at the trial. That is the function of the trial court after hearing evidence and legal submissions. The function of the court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleading and to impose appropriate sanctions if they have not been so formulated. In other words, it is the soundness of the pleading itself which is a concern of the court at that stage in the mitigation process.”*** She, therefore, submitted that it was not for this court at this stage to assess whether the defence will stand at the trial.

Relying on the same authority of ***Linet B. Oyier & Others***, **Miss Kirimi** submitted that the plaintiff could only succeed by showing that the defence was embarrassing or would otherwise delay the fair trial of the suit. She submitted that the defendant had put forward a defence of frustration which is a valid defence requiring ventilation before the court. She submitted further that clause 7.2 of the agreement provided only refund of the deposit to the plaintiff and no further rights and the plaintiff could not therefore seek specific performance of the contract. She maintained that the defence was not a sham defence or an abuse of the court process as it raised serious issues.

Referring to the case of ***D.T. Dobie & Co. (K) Ltd. -vs- Muchina [1982] KLR 1***, she urged the court not to embark on the merits of the case. With regard to the prayer for judgment upon the striking of the defence, **Miss Kirimi** submitted that Order IX (a) Rule 5 of the Civil Procedure Rules only allows for judgment in default of defence in very specific cases, which did not include a suit for declaratory orders or specific performance as is the case herein. She therefore, urged the court to dismiss the application.

The application under consideration was said to be brought under Order VI, Rule 13 (c) and (d) of the Civil Procedure Rules. There is however no such rule in the Civil Procedure. I can only surmise that there is a typographical error, and that the correct provision under which the application was intended to be brought was Order VI, Rule 13 (1) (c) and (d). The said rules states as follows:

***“13.(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-***

(a) ...

(b) ...

(c) *It may prejudice, embarrass or delay the fair trial of the action; or*

(d) *It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

Thus the plaintiff must convince this court that the defence filed by the defendant may either prejudice it, or embarrass it, or delay the fair trial of the action or that it is otherwise an abuse of the court process. To do this, the plaintiff must show that the defence filed does not appropriately address the issues raised, but raises issues which only serve to obscure the real issues thereby causing confusion or unnecessarily procrastinating the issues thereby delaying the suit. The defence would also be an abuse of the court process, if the power of the court is not carried out properly, or is carried out without honesty or good faith. (See **Simiyu -vs- Standard Chartered Bank [1994] LLR 1132**).

The case of **D.T. Dobie & Co. (K) Limited –vs- Muchina** (supra) is quite instructive with regard to the manner in which the court ought to exercise the power to strike out pleadings, i.e. the power should be exercised cautiously and sparingly as it is being exercised without the court being fully informed on the merits of the case through discovery and oral evidence.

With the above in mind, this court is obliged to carefully consider the pleadings and all facts of the case as presented as presented in the affidavit, bearing in mind that it is not dealing with the merit of the case, as that is the sole function of the judge at the trial.

Having taken that precaution, I note that while the defendant does not deny the sale agreement, or the fact that the plaintiff paid 10% of the purchase price as deposit, nor does the defendant deny the fact that he did not give plaintiff possession of the suit property as provided in the contract, the defence filed by the defendant raises various issues. Some of the issues raised are as follows:

- (i) Whether the agreement of sale was incapable of performance,
- (ii) Whether the contract was frustrated by third parties mentioned in the agreement,
- (iii) Whether the defendant was incapable of meeting the demands of the third party,
- (iv) Whether the defendant breached the agreement,
- (v) Whether time was of the essence and whether completion period had elapsed, thereby rendering the agreement invalid,
- (vi) Whether the plaintiff is entitled to specific performance under the agreement for sale,
- (vii) Whether the court can order specific performance of the contract, given the fact that the suit property remains encumbered by the charge in favour of National Bank of Kenya Limited and the debenture in favour of International Finance Corporation.

In my considered view, the defence dated 20<sup>th</sup> June, 2007 and filed on 28<sup>th</sup> June, 2007 raises pertinent issues that cannot be said to embarrass, prejudice or otherwise delay a fair trial. Moreover, it is evident that the plaintiff's position has been complicated by the fact that the suit property is encumbered by the charge registered against the title in favour of the National Bank of Kenya Limited and the debenture in favour of International Finance Corporation, a fact which was within the plaintiff's knowledge, at the time of entering into the agreement of sale. The issue raised in the defence with regard to the failure to make the two financial institutions party to the sale agreement therefore becomes a moot point.

It is evident that the conduct of the defendant in the sale transaction was rather questionable, given the fact that defendant entered into the sale agreement and agreed to give vacant possession of the suit premises without involving the financial institutions. The plaintiff is however, also equally to blame for this omission having been aware of the banks' interest. The attempt by the defendant to renegotiate the agreed consideration, also impacts negatively on the defendant's good faith to the transaction. Nevertheless, I am satisfied that the defence filed is not a sham but raises pertinent *bona fide* issues as above demonstrated.

To borrow the words of **Ringera, J.** (as he then was) in **Linet B. Oyier & 2 Others –vs- Savings & Loan (K) Limited** (supra); ***“a pleading will be held to be one tending to prejudice or delay fair trial if it states matters which are immaterial and thus raise irrelevant issues which may involve expense, trouble and delay or if it does not state the claim or defence sufficiently and clearly.”*** The plaintiff has not convinced this court that the defence filed herein states matters which are immaterial or raise irrelevant issues which may involve trouble and delay. All the plaintiff has endeavoured to establish is the fact that the defence filed is not meritorious. That, however, is a conclusion that can only be arrived at by the trial judge after the full trial. Moreover, the defence cannot be said to be an abuse of the process of the court. It would not be fair nor just to shut out the defendant without giving them an opportunity to fully ventilate their defence. I come to the conclusion that this is not an appropriate case for striking out. Accordingly, I disallow the application and order that the suit shall proceed to full hearing. Costs of the application shall be in the cause. Orders accordingly.

Signed and delivered this 22<sup>nd</sup> day of January, 2008.

**H. M. OKWENGU**

**JUDGE**