



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

**Civil Case 74 of 2004**

**JACKSON NJUKI KAGENDO.....APPELLANT**

**VERSUS**

**MARTIN WERE OPI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PAUL N. NDUNG’U.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ELIUD N. NJOROGE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RAPHAEL K. NGETHE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

On 7/9/04, the Defendants/Applicants, through a Chamber Summons, sought the following orders from this court.

1. That the Plaintiff’s suit be dismissed in its entirety for non-disclosure of a reasonable cause of action against the Defendants/Applicants.
2. Alternatively, the Plaintiff’s claim as against 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants be struck out for non-disclosure of a reasonable cause of action.
3. Costs of this application.

The application, under Order 6 Rule 13 (1) (a) of the Civil Procedure Rules is on the grounds that:

- a) The Plaintiff’s claim, as pleaded in the plaint against the Defendants, is belated and has been overtaken by events as the subject/funds have already been disbursed to the 1<sup>st</sup> Defendant and utilized as per his instructions.
- b) The ruling of this court, dated 31/1/04, cast serious doubts on the chances of the Plaintiff making out a prima facie case against the Defendants’ herein. The possibility, according to the court, was very remote.
- c) In view of the Ruling of this court, the claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is incapable of being sustained and its continued subsistence is an abuse of the court process.

- d) No appeal has been preferred against the court order herein, referred to.
- e) The acts of the Defendants/Applicants are in accordance with the agreement between the vendor and purchaser and the court cannot remake or alter the same.
- f) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are non-suited in view of the orders of the court, dated 31/3/04.

In opposition, the Plaintiff/Respondent's key issues are as per his Replying Affidavit filed in this court on 18/10/04.

It is important to briefly state the facts of the case in order to put the issue that I must adjudicate on, in proper perspective.

On 20<sup>th</sup> September 2003, the 1<sup>st</sup> Applicant and the Respondent entered into a Sale Agreement whereby the 1<sup>st</sup> Applicant agreed to sell his land, Title No. Nairobi/Block 112/19, Mimosa, Runda, to the Respondent for K.Shs.9,000,000/- of which K.Shs.50,000/- was paid directly to the vendor, and K.Shs.1,450,000/- was paid to the Applicant's firm as stakeholders, with express authority to release the sum of K.Shs.150,000/- to the (Vendor) 1<sup>st</sup> applicant. It is not disputed that the agreement for sale was subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not varied by or inconsistent with the terms of Agreement. The only provisions of the Law Society conditions of sale that varied concerned: interest; , and identity and conditions of the property, which are irrelevant for the current case. The rest of the Law society Conditions of sale remained unchanged.

The completion date was 90 days from the date of the Agreement (29/9/03). Three weeks after signature of the Agreement (i.e. 19/11/03) the Purchaser, through his Advocates, informed the Vendor's Advocates that the Purchaser was unable to proceed with the purchase because he had failed to secure a bank loan, to which the Vendor's Advocates immediately responded that obtaining of the loan was not part of the terms of the Agreement, and drew the purchaser's attention to condition No. 4 (7) (d) of the Law Society Conditions of Sale and issued a Completion Notice.

Under the above condition, if the purchaser fails to comply with the Completion Notice, the Vendor may forfeit and retain any deposit paid and/or resell the property either by auction, tender or private treaty.

If upon a re-sale contracted within 6 months after the completion the vendor incurs a loss, the purchaser may be called upon to pay the vendor liquidated damages including the aggregate of such loss, all costs and expenses reasonably incurred in any such resale, giving credit for the amount of forfeited deposit (if any) and for all sums received under re-sale contract on account of the re-sale price, after the completion date.

From the Complaint, the Plaintiff's claim is for refund of the deposit of K.Shs.1,500,000/- paid to the Defendants, and a permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from releasing K.Shs.1,450,000/- to the 1<sup>st</sup> Defendant (the vendor).

From correspondence between the parties, it is common ground that by the time the suit was filed, the deposit had been forfeited and the funds so deposited, disbursed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in accordance with the 1<sup>st</sup> Defendants' instructions, and as per the terms of the Agreement of Sale.

With the above set of facts, I now turn to the application before me which seeks to dismiss the suit herein for non-disclosure of a reasonable cause of action, under Order 6 Rule 13 (1) (a) of the Civil Procedure Rules.

In the case of **D.T. DOBIE & CO. (KENYA) LTD. V. MUCHINA**, Civil Appeal No. 37 of 1978, the Court of appeal – the highest court in this Republic, - define **cause of action to mean “an act on the part of the Defendant which gives the Plaintiff his cause of complaint,” and reasonable cause of**

**action to mean “action with some chance of success when the allegations in the plaint only are considered.”**

From the facts in the case before me, which, as stated herein earlier are common grounds, every act and transaction by the 1<sup>st</sup> applicant, the 1<sup>st</sup> Defendant in the suit, and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’/Applicants were pursuant to the terms and conditions of the Agreement of Sale, voluntarily entered into by the Plaintiff/Respondent and the 1<sup>st</sup> Applicant/Defendant. The 2<sup>nd</sup> through the 4<sup>th</sup> Defendants were the counsels for the 1<sup>st</sup> Defendant and all they did was as per the instructions of their client, and within the terms and conditions of the Sale Agreement between the parties.

Accordingly, it is unimaginable that the Plaintiff should be heard to complain, much less aver that he has a reasonable cause of action against the Defendants. Put differently, I find and hold that everything done by the defendants was lawful and any suit challenging such actions has no chance whatsoever, of success. And that is so irrespective of whether or not the suit has been overtaken by events as far as the 2<sup>nd</sup> through the 4<sup>th</sup> Defendants, who were mere stakeholders, are concerned.

Accordingly, I hereby grant the application herein, and dismiss the suit for non-disclosure of a reasonable cause of action against all the four Defendants.

I further order that the Plaintiff to pay costs to the Defendants, for both this application and the suit.

It is so ruled.

DATED and delivered in Nairobi, this 31st day of May, 2006.

**O.K. MUTUNGI**

JUDGE