



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 50 OF 2002**

**GEORGE MAINA MACHARIA.....1ST PLAINTIFF**

**SAMUEL NDUNGU MAHIANYU.....2ND PLAINTIFF**

**JOSEPH WAWERU MAINA.....3RD PLAINTIFF**

**VERSUS**

**EAST AFRICA DEVELOPMENT BANK.....DEFENDANT**

**RULING**

The Plaintiffs herein have made an application under the provisions of **Order VI Rule 13(a) and (b) of the Civil Procedure Rules** praying for the amended defence filed by the Respondent herein be struck out on the grounds that it did not disclose a reasonable defence and further that the said Amended defence was scandalous, frivolous and vexatious. The Application is supported by the annexed affidavit of George Maina Macharia, the 1st Plaintiff. The Application is opposed. The Defendant has filed grounds of opposition to the Application. The Defendant, through its Regional Manager (Kenya), has also filed a replying affidavit in opposition to the said application for the striking out of the Defendants suit.

At hearing of the Application Mr Karanja, Learned Counsel for the Plaintiffs submitted that the Defendant offered for sale a parcel of land known LR No. 1323 Molo in a public auction. The said parcel of land was sold in the said public auction by a firm of auctioneers called Equity Recovery Services Ltd to the Plaintiffs. The Plaintiffs had bid the sum of Kshs. 1.5 million for the said parcel of land and were successful. The Plaintiffs paid the full purchase consideration of Kshs 1.5 million. However due to the fact that the Auctioneers did not remit the entire purchase consideration to the Defendant, the Defendant was unable to transfer the said property to the Plaintiffs. The Plaintiffs submitted that the Auctioneer was the agent of the Defendant and the fact that the auctioneer did not remit part of the money to the Defendant should not be the concern of the Plaintiffs. The Plaintiffs further submitted that the Defendant to date had not cancelled the deal and therefore the Defence that they had filed did not raise any triable issues. It was the Plaintiffs submission that Defendants had only refunded the sum of Kshs 700,000/= out of the entire purchase price paid. It was therefore the Plaintiffs' submission that the Defence filed by the Defendant was a sham and should to be struck out. The Plaintiffs referred this Court to several decided cases in support of their application.

In response, Mr Kamunyori, Learned Counsel for the Defendant argued that the Defendant was of the view that no proper public auction was conducted by Mssrs Equity Recovery Services Ltd. The Defendant further submitted that there was dispute as to whether the Plaintiffs paid the purchase consideration immediately after the said auction was conducted. Mr Kamunyori further submitted that the said Auctioneer had authority to sell the said property by public auction upto the 27th of February 2001. It was the Defendant's submission that the said Auctioneers did not have authority to sell the said property beyond the said date. The Defendant submitted that the said Auctioneers acted in excess of their instruction and therefore they could not be said to be acting within the instructions issued by the Defendant when they sold the said parcel of land to the Plaintiffs. The Defendant further submitted that the Defence raise substantive and comprehensive issues and was not a sham or frivolous. The Defendant questioned the procedure that the Plaintiffs had used to come to Court and submitted that the rules under which the Plaintiffs had made the application were not specified. The Defendant further submitted that the striking out of pleadings was a drastic action which could only be exercised by the Court in the clearest of the cases. The Defendant urged this Court to dismiss the Application with costs. The Defendant referred this Court to several decided cases in support of its submissions.

I have read the pleadings filed in Court by the parties to this Application. I have also considered the rival arguments made by the Counsel for the Plaintiffs and the Counsel for the Defendant including the decided cases that they referred to. The issue for determination by this Court is whether the Plaintiffs have established their case that the Amended Defence filed by the Defendant was a sham and therefore should be struck out. The other issue for determination is whether the Amended Defence filed by the Defendant raises any triable issues to enable this Court to order that the case goes to full trial. The Plaintiffs filed suit against the Defendant when they were unable to have land parcel LR No. 1323 Molo transferred to them after they had purchased the same in a public auction conducted by Equity Recovery Services Ltd on the instructions of the Defendant. According to the Plaintiffs the said auction was properly conducted. The Plaintiffs averred that they paid the full purchase consideration after they had successfully bid for the said property. The Plaintiffs stated in their Amended Complaint that the Defendant should be ordered to transfer the said property to them or alternatively refund them the entire purchase consideration that they had paid. In the Amended Defence filed, the Defendant denied that there was a public auction which was conducted by Equity Recovery Services Ltd. The Defendant further denied that the Plaintiffs paid the bid consideration as required by the terms and conditions of the auction. The Defendant further stated in its defence that the Plaintiffs did not fulfil the terms and conditions of the said auction so as to enable them to have the said property transferred to them. The Defendant further stated that no consent of the land control was procured. The Plaintiffs have now prayed that the said Amended Defence be struck out as it did not raise any triable issues.

I have considered the Submissions made. The law on the striking out of pleadings is clear. In **Caneland Ltd & Others –versus- Delphis Bank Ltd Civil Appeal No. 20 of 2000 (unreported)**, Lakha JA (as he was then ) stated at page 4 that:

***“The broad principle on which the Court acts to strike out is that apart from specified cases, it is only where it is perfectly clear that the plea cannot succeed or has little substance.”***

In **Kenya Commercial Bank Ltd –versus- Baraka Ochungu & Anor. Nairobi HCCC No 3815/94 (Milimani)** Onyango Otieno J (as he was then ) held that;

***“The law is now well settled that a defendant who shows that he has in his defence at least one triable issue, must be allowed to proceed unconditionally and be heard in his defence at a full hearing .”***

In **Co-operative Bank of Kenya Ltd –versus- Kisii Petroleum Products Ltd Nairobi HCCC No. 1665 of 1999 (Milimani)** (unreported ), it was held at page 2 that

***“striking out a pleading is a draconian action which no Court can do when there is a chance however remote that the Defence raised may result in a difference in respect of the amount to be awarded to the Plaintiff and particularly when such amount to be awarded can only be reached after hearing evidence in Court.”***

In the instant case the Defendant has raised several issues which cannot be determined on the documents exhibited in support of the Plaintiffs Application. The issue raised is whether the said auctioneer had authority to sell the said property to the Plaintiffs and whether the Plaintiffs complied with the terms and conditions of the purchase of the said property in a public auction. The above two issues, to mention but a few, are weighty issues which cannot be determined without oral evidence being taken by the Court to establish the conflicting evidence as exhibited by the rival pleadings filed by the Plaintiffs and the Defendant. In the circumstances therefore, the Plaintiff’s application to strike out the Amended Defence is disallowed. The Amended Defence raises triable issues which can only be determined in a full hearing. The Defendant shall have the costs of this Application.

**DATED at NAKURU this 1st day of October, 2004.**

**L. KIMARU**

**AG. JUDGE**