



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Civil Case 21 of 2005**

**FIROZ JUSAB SUMAR.....PLAINTIFF**

**VERSUS**

**PATRICK AMADI ONZERE.....DEFENDANT**

**RULING**

This Ruling is in respect of a Motion of Notice brought by the plaintiffs seeking that summary judgment be entered in terms of the plaint against the defendant. The application is based on the grounds that the defendant's amended defence is a mere sham and discloses no reasonable cause of action or triable issues. That it is only aimed at delaying the fair and speedy conclusion of the suit.

The application is opposed. The defendant in his replying affidavit has made an averment that there was misrepresentation on the part of the 1<sup>st</sup> plaintiff to the firm of Muli and Ole Kina Advocates. That following the misrepresentation the said firm of Muli & Ole Kina Advocates released both the original Certificate of title and the duly signed Transfer in respect of the suit premises. That the 1<sup>st</sup> plaintiff acted fraudulently in registering the suit premises in his name.

The background to this application is that the plaintiff advanced to the defendant a loan in the sum of Kshs. 300,000/= repayable with a monthly interest of Kshs. 20,000/= within 6 months from the date of execution of agreement. It was agreed that the defendant would secure that loan with his property known as Plot. 5437 Malindi. It was further agreed that in default of payment, the 1<sup>st</sup> plaintiff would register the said property in his name. The defendant defaulted and the 1<sup>st</sup> plaintiff sold the property to the 2<sup>nd</sup> plaintiff in whose name the property is now registered. The defendant has refused to deliver possession to the 2<sup>nd</sup> plaintiff. The plaintiffs are seeking in the plaint a declaration that the defendant has failed to comply with the terms of the said agreement and that the 2<sup>nd</sup> plaintiff is the rightful and registered owner of Plot No. 5437, Malindi, general damages, costs and interest.

In his amended defence the defendant has stated that the 1<sup>st</sup> plaintiff fraudulently interfered with the transfer documents before effecting registration.

This application is expressed to be brought under Order 35 rule 1 sub rules (1) (b), (2) and (3) of the Civil Procedure Rules, which stipulates

1. (1) in all suits where a plaintiff seeks judgment for
  - (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profit, by a landlord from a tenant whose term has expired or been determined by notice to quit or non-payment of rent or for breach of covenant or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff, may apply for judgment for the amount claimed or part thereof and interest, or for recovery of the land and rent or mesne profits.

Clearly, judgment under this rule can only be entered where the claim is for a liquidated sum or where the claim relates to the recovery of land by a landlord from a tenant.

In the present case the plaintiffs are seeking a declaratory order and general damages. Summary judgment cannot be entered for a declaration or general damages.

The plaintiffs may have considered invoking the provisions of Order VI rule 13 (1) of the Civil Procedure Rules instead of Order 35.

But even if he did so, the question would still remain – whether the amended defence does not disclose any reasonable cause of action. The case of **Provincial Insurance of East Africa V. Kivuti**, (1995-1998) 1 EA 282 was cited for the proposition that in an application for summary judgment even one triable issue, if *bona fide*, would entitle the defendant to unconditional leave to defend.

It is unusual to enter summary judgment when allegations of fraud and other wrong doings are made. The defendant herein has raised the issue of fraud on the part of the 1<sup>st</sup> plaintiff. This is a matter which can only be decided during the trial and not on conflicting affidavits.

In **Dhanjal Investment Ltd V. Shabaha Investment Ltd** Civil Appeal No.232 of 1997 (unreported) the Court of Appeal stated:

**“The law on summary judgment procedure has been settled for many years now. It was held as in 1952 in the case of Kandulal Restaurant V Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Songa Figne rido & Company Ltd. V Mooring Hotel Ltd. (1952) EA 425 that, if the defendant shows a *bona fide* triable issues he must be allowed to defend without conditions”**

To emphasis this point let me cite one last authority also decided by the Court of Appeal in 1999 – ie **Kenya Trade Combine Ltd. V. MM Shah**, Civil Appeal No 193/1999 (V.R.) in which the Court said:

**“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”**

I find that the defendant has raised one important triable issue in his defence, that of fraud, which can only be conversed at the trial. For all these reasons, the plaintiffs’ Notice of Motion dated 18<sup>th</sup> May, 2005 is dismissed with costs.

**Dated and delivered at Malindi t his 21<sup>st</sup> day of July 2005.**

**W.OUKO**

**JUDGE**

**21.7.2005**

Ruling delivered.

Present Mr.Omwencha

Mr.Okuto

CC: Matu/Linda

**W.Ouko**

**Judge**