



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 158 OF 2012

CENTRIF LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. MUKUI KIMATTA T/A KIMATTA & CO. ADVOCATES.....1ST DEFENDANT

2. CHANDUBHAI AMBALAL PATEL.....2ND DEFENDANT

3. VIMLABEN MANUBHAI AMBALAL PATEL.....3RD DEFENDANT

RULING

1. The plaintiff/applicant by its Notice of Motion application dated 30th January 2013 sought the following orders:

1. That the defence and counterclaim herein be struck out with costs.

2. That otherwise judgment be entered against the Defendants/Respondents in terms of the prayers in the plaint.

The application is premised on the provisions of **Order 2 Rule 15 (1), (b), (c) and (d) of the Civil Procedure Rules.**

2. The main grounds for the application are that the defence as filed is a sham and discloses no cause of action as it contains mere denials and offers no serious challenge to the plaintiff's claim, which is a liquidated claim. A supporting affidavit was sworn on the 30th January 2013 by a director of the plaintiff namely Ronald Mwangi Kibuchi. In brief, it is his deposition that there is no valid agreement between the parties as the same was never signed by the Defendants and therefore no binding contract was ever executed, and therefore the Defendants were obligated to refund the deposit paid for the purchase of the subject property **Nakuru/Municipality Block 9/67** in the sum of **Kshs.8.2 Million.**

3. In opposing the application, the defendants filed a Replying affidavit sworn by Dominic Mukui Kimatta on the 10th May 2013 the first Defendant. Referring to the Sale Agreement dated 18th June 2011 and duly executed by all the parties it was deponed that by Clause 4.1 of the said agreement, and the plaintiffs having breached the terms of the said Sale agreement, the defendants forfeited the 10% deposit and thus no amount of money is refundable to the plaintiffs by the defendants, which claim is supported by the defence and counter claim as filed and therefore triable issues arise that ought to go for full trial.

4. Parties filed written submissions in support of their respective positions. I have read them, as well as the plaint, defence and counterclaim. I have also looked at the annexures to the supporting affidavit and replying affidavit.

5. The plaintiffs position is that as the defendants failed to execute the sale agreement, there was no valid sale agreement, and were therefore obligated to refund the deposit paid having received the deposit through the first defendant to hold the same as stakeholders pending completion. Relying on the cases **Kenya Commercial Bank Ltd -vs- Suntra Investments Bank (2015) e KLR**, and **Equitorial Commercial Bank Ltd -vs- Jodam Engineering Works Ltd & Others (2014) e KLR**, it was submitted that the defence and counterclaim did not disclose any reasonable cause of action but only made to delay the fair and expeditious disposal of the case.

6. The defendants joint submissions are that there was a valid sale agreement executed by all the parties and the terms thereof bind all, that all allegations of fraud labelled against them are denied and subject to proof.

It is submitted that contrary to the plaintiff's contention, it is the plaintiff who breached the sale agreement and therefore the default clause is applicable thus forfeiture of the deposit paid.

7. From the above, the issues that arise concerning the application as I can discern are:

(1) *Whether there was a duly executed and valid sale agreement between the parties in terms of **Section 3 of the Law of Contract Act** and if so, whether the default **Clause No 4.1** of the alleged sale agreement dated the 18th June 2011 can be invoked.*

(2) *Whether the Defendants altered the contents to the sale agreement thereby committing fraud.*

(3) *Whether defendants breached the sale agreement by failure to release the completion documents to the plaintiffs financier.*

(4) *whether the defence and counterclaim disclose any defence or cause of action.*

8. The above in my opinion, are weighty issues that require full interrogation and determination. In **KCB -VS- Suntra Investments Bank (2015) e KLR**, the court held that:

“Although courts have been loath to enter summary judgment as it is seen to be a draconian measure, it should be entered in the clearest of cases where:

(a) The amount claimed has been specified

(b) The amount claimed has been ascertained or is capable of being ascertained

(c) The amount claimed is due and payable.

The above sediments were also held in the **Equatorial Commercial Bank Ltd (Supra)**. I fully agree with the applicant that summary procedure is intended to give efficacious and speedy determination of a claim but only in very clear cases. See **Diamond Trust Bank Ltd -vs- Jodam Engineering Works Ltd and 2 Others (2014) e KLR**

I add that such should only be resulted to if the pleadings, documentation and in this case affidavit evidence all agree on the issues and not otherwise more so where issues of fraud are raised.

9. I have looked at the documents filed by the plaintiffs together with the plaint. It is filed an undated Draft Sale Agreement and forwarded on the 24th February 2011, and another.

I have also seen documents filed by the defendants. A duly executed sale agreement dated 18th June 2011 and witnessed by Mburu Maina and Company Advocates for both parties and a certificate is filed.

10. The question that begs an answer is whether there was indeed a a duly executed and valid sale agreement between the parties hereof. The defendants claim that there was a valid Sale Agreement whose terms bide the parties.

The plaintiff submits that there is no valid sale agreement between the parties whereas the defendants claim otherwise. Without a doubt, this is a fundamental issue that the court ought to determine before going into the the rest of the issues – which flow therefrom, as it determines the legal status of both parties as envisaged under **Section 3 of the Law of Contract Act**.

11. In my view, this is not one of the clearest, plain and obvious cases where summary procedure may be invoked. Allegations of fraud have been raised. Such allegations must be strictly proved beyond reasonable doubt, and not on a mere balance of probabilities See **R.G. Patel -vs- Valji Kamanji (1957) EA 314** as cited in **Harit Sheth T/A Harit Sheth Advocates -vs- Sherman Charania (2014) e KLR** where the Hon. Judges of appeal held that:

“---if the defendant shows a bona fide triable issue, he must be allowed to defend without condition---”

12. As to what constitutes triable issues, in **Kenya Trade Combine Ltd -vs- Shah Civil Appeal No. 193 of 1999**, the Court held:

“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.”

13. Having so stated, it is my findings that there are numerous triable issues that can only be resolved in a full hearing. The defendants must be afforded a chance to defend their claims as stated in their defence and counterclaim. I decline to strike out the same.

Accordingly, I find no merit in the application date 30th January 2013. It is dismissed with costs.

Dated, signed and delivered in open court this 15th day of September 2016.

JANET MULWA

JUDGE