



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 364 OF 2010

MUNICIPAL COUNCIL OF RUIRU PLAINTIFF

VERSUS

CELINA WAMBUI KIGWE DEFENDANT

RULING

The Defendant is seeking orders that the Plaintiff filed herein dated 28th July 2010 be struck out with costs. The grounds are contained in the Defendant's application dated 22nd November 2011 and her supporting affidavit sworn on the same date. After perusal of the said Plaintiff, it is revealed that the Plaintiff is seeking relief in terms of specific performance of the Agreement for Sale dated 12th August 2008, general damages for breach of contract and costs of the suit. The terms of the said sale agreement in summary were that the Defendant was to sell and the Plaintiff to buy 10 acres of land out of the Defendant's parcel of land known as L.R. No. 10823/17. The purchase price was Kshs 4,950,000/=, of which Kshs 2,500,000/= was paid by the Plaintiff to the Defendant.

The Defendant avers that the transaction contemplated by the said Sale Agreement is void for reasons that the mandatory land control board application was not made within six months of the said date; the said agreement has not been signed by two authorized officials of the Plaintiff under its Common Seal; and that the Plaintiff did not comply with the mandatory provisions of the Public Procurement and Disposal Act No. 2005.

The Defendant further states that general damages cannot be awarded for breach of contract, and therefore the Plaintiff's suit cannot be sustained as it does not disclose any reasonable cause of action and is frivolous, vexatious and an abuse of the Court process.

The Plaintiff responded in a Replying Affidavit sworn by its Clerk, Lesley Khayadi on 22nd December 2011. The Plaintiff avers that the Defendant does not deny that any agreement was entered into, nor does she deny having received the down payment of the purchase price totaling to Kshs.2,500,000/=. Further, that the Defendant should not be absolved from her contractual obligation, and that allowing the application will amount to allowing the Defendant to benefit from an illegality to which she is the prime mover.

The Advocates for the Plaintiff and Defendant made oral submissions during the hearing of the application on 17th January 2012. The Defendant's Advocate relied on section 8 of the Land Control Act that provides that an application for consent of the Land Control Board must be made within 6 months of the sale agreement of a controlled transaction. Further, that the sale of agricultural land as was the case in the present agreement, is a controlled transaction under section 6 of the said Act and no consent had been given by 12th February 2008, 6 months after the sale agreement dated 12th August 2008. The Advocate cited **Hirani Ngaihe Githire v Wanjiku Munge (1976 – 1980) 1 KLR 1132** and **William Ocharo Maangi v Joseph Onyoni Kombo, Civil Appeal 18 of 1995** as authority for the position that such an agreement is illegal and void, and that the remedy is to recover the consideration paid.

The Defendant also contends that the purchase of the said land by the Plaintiff was subject to the Public Procurement and Disposal Act, as the Plaintiff is a public entity within the meaning of section 3(d) of the said Act and ought to have followed the procedures in section 4 of the Act. The Defendant's Advocate in his submissions relied on the decision in **Kenya Transport Association v Municipal Council of Mombasa & Anor. H.C. Constitutional Petition No. 6 of 2011 (Mombasa)** for his argument that the sale as thereby void and a nullity for reasons of such non compliance.

The Plaintiff's Advocate in his submissions contended that under the said sale agreement it was the Defendant as the vendor who was to get the Land Control Board consent within 6 months, and she could not absolve herself from the obligation by declaring the sale agreement null and void. The Plaintiff's Advocate also submitted that this issue was canvassed by the Defendants in the application dated 28th July 2010 and a ruling given on the same by Honourable J. Okwengu (as she then was) on 10th December 2010.

The Plaintiff also submitted that section 29(3) of the Public Procurement Act provides instances when a public entity can make a direct procurement including when there is written approval by its tender committee. Further, that the Plaintiff's council approved the acquisition of the land from the Defendant and the Plaintiff were therefore within the law. The decision in **Kenya Transport Association v Municipal Council of Mombasa & Anor** was distinguished by the Plaintiff's Advocate on the ground that the sale in the cited case was carried out in secrecy, unlike that in the present suit. Finally, the Plaintiff's Advocate relying on this Court's decision (**Asike Makhandia J.**) in **Kenindia Assurance Ltd v Laban Idiah Nyamache H.C Civil Appeal 141 of 2009 (Kisii)**, argued that the powers to strike out a suit are draconian and need to be exercised sparingly.

After consideration of the pleadings filed in this case and the submissions by the parties, the main issue for consideration is whether the Plaintiff filed herein by the Plaintiff discloses any reasonable cause of action, or is frivolous or vexatious in light of the reasons given by the Defendant to justify its striking out.

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in **D.T.Dobie & Company (Kenya) Ltd. v. Muchina**[1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and 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 a case before it.”

I will at the outset state that I do not find the Plaintiffs’ suit frivolous or vexatious, as there is a sale agreement entered into between the Defendant and Plaintiff, which is a fact that is not disputed by either party. The Plaintiff’s suit therefore raises substantive legal issues that need to be considered and determined. I will also not belabour the issue of whether the grounds alleged by the Defendant merit a striking out of the Plaint. This is because this issue has already been decided by this court in two previous rulings. On 10th December 2010 Honourable J. Okwengu (as she then was) did consider the said grounds in deciding the Plaintiff’s application dated 28th July 2010 for injunctive relief, and found that an issue arose as to whether the Defendant can rely on her own default to absolve her from her contractual obligation.

The Defendant’s Advocate argued that the ruling of 10th December 2010 was given *ex parte*, and indeed it was. However, the Defendant did thereafter make an application dated 20th January 2011 to set aside the orders given on 10th December 2010, and to have the Plaintiff’s application of 28th July 2010 heard and determined *inter partes*. The Defendant in the said application relied on her Replying affidavit to the Plaintiff’s application of 28th July 2010 sworn on 21st September 2010, and in which she *inter alia* deponed as follows:

“...that the said application and the entire suit is fatally defective on the following grounds:

- i) The Sale Agreement dated 12th August, 2008 is void for all purposes as no application for the mandatory land control board consent was made within six months of the said date.
- ii) The said sale agreement was not executed on the part of the Plaintiff/Applicant by two authorized officials of the plaintiff under its Common Seal.
- iii) The Plaintiff did not follow the mandatory provision of the Public procurement and Disposal Act Chapter 3 of 2005 which applies in respect of any purchase of property by the Plaintiff....”

Honourable J. Koome (as she then was) in her ruling on the Defendant’s application dated 20th January 2011 which was delivered on 7th November 2011 stated as follows, after considering the pleadings filed and the earlier ruling given by Honourable J. Okwengu (as she then was) :

“Bearing in mind all the issues in controversy, I am of the opinion that this matter should proceed to hearing of evidence to determine those issues that have been raised in the replying affidavit and also the ruling.”
The Honourable judge then proceeded to direct the parties to comply with the Civil Procedure Rules by filing witness statements, list of documents and agreed issues within 90 days.

I therefore find that the grounds for this application and have already been considered and determined by this Court, and that as was stated in the previous rulings cited, there are triable issues raised by the pleadings and submissions made that need to proceed to full trial. For this reason the Defendant’s application dated 22nd November 2011 is dismissed. The parties shall proceed as directed in by Honourable. J. Koome (as she then was) in the ruling delivered on 7th November 2011.

The Defendant shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____1st____ day of ____March____, 2012.

**P. NYAMWEYA
JUDGE**