

REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 503 of 2010

JOHN GUCHU NJOROGE.....PLAINTIFF

VERSUS

MBOI KAMITI FARMERS COMPANY LIMITED..... DEFENDANT

RULING

1. The plaintiff/applicant hereinafter referred to the applicant filed a Notice of Motion dated 20th September 2011 under Order 2 Rule 15(1) b and c, Order 51(1) of the Civil Procedure Rules and Section 3A of the Civil procedure Act, Chapter 21, Laws of Kenya seeking the following orders;

- i. That this Honourable Court be pleased to strike out the defence.
- ii. In the alternative to prayer 1 the contents of paragraph 2, 3,4,5,6 and 7 of the defence be struck out.
- iii. Interlocutory Judgment be entered for the plaintiff and the matter to proceed for formal proof.
- iv. The costs of this application and of the suit be paid by the defendant.

The application is based on the following grounds.

- i. The defence is scandalous, frivolous and vexatious.
- ii. The defence is otherwise an abuse of process of the Court.
- iii. The defence does not comply with the mandatory provisions of Civil Procedure Act.

The application was supported by the supporting affidavit of John Guchu Njoroje dated 20th September 2011. He avers as follows; that by an agreement dated 17th July 2007 the defendant sold to him the following parcels of land;

1.	Ruiru/kiu Block 4/1681	Ruiru/kiu Block 174/1710	Ruiru/kiu Block 334/1799
2.	Ruiru/kiu Block 4/1682	Ruiru/kiu Block 184/1712	Ruiru/kiu Block 344/1801
3.	Ruiru/kiu Block	19Ruiru/kiu Block	35Ruiru/kiu Block

	4/1685	4/1713	4/1802
4.	Ruiru/kiu Block 4/1690	Ruiru/kiu Block 204/1715	Ruiru/kiu Block 364/1828
5.	Ruiru/kiu Block 4/1692	Ruiru/kiu Block 214/1730	Ruiru/kiu Block 374/1890
6.	Ruiru/kiu Block 4/1693	Ruiru/kiu Block 224/1743	Ruiru/kiu Block 384/1891
7.	Ruiru/kiu Block 4/1694	Ruiru/kiu Block 234/1713	Ruiru/kiu Block 394/1928
8.	Ruiru/kiu Block 4/1695	Ruiru/kiu Block 244/1715	Ruiru/kiu Block 404/1930
9.	Ruiru/kiu Block 4/1696	Ruiru/kiu Block 254/1744	Ruiru/kiu Block 414/1969
10.	Ruiru/kiu Block 4/1697	Ruiru/kiu Block 264/1748	Ruiru/kiu Block 424/1995
11.	Ruiru/kiu Block 4/1698	Ruiru/kiu Block 274/1766	Ruiru/kiu Block 434/2014
12.	Ruiru/kiu Block 4/1700	Ruiru/kiu Block 284/1767	Ruiru/kiu Block 444/2031
13.	Ruiru/kiu Block 4/1702	Ruiru/kiu Block 294/1785	Ruiru/kiu Block 454/2035
14.	Ruiru/kiu Block 4/1704	Ruiru/kiu Block 304/1787	Ruiru/kiu Block 464/2050
15.	Ruiru/kiu Block 4/1705	Ruiru/kiu Block 314/1790	
16.	Ruiru/kiu Block 4/1707	Ruiru/kiu Block 324/1791	

That at the time of the said sale the Commissioner of lands had issued allotment letters to the defendant being the 1st step towards the processing and registration leases. Accordingly the transfers by the defendant to him had to await the processing and registration of formal leases in favour of the defendant, that in order to facilitate the smooth transfer of the parcels the defendant executed an irrevocable power of Attorney dated 25th July 2007, wherein the defendant appointed him as its agent in all dealings in respect of the parcels of land. The defendant thereafter granted possession of the said parcels of land to him pending the processing, issuance and registration formal leases and transfer in my favour. That the processing of the leases commenced after he paid the conveyance fees, registration fees and stamp duty. That the allegations contained in paragraph 3 of the defence that the defendant did not sell the said properties are frivolous and are not maintainable and the said paragraph ought to be struck out. That the allegation contained in paragraph 4 of the defence that the defendant had repaid the sum is also not maintainable as the defendant did not repay the sum as alleged. That no particulars or evidence of such payment has been given. That allegation that the transaction was fraudulent in paragraph 5 has no basis. That the sale agreement and power of attorney were signed by the defendants directors Michael Njuguna Kungu and Peter Wahinya Muiruri who were the registered directors of the defendant as per the letter by

Registrar of Companies. The said transaction had been approved by the defendant board of directors as per the extract of board resolution. That the allegation of fraud is scandalous and vexatious in absence of particulars of fraud and the defence is a sham consisting of mere denials and should be struck off.

2. The defendant opposed the application through a Replying affidavit of Thou Mathenge, the chairman of the Board of directors of the defendant company dated 8th December 2011. He depones as follows; that the defendant's application is mischievous and incurably defective and ought to be dismissed in *limine* for seeking diverse orders lumped under one application. That the plaintiff's allegations that he purchased the suit properties herein in the year 2007 is false and misleading as no evidence has been tendered to show how the previous sale transaction was rescinded mutually and or how the defendant is holding the suit premises in trust for the plaintiff. That to confirm the fraudulent activities of the purported Executive Chairman and secretary, some of the said plots were again sold in August 2008 without a valid board resolution. That the beneficiary of the aforesaid sale has now filed a suit at Kiambu law Courts being case No. 173 B of 2010 and has obtained a decree in his favour. That the current board was elected recently and realized these fraudulent acts and has taken precipitate action to have such transactions declared null and void. That all these issues are raised in the defendant's defence filed, in particular at paragraph 5 of the defence, the particular of fraud being that no board resolution was ever made to warrant the sale of the suit premises.

3. The Respondent did not attend the hearing of the application though served with the date. Counsel for the plaintiff filed written submissions in support of the application and cited the following cases; **Showind Industries Ltd Vs. Guardian Bank Ltd & another 2002 Klr, Natgil Enterprises Ltd Vs. Gatukuyu Coffee Growers (1998) Klr, Coast Projects Limited Vs. M. R Shah Construction Ltd Mombasa HCC No. 48 of 2000 and D.T. Dobie & Co Vs. Muchina 1982 Klr.** I have read the affidavits filed together with annexures, the defence that is being challenged and the cases cited I find as follows; for a defence to be struck out under order 2 rule 15 (1) (b) and (c) the plaintiff has to show that the defence;

- i. is scandalous, frivolous or vexatious; or
- ii. It may prejudice, embarrass or delay the fair trial of the action, and the Court may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

4. In the defence filed the respondent raises issues at paragraph 5 that the alleged sale was fraudulently and was done by the plaintiff in collusion with the unnamed Executive Chairman and secretary of the defendant. That the same was a fraud as no board resolution was ever made in compliance with the defendant's memorandum and Articles of Association. This issue is retaliated in the replying affidavit of Mr. Mathenge at paragraphs 6 of his replying affidavit. At paragraph 6 of the defence the defendant also raises another issue of a suit involving the suit premises that was filed at Kiambu Courts which is again retaliated at paragraph 7 of Mr. Thuo's replying affidavit. At paragraph 8 of the replying affidavit Mr. Thou states that the current board realized that fraudulent acts had taken place and has taken precipitate action to have the transactions declared as null and void. The defence on record raises triable issues. I find that the applicant has not shown that the defence was frivolous or scandalous or that it will delay the fair trial of this suit. The applicant has an injunction to preserve the status quo. Although the defence on record does not particularize the fraudulent activities I find that it raises triable issues at paragraphs 5 and 6 of the defence dated 19/8/2011. The applicant should fix this matter for trial so that the issues raised can be determined once and for all. I therefore decline to grant the prayers sought in the application dated 20th September 2011. Cost in the cause.

Orders accordingly.

Dated, signed and delivered this 2nd day of July 2012.

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk