



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

Civil Case 1075 of 2006

GLADYS BETTY ODERAPLAINTIFF

VERSUS

**BALOZI HOUSING CO-OPERATIVE SOCIETY
LTD.....DEFENDANT**

RULING

On 7th December, 2007 the court (Rawal, J) granted the Defendant herein conditional leave to defend the suit upon the issue of **“the validity of the Sale Agreement and its effect”**. The Defendant was thus required to file a statement of defence **“limited to...issues based on (the) sale agreement”**. On 13th December, 2007 the Defendant filed a statement of defence dated 11th December, 2007.

The Plaintiff has applied by chamber summons dated 18th January, 2008 for an order to strike out that defence and for judgement to be entered as prayed in the plaint. The application is stated to be brought under Order VI, rule 13(1)(a), (b) and (d) of the Civil Procedure Rules (the Rules). It is supported by an affidavit annexed to it sworn by the Plaintiff. It is deponed in paragraph 6 of that affidavit that the defence is a mere denial to the claim, and in paragraph 7 that the Defendant has no defence to the claim **“as it has through its Chairman admitted having lawfully utilised my KShs. 2,220,863/00 to erect the suit property for me”**.

In paragraph 8 it is deponed that there is no reasonable defence raised by the Defendant meriting trial because:-

- (a) the defence purports to deny that there is any contract between the parties whereas the Defendant has admitted the Plaintiff's claim and that the Plaintiff partly performed the contract;
- (b) the defence denies knowledge of an unexecuted sale agreement between the parties whereas the same fact is admitted elsewhere;
- (c) the Plaintiff's failure to execute the sale agreement

was occasioned by the fact that it departed materially from the earlier oral agreement between the parties; and

- (d) paragraph 6, 7, 8 and 9 of the defence are contradictory.

In paragraph 9 and 10 it is deponed that the statement of defence raises issues other than those limited by

the order of 7th December, 2007 and numerous other issues that the court has previously determined, and therefore the same is designed to embarrass and prejudice the Plaintiff's claim.

The Defendant has opposed the application as set out in the replying affidavit filed on 3rd March, 2008. It is sworn by one MENELIK KWAMLA MAKONNEN who has described himself as the chairman of the Defendant. The single main ground of opposition emerging from that affidavit is that the statement of defence does not contravene the order of 7th December, 2007 as it raises the issue of the validity of any sale agreement between the parties in respect to the suit property.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also perused the plaint, the impugned statement of defence and the affidavits of the parties previously filed. Rawal, J in her ruling of 7th December, 2007, found that the **validity** of the sale agreement between the parties is a "**glaring**" issue in this suit. It is also clear that the **existence** of such a sale agreement is an issue as it is common ground that no formal written sale agreement was executed by the parties. What the Plaintiff has pleaded is an **oral** sale agreement and part-performance on her part of that oral sale agreement. See paragraph 8(c) of her supporting affidavit.

The statement of defence is rather rambling and could have been better and more succinctly drawn. But it does plead clearly the following:-

- (i) that there was no sale agreement between the parties;
- (ii) alternatively, if there was such sale agreement, it was not valid or binding upon the Defendant.

The Defendant has in the defence rather disingenuously denied receiving from the Plaintiff KShs. 2, 220,863/00, a fact that was admitted in paragraphs 28 and 30 of the replying affidavit filed on behalf of the Defendant on 11th November, 2006. The Plaintiff has submitted that this denial is contrary to rule 6(1) of Order VI of the Rules which prohibits parties to make allegations of fact in any pleading, or raise any new ground of claim, that is inconsistent with their previous pleading in the same suit. This begs the issue whether an affidavit is a pleading. The definition of "**pleading**" in section 2 of the Civil Procedure Act, Cap. 21 (the Act) is not exhaustive. That definition is:-

"**pleading** includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant".

However, it seems to me that anything else included in this definition must be of the same genus or class as, and be analogous to, those in the definition. An affidavit is clearly not of the same genus or class, nor is it analogous to a claim or demand, or to a defence or reply to such defence. An affidavit is in fact evidence and will not contain any claim or demand of a plaintiff, or a defence of a defendant thereto, or a reply of a plaintiff to such defence. I therefore find that though the denial in paragraph 6 of the Defendant's defence clearly contradicts the admission made in paragraphs 28 and 30 of the replying affidavit filed on 1st November, 2006, there is no contravention of rule 6(1) of Order VI.

But paragraph 6 of the statement of defence clearly goes outside the core issue of the validity of any sale agreement between the parties as limited by the order of 7th December, 2007. However, that would not be a proper basis for striking out the entire defence because that core issue of validity of the sale agreement is clearly pleaded. What the Plaintiff should have sought is the striking out of that paragraph of the defence. Paragraph 6 of the defence is therefore hereby struck out.

It is clear from a perusal of the plaint and defence that there is a serious issue between the parties herein over the validity of the sale agreement. Existence of such sale agreement between them is another and related issue that has been raised. These issues cannot be resolved upon interlocutory applications such as the present one. The action ought to go to trial as Rawal, J determined on 7th December, 2008.

The application by chamber summons dated 18th January, 2008 is therefore without merit in so far as it seeks the striking out the entire statement of defence. It is hereby dismissed. In the circumstances costs of the application shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF MAY 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 20TH DAY OF MAY 2008