



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 388 of 2011

PETER THURANIRA NDUBAI PLAINTIFF/APPLICANT

VERSUS

KIRIINYA MWENDIA MWITHIMBU DEFENDANT/RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 29th February 2012 filed by the Plaintiff, Peter Thurania Ndubai. It was filed under Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and Order 13 rules 1, and 2 of the Civil Procedure Rules, as well as Section 120 of the Evidence Act (Cap 80). It seeks the following orders:-

- 1. That the statement of defence filed herein on 15th February, 2012 struck (sic) from the pleadings on admission.**
- 2. That judgment on admission be entered in terms of prayers i, ii, iii, iv and v of the plaint.**
- 3. That costs of the application be provided for.**

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn on 29th February 2012, by John M Khaminwa, advocate for the plaintiff. It was deponed in the said affidavit that the defence did not disclose any ground at all for refusing to grant the orders sought and was a mere denial and delay tactic employed by the defendant to frustrate the plaintiff from the agreement signed between the parties. That the conduct of the defendant caused the plaintiff to believe that the defendant would complete the transactions, thus the defendant is estopped from denying otherwise.

The application is opposed and a replying affidavit sworn by the defendant on 18th April 2012 was filed. It was deponed that the defendant denied every allegation in the plaint, and that the defence raised substantial legal issues.

The plaintiff filed written submissions, and the defendant filed a list of authorities and copies of the said authorities. On the hearing date, learned counsel for the plaintiff, Mr Albert Khaminwa, made oral submissions. Learned counsel for the defendant, Mr Khaseke, also made oral submissions.

I have considered the application documents filed, as well as the submissions and authorities. I have

perused the plaint and the defence. In the defence, there is part admission in paragraph 4 as follows:-

4. The defendant admits the contents of paragraph 4 of the plaint in so far as it states that the purchase price agreed was Kshs.4,960,000.00 and the deposit amount as Kshs.1,500,000.00 to be paid on approval and execution of the Sale Agreement. The defendant denies that the deposit was to be paid upon confirmation that the vendor has caused to be surveyed and beacons pointed out to the purchaser and puts the plaintiff to strict proof thereof.

Counsel for the plaintiff has argued that the above admission, and the conduct of the defendant has shown that there is unequivocal admission. Therefore, there is no triable defence. Counsel for the defendant has, on the other hand, argued that there is an arguable defence.

The court has discretion to enter judgment on admission. However, such discretion, has to be exercised judicially, not on whims. In the case of **Choitram –vs- Nazari (1984) KLR 327**, it was held *inter alia*:-

5. An order for judgment on admission under the Civil Procedure Rules Order XII Rule 6 should only be made if it is plain that there are either clear express, or clear implied, admissions.

It must be emphasized that an order for entry of judgment on admission, finally determined the proceedings. It is not an interlocutory order, but a final determination of the court in the subject litigation. In my view, courts must be slow in granting such orders, before hearing the parties substantively. In this, I am fortified by Article 159(2) (d) of the Constitution of Kenya 2010, which provides:-

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

- (a)
- (b)
- (c)
- (d) **Justice shall be administered without undue regard to procedural technicalities; and**
- (e)

In my view, the above provisions of the Constitution require that, as far as possible, substantive rather than technical justice be administered. In the present situation, I am of the view that the technical point of unequivocal admission, has not been established to justify judgment being entered on admission without hearing the evidence from parties. I am of the view that though there is admission on the existence of the contract, there are triable issues. I conclude that the application is not merited, and have to dismiss the same.

Consequently, the application is dismissed. However, costs will be in the cause.

Dated and delivered this **9th** day of **July** 2012.

.....

George Dulu

Judge

In the presence of:

Nyalo – Court clerk

N/A for Plaintiff

Mr Mutinda Kimeu holding brief for Mohamed Muigai for Defendant