REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 77 of 2005

BILL KIBUIKA NGANGA t/a OLYMPIC STUDIO……….....................………..PLAINTIFF

VERSUS

ORYX ENERGY DEVELOPMENT CO. LTD……..…DEFENDANT

RULING

This is an application made under **Order VI rule 13(1)(a)(b)(c) & (d) of the Civil Procedure Rules** by the plaintiff seeking the order of this court to strike out the written statement of defence filed by the defendant and thereafter judgment be entered in his favour as prayed in the plaint. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Bill Kibuika Nganga. The application is opposed. The defendant through its director Ethan Richard Ndubai has sworn a replying affidavit opposing the said application.

At the hearing of the application, Mr. Karanja learned counsel for the plaintiff submitted that it was not disputed that the plaintiff and the defendant had entered into an agreement whereby the defendant had agreed to purchase a parcel of land which had been allocated to the plaintiff by the Government of Kenya. The defendant deposited a sum of Kshs 1,547,936/= being part payment of the agreed purchase consideration of Kshs 4,000,000/=. The parcel of land in question was registered as LR. No. 2787/1383 situate at Nanyuki Municipality. It was submitted that after the said agreement, the plaintiff learnt that the said parcel of land had been allocated to another person who had also been issued with a title. Mr. Karanja submitted that the plaintiff approached the Commissioner of Lands and was allocated an alternative parcel of land, namely LR. No. 159833/34 within Nanyuki Municipality which he transferred to the defendant.

It is the plaintiff's case that although the defendant has been registered as the owner of the alternative parcel of land, it has refused to pay the balance of the purchase consideration of Kshs 2,472,046/=. The plaintiff had therefore filed suit to recover the said balance of the purchase consideration or alternatively to have the subsequent parcel of land which was transferred to the defendant to be reconveyed to the plaintiff. Mr. Karanja conceded that there was no agreement in respect of the subsequent parcel of land but argued that the plaintiff had annexed correspondences in support of his application which established that the initial agreement had been modified and therefore there was consensus *ad ldem* between the plaintiff and the defendant in respect of the subsequent parcel of land. It was his submission therefore that the defendant could not deny owing the said sum being the balance of the purchase consideration to the plaintiff. It was his submission therefore that the defence and counterclaim filed by the defendant lacked merit and should be struck out as it was frivolous, vexatious and sham. He referred this court to several decided cases in support of the plaintiff's application. He urged this court to allow the application with costs.

Mr. Ogweno learned counsel for the defendant opposed the application. He submitted that the plaintiff's case was not one of those clear cases where the defence would be struck out and judgment be entered in favour of the plaintiff. He submitted that there was a dispute as to whether there existed an agreement between the plaintiff and the defendant and whether the subsequent parcel of land was allocated to the defendant at the instance of the plaintiff. He further submitted that the two parcels of land were of different acreages and therefore they could not cost the same price that was initially agreed between the plaintiff and the defendant. He submitted that the plaintiff had pleaded particulars of fraud and illegality which could not be established by affidavit evidence but could only be proved in a full trial.

Further, it was the defendant's argument that the counterclaim filed by the defendant raised issues which were intertwined with the issues raised in the plaint and could only be determined in a full trial. He urged this court to disallow the application.

I have considered the rival arguments made by the learned counsel for the plaintiff and the learned counsel for the defendant. The issue for determination by this court is whether the plaintiff has established by affidavit evidence and the submissions made that he is entitled to have the order of this court to strike out the defence filed by the defendant as being frivolous, vexatious and a sham. The law as regard the principles to be considered by this court in considering whether or not to strike out a defence is well settled. In **D. T. Dobie Co. (K) Ltd. –vs- Muchina [1982] KLR 1** at page 9 Madan J. A. held that;

"***A court should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."***

In the present application, the subject matter of the suit involves an alleged agreement which was entered between the plaintiff and the defendant subsequent to an initial agreement which was frustrated when the parties to this suit learnt that the initial parcel of land which was the subject matter of the original agreement had been allocated to a third party by the Commissioner of Lands. While it is the plaintiff's case that he had pursued the issue with the Commissioner of Lands until he had secured an alternative parcel of land for the defendant within the same locality as the first parcel of land, it is the defendant's case that the plaintiff took no such action. The defendant has further submitted that the purchase consideration of the original parcel of land could not be similar to the purchase consideration of the subsequent parcel of land because the said subsequent parcel of land was smaller than the original parcel of land. In support of his case the plaintiff has relied on ten annextures numbering more than fifty pages.

It is clear from the submissions made by the plaintiff and the reply made thereto by the defendant that the issue in dispute is not just about an agreement which was entered into for the purchase of a parcel of land and was breached. The plaintiff has admitted that the subsequent agreement was not in one written document but was contained in several correspondences exchanged between the plaintiff and the defendant. The defendant disputes that these correspondences constitutes a binding contract between it and the plaintiff. Having carefully evaluated the facts of this case, it is clear that the dispute between the plaintiff and the defendant cannot be determined by affidavit evidence. There are conflicts in the positions taken by the plaintiff and the defendant which can only be resolved by each of the party testing the evidence of the other party in cross-examination in a full trial. Further, from the submissions made by the defendant, it is clear that the defence and the counterclaim of the defendant raises triable issues which ideally would have to be disposed of by the taking of oral evidence.

It was not the intention of the law that this court should consider and determine an application to strike out pleadings by the minute examination of exhibits running to tens of pages. Pleadings can only be struck out if it is clear that either the suit or the defence filed raises no triable issue and therefore amounts to an abuse of the due process of the court. In this case the bulky nature of the documents annexed as exhibits is clear evidence that the dispute involving the plaintiff and the defendant is not a simple one which can be determined on application made under **Order VI rule 13 (1)** of the **Civil Procedure Rules**. I agree with the submissions made by the defendant that when a party pleads fraud or illegality, then prima facie, it is incumbent on such a party to prove the said fraud or illegality by adducing viva voce evidence in a full trial.

In the premises therefore, it is clear that this court will not allow the application by the plaintiff. The issues in dispute in this case shall be heard and determined in a full trial where each party will have an opportunity of putting forward his case by adducing viva voce evidence. The application by the plaintiff is therefore dismissed with costs.

DATED at NAKURU this 23rd day of June 2006.

L. KIMARU

JUDGE