

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

Civil Case 12 of 2006

GITONGA KAMITI & ANOTHER.....PLAINTIFF

VERSUS

ROSE M. SIMBA & ANOTHER.....DEFENDANT

RULING

This application by the plaintiffs seeks to strike out the defendant's defence dated 26.1.2006 and that judgment be entered as prayed in the plaint. The application is expressed to be brought under Order VI Rule 13(1)(b) and (c) of the Civil Procedure Rules and all other enabling provisions of Law and Practice. The reasons for the application are that the defence is trifling, lacks bonafides, is frivolous and vexatious; that it is devoid of merit and is intended to embarrass or delay the fair trial of the action and that it lacks substance and/or any foundation whatsoever. The application is supported by an affidavit sworn by the first plaintiff and several annexures.

The defendants have filed a replying affidavit sworn by the 1st defendant. I now proceed to consider the application in the light of the pleadings, the affidavit evidence and the submissions of the Advocates for the parties. Both parties are advocates of the High Court of Kenya and acted on different sides with respect to a sale involving **NAIROBI/BLOCK 112/63**. The plaintiffs acted for the purchaser and the defendants acted for the vendor. The vendor was paid the entire purchase price and released transfer documents including consent to transfer, original certificate of lease, clearance and PIN certificate through the defendants who forwarded the same to the plaintiffs for registration. The plaintiffs however could not register the transfer as the vendor's wife had lodged a caution against the title. The plaintiffs aver that the defendants offered to ensure registration of the transfer whereupon the plaintiffs returned the transfer documents to them. The defendants however did not succeed to effect registration of the transfer by reason of the same caution aforesaid but did not return the transfer documents to the plaintiffs. The plaintiffs further aver that in failing to ensure registration and failing to return the transfer documents, the defendants are in breach of first particulars whereof are given in paragraph 9 of the plaint.

In the premises the plaintiffs for judgment for the return or delivery back of the said documents and for damages for breach of trust and misrepresentation.

The defendants have filed a joint statement of defence under protest. At paragraph 3 the defendants aver that they duly discharged their duty of care, deny failing to ensure that the vendor performed his part of the contract. They further aver in paragraph 4 that they are not responsible for the actions of the wife of the vendor who lodged a caution against the said title. In paragraph 5 the defendants deny giving any undertaking to the plaintiffs but add in paragraph 6 that they only offered to assist the plaintiffs to present the transfer for registration which offer was voluntary without any assurance that they would succeed. Paragraph 7 introduces Nairobi CMCC No.10851 of 2005 in which the defendants have been sued by the vendor's wife for the return of the title documents. There is an averment in paragraph 8 that the vendor withdrew instructions for the sale of the said title and asked the defendants to return the purchase price which was duly done. In paragraph 9 breach of trust and misrepresentation are denied. There is also an averment in paragraph 10 that all material times the defendants acted for the vendor who cancelled the transaction and returned the purchase price. Loss and damage are not admitted in paragraph 11 and in paragraph 12 the defendants contend that the plaintiffs' claim is unfounded in law and the plaint does not disclose any cause of action known in law.

Is this defence scandalous, frivolous or vexatious and will it prejudice embarrass or delay the first trial of

the action? In my view a defence which lacks bona fides would be scandalous and a trifling defence would be frivolous and vexatious. I am unable to describe the defendants' written statement of defence in those terms. The issues that emerge on a consideration of the pleadings and the affidavit evidence as far too complex to be determined in this application. The plaintiffs have pleaded a trust relationship in paragraphs 78 and 9 of their plaint which trust is alleged to have been created by an undertaking by the defendants to ensure registration of the transfer documents. The defendants have denied that a trust relationship was ever created and have pleaded that they merely offered to assist in the registration which was not to be because the title was cautioned by the vendor's wife and the transaction was later rescinded by the vendor. The defendants have further averred that the vendor withdrew instructions for sale as the subject property and asked the defendants to refund the purchase price which was done. As to whether or not the defendants could lawfully act in this manner is in my view an issue that can be resolved by a trial. The defendants have further denied owing any duty of care to the plaintiffs. They in fact specifically aver that at all material times they acted for the vendor and on his instructions they cancelled the transaction and returned the purchase price in accordance with their principals instructions. The issue that is set up in this averment is whether or not the defendants were acting as principals or agents. Paragraph 12 of the defence challenges the competence of the plaint and the plaintiffs' claim. This challenge is made on the basis that the transfer documents are not the property of the plaintiffs. The issue at the trial will therefore be whether or not the plaintiffs who have no title in the documents can maintain the action.

Finally it has emerged that the said transfer documents have been released to the vendor's wife by the defendants which raises the issue as to whether or not prayer (a) of the plaint can be maintained. The upshot of this matter is that I cannot strike out the defendants' defence for being scandalous, frivolous or vexatious. What I have found above shows that the said defence cannot be said to prejudice, embarrass or delay the fair trial of this action.

The plaintiffs' application dated 9.2.2006 cannot succeed. It is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2006.

F. AZANGALALA

JUDGE

4/4/2006

Read in the presence of:-