



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION – MILIMANI**

**Civil Case 1109 of 2001**

**INTER CONSULT ENGINEERS ..... PLAINTIFF**

**VERSUS**

**GABRIEL MUNGAI .....1<sup>ST</sup> DEFENDANT**  
**NAIROBI CITY COUNCIL ..... 2<sup>ND</sup> DEFENDANT**  
**GABELLI FARM LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

I have before me an application to strike out the Plaintiff’s further amended plaint and the entire suit as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. It is expressed to be under Order VI Rule 13(1) (b) (c ) and (d) of the Civil Procedure Rules. At the hearing however, Counsel for the Applicants specified by an oral application that the application was intended to be brought under Order VI Rule 13 (1)(a). The basis of the application therefore is that the further amended plaint discloses no reasonable cause of action as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. No affidavit evidence is expected and in fact there was none. I am therefore enjoined to look at the pleadings only.

The primary grounds for the application are that:

- (i) There is no fraud or misrepresentation alleged against the 3<sup>rd</sup> Defendant.**
- (ii) The further amended plaint shows that the 1<sup>st</sup> Defendant had nothing to sell.**
- (iii) As per paragraphs 9 and 10 of the further amended plaint, the 3<sup>rd</sup> Defendant assigned its rights and delivered the physical possession of the suit property to the Plaintiff whereupon the 2<sup>nd</sup> Defendant prepared an agreement for lease in favour of the Plaintiff.**
- (iv) No breach is alleged against the 3<sup>rd</sup> Defendant. Indeed the further amended**

**plaint shows that the 3<sup>rd</sup> Defendant fulfilled its obligations under the contract.**

- (v) The 3<sup>rd</sup> Defendant acted through its director, the 1<sup>st</sup> Defendant and since the 3<sup>rd</sup> Defendant was a limited liability company the Plaintiff cannot sue the 1<sup>st</sup> Defendant in his personal capacity.**
- (vi) Upon assignment of its rights in regard to the suit property and upon execution of the agreement for lease between the Plaintiff and the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> Defendant's obligation was completed.**
- (vii) As per paragraph 16 of the further amended plaint the Plaintiff had legally acquired the suit property and if the 2<sup>nd</sup> Defendant breached the contract it had entered into with the Plaintiff, then the 1<sup>st</sup> and 3<sup>rd</sup> Defendants cannot be blamed.**

The Plaintiff has filed Grounds of Opposition in which it contents as follows:-

- 1. That the application is misconceived and an abuse of the Court process as it does not satisfy the provisions of Order VI of the Civil Procedure Rules.**
- 2. That the Plaintiff has clearly pleaded fraud and misrepresentation as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and as such the application cannot stand. In any event, the Court has discretion under Order VI Rule 8 (2) of the Civil Procedure Rules to order that further particulars be provided.**
- 3. That the application is a mischievous attempt to procure summary trial of the matter and does not warrant the draconian orders so prayed in the application.**
- 4. That the further amended plaint as drawn clearly discloses a reasonable cause of action as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants for fraudulent misrepresentation and it is therefore only fair and just that the present application be dismissed with costs.**

The application was canvassed before me on 10.11.2005 by Mr. Chege Learned Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and Mr. Ngugi Learned Counsel for the Plaintiff. Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants recited the grounds in the Chamber Summons. In his concluding remarks Counsel referred

me to paragraph 17 of the further amended plaint and pointed out that the particulars of loss given therein excluded the 1<sup>st</sup> and 3<sup>rd</sup> Defendants from blame. In the premises Counsel urged me to allow the application with costs.

In his response, Mr. Ngugi for the Plaintiff substantiated the above Grounds of Opposition and contended that the issues disclosed in the said Grounds should go to trial.

Counsel placed reliance upon the case of THE PICTURE COMPANY LTD –V- ERNEST MWANGI NDEGWA: HCCC NO. 782 OF 1998 (UR) for the proposition that Courts should learn in favour of hearing suits on merits.

Counsel pointed out that the main suit is ready for hearing, issues have been settled and this application is an unnecessary impediment in the way of a trial and should be dismissed. Counsel admitted that paragraph 17 of the further amended plaint was flawed and will require amendment.

In a brief reply Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that an application under Order VI Rule 13(1) can be made at any stage of the proceedings. It was immaterial that issues had been settled. In Counsel's view, it was not just paragraph 17 of the further amended plaint which is flawed. In his view the entire plaint is flawed and cannot be saved by amendment. He concluded that the case of THE PICTURE COMPANY LTD –V- ERNEST MWANGI NDEGWA (SUPRA) was founded on different facts and was irrelevant to the case at hand.

I have considered the application, the pleadings and the able submissions by the Learned Counsels. Having done so, I take the following view of the matter. In D.T. DOBBIE & COMPANY (KENYA) LTD –V- MUCHINA (1982) KLR 1 THE Court of Appeal held *inter alia* that:-

- “1. The words “reasonable cause of action” in Order VI rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim.
2. The words “cause of action” means an act on the part of the Defendant which gives the Plaintiff his cause of complaint.
3. As the power to strike out pleadings is exercised without the Court being fully informed on the merits of the case through discovery and oral evidence, it should be used

*sparingly and cautiously.”*

With that Court of Appeal decision in mind, I ask myself whether the further amended plaint herein discloses some cause of action with some chance of success. In other words does the further amended plaint show an act on the part of the Defendant which gives the Plaintiff a cause to complain? The Plaintiff says in the further amended plaint as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants as follows:-

In paragraph 6.

**“Subsequently thereto, the 1<sup>st</sup> Defendant in his personal capacity and/or in his capacity as the director of the 3<sup>rd</sup> Defendant offered to sell the property to the Plaintiff and in order to induce the Plaintiff to purchase the same represented to the Plaintiff that he was in a position to pass title in respect thereof and deliver vacant possession thereof to the Plaintiff.”**

AND in paragraph 7:

**“7. The 1<sup>st</sup> Defendant at the time he made the said representations knew them to be false and untrue and made these representations in order to induce the Plaintiff to paying him the sum of Kshs 3,390,000/=.”**

Further the Plaintiff avers in paragraph 8 as follows:-

**“8. By means of the said representations and acting on the faith and truth thereof and in the belief that the same were true the Plaintiff was induced to purchase the property from the 1<sup>st</sup> Defendant and/or the third Defendant and proceeded to pay the sum of Kshs 3,390,000/= to the 1<sup>st</sup> Defendant and/or the 3<sup>rd</sup> Defendant receipt whereof the 1<sup>st</sup> and 3<sup>rd</sup> Defendants duly acknowledged.”**

AND in paragraph 15 the Plaintiff avers as follows:-

**“15. In or about September, 1999, the 2<sup>nd</sup> Defendant proceeded to evict the Plaintiff from the property allegedly on the ground that Gabelli Farm Ltd the 3<sup>rd</sup> Defendant herein had acquired the property illegally, and allocated the same to one Rachael Mumbi Kabui whom it put into possession thereof. To date, the 2<sup>nd</sup> Defendant charges and continues to receive rent from the said Rachael Mumbi Kabui in respect of the property.”**

Finally the Plaintiff avers in paragraph 18 as follows:-

**“18. The Plaintiff’s claim against the Defendants jointly and severally is therefore for the sum of Kshs 5,374,000/= together with interest thereon at the rate of 18% p.a. or at such higher or other rate that this Honourable Court may deem fit and just to grant with effect from September, 1998 until payment in full.”**

In a nutshell the Plaintiff is saying that it was induced into buying the suit property from the 1<sup>st</sup> or 3<sup>rd</sup> Defendant which property in fact belonged to the 2<sup>nd</sup> Defendant who has evicted the Plaintiff. The purchase price was received by the 1<sup>st</sup> and/or the 3<sup>rd</sup> Defendant and it claims the same.

A plain reading of the above averments disclose acts of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants which give the Plaintiff a cause to complain. I agree with Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants that there are no particulars of misrepresentation inducement or fraud. I also agree that the averment in paragraph 17 seems to wholly blame the 2<sup>nd</sup> Defendant. But there is no doubt that the further amended plaint shows acts done by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants which have given the Plaintiff cause to complain.

Madan J.A. as he than was in D.T. DOBIE & COMPANY (KENYA) LTD –V- MUCHINA (SUPRA) observed (*obiter*) as follows:-

**“1. The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out.”**

With respect to the case at hand, I am unable to hold that the Plaintiff’s suit is so weak that it is beyond redemption and incurable by amendment. As I have stated above the Plaintiff has cause to complain against the acts of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The complaint may have been crafted in an unprofessional manner. The defects in my view are capable of being rectified by an amendment.

The upshot of these considerations is that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants’ application dated 29.9.2005 is dismissed.

I make no order as to costs.

Each party has liberty to apply.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF DECEMBER, 2005.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-