



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 886 OF 2006

SCOLASTICA WAMBUI KIBATHIPLAINTIFF

VERSUS

WINSTON BUSINESS CENTRE LIMITED.....DEFENDANT

RULING

In an application dated 7th and filed herein on 8th November 2006 the plaintiff/applicant seeks the striking out of a defence and entry of judgment as sought in the plaint. There is also a prayer for the costs of the application.

The application is under **Order VI rule 13(1)(b), (c) and (d)** and is based on the grounds set out on the body thereof and the averments in the supporting affidavit.

The grounds are that the defence filed herein raises no triable issues, that the defence filed is frivolous and vexatious, the defence filed is a mere sham intended to delay the expeditious and fair trial/or disposal of this suit; that it is an abuse of the process of the Court and that it is unsustainable against the plaintiff's claim.

The supporting affidavit is deponed to by the plaintiff who depones that the defendant is the registered proprietor of a piece of land known as **L.R. No. 10823/138** (herein referred to as "**the suit premises**").

That by an agreement for sale dated 16th November 2005, the defendant agreed to sell to the plaintiff the suit premises for a consideration of **Kshs.6,500,000/=**.

That as per the terms of the agreement the plaintiff paid the defendant the initial deposit amounting to **Kshs.3,500,000/=** on execution of the agreement.

That thereafter the plaintiff took possession of the suit premises as per condition 6.2 of the agreement and on diverse dates between 15th December 2005 and 15th January 2006 he paid to the defendant the balance of the purchase price amounting of **Kshs.3,000,000/=**.

That the defendant has admitted receiving the full purchase price for the suit premises in paragraph 8 of the defence.

That in reliance on the terms of the agreement and expecting performance by the defendant of the same on taking possession of the property the defendant caused the survey to be carried out on the property and plans drawn in respect of the proposed subdivision scheme at considerable expense to him.

That despite the foregoing the defendant had refused, failed and/or neglected to hand over completion documents and to transfer the suit premises in his favour as per the terms of the agreement.

That it is not true that the defendant has offered to refund the amount paid as claimed in paragraph 8 of the defence or at all; that the defendant continues to hold onto the whole purchase price.

That on information from his advocate which she believes to be correct that any offer for refund of the purchase price would be a clear and unjustifiable breach of the contract of sale and such action would also occasion the plaintiff irreparable loss and damage in view of the developments she has undertaken on the suit premises.

That on advice by her said advocates which she believes to be true the defendant's defence filed herein is frivolous, an abuse of the Court process and is merely calculated to delay her enjoyment of her suit premises despite having fully paid for the same.

That in view of the aforesaid, it is clear that the defendant's defence is a sham and does not raise any triable issue warranting the matter to proceed to full trial.

That the plaintiff is aware that the defendant's agents have been visiting the suit premises and offering the same to third parties with the intention of defeating the plaintiff's interest therein.

The plaintiff urges the Court to grant her the orders sought in the plaint on the basis of the unconceivable; illegal and unjustified conduct of the defendant aimed at frustrating and breaching clear terms of the agreement for sale of which she had fully performed her part.

That the plaintiff stands to suffer irreparable harm, loss and damage in the event that orders sought herein are not granted as this will enable it to continue perpetuating and benefiting from the fraud and illegal conduct expressed herein at her sole detrimental.

That she is of the honest view that it is in the clear interest of justice that the orders sought herein be granted.

It is apparent from the record that there was no reply to this application. It has been fixed twice for hearing but each time counsel for the respondent has never appeared and when it came up for hearing on 19th July 2007, and the defendant failed to turn up I allowed the counsel for the applicant to present the application *ex parte*.

She submitted on the application and relied mainly on the grounds set out on the face of the application and the averments in the supporting affidavit.

I have considered these submissions. The defendant did not file a replying affidavit to it and neither its representative nor counsel has attended Court when the application has been fixed for hearing three times.

This is why I heard the application *ex parte* on 19th July 2007.

The respondent has admitted receiving **Kshs.6,500,000/=** from the plaintiff being the purchase price for the suit premises and allowing the plaintiff immediate possession of the suit premises.

Though in paragraph 8 of the defence the defendant alleges to have offered a refund of the purchase price to the plaintiff, there is nothing to show for this. There is no letter shown written to the plaintiff to offer such refund or the defendant himself to appear in Court to say so.

In fact no reason has been offered and/or attributed to the plaintiff for this apparent negation of the agreement entered into by the defendant and the plaintiff on 16th November 2005.

I am aware the primary Court's aim should be to sustain rather than to terminate a suit; and that a pleading should be termed vexatious only if the case disclosed there in is obviously and plainly unsuitable i.e.; *The Supreme Court Practice 1988, Volume 1 paragraph 18/19/14; Wenlock v. Moloney (1965) 1 W.L.R. 1235* and *D. T. Dobie v. Joseph Mbaria Muchina C.A. No. 37 of 1978.*

I have perused the defence in this case and find it most contradictory.

For instance, it says in paragraph six thereof that “***the plaintiff had sought to buy the suit premises from the defendant for a consideration of Kshs.6,500,000/= which offer was rejected by the defendant***”.

Then in paragraph 8 of the same defence he says:

(8) “***In the alternative and without prejudice to the foregoing the defendant avers that the plaintiff paid the sum of Kshs.6,500,000/= which amount the defendant has offered to return to the plaintiff but the plaintiff has refused to accept the same.***”

Surely the defendant could not have rejected the offer and at the same time accepted the purchase price.

This defence, I am sorry to say is vexatious and frivolous or an abuse of the Court process and does not raise a triable issue worth maintaining this suit for the main trial.

Then the defendant, though served with hearing notice for this application through counsel twice, has not bothered to appear in Court to oppose it. This shows lack of his interest in this matter and we could not continue adjourning the application to wait for him any longer.

In the circumstances, I find the plaintiff's application dated 7th and filed in Court on 8th November 2006 most convincing and do order that the defence filed herein on 13th October 2006 be and ***is hereby stuck out with costs to the applicant.***

The plaintiff is at liberty to move the Court and to have his suit fixed for hearing by way of Formal Proof.

These shall be the orders of this Court.

Delivered, signed and dated at Nairobi this 27th day of July 2007

D. K. S. AGANYANYA

JUDGE