



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Suit 126 of 2005**

**SIEGFRIED HOFSTETTER ..... PLAINTIFF**

**VERSUS**

**RANGATIRA LIMITED ..... DEFENDANT**

**RULING**

1) **“With a view to eliminate delays in the administration of justice which would help litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim of the Plaintiff under the summary procedure provided under Order 35 subject to there being no bona fide triable issues which would entitle a Defendant to leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”** Per Madan, JA in **Continental Butchery Ltd vs. Nthiwa (1989) KLR 573**.

2) With the above quoted words, Madan, JA (as he then was) captured the first principles of applications for summary judgment that where there are no triable issues raised or where the triable issues offered are sham, the court will grant an application for summary judgment to eliminate delays in administration of justice. It is the application for this principle in the present case that will determine the outcome of the Plaintiff’s application dated 17<sup>th</sup> October 2005.

3) Regrettably, I have been unable to deliver a decision on the application since 20<sup>th</sup> January 2012 when it was due on account of heavy workload and long absences from the court on official duties within and out of the country. Of greater regret is the delay in the prosecution of the application since it was filed on 17<sup>th</sup> January 2005 to the 16<sup>th</sup> November 2011 when I took the parties’ written submissions and reserved the ruling thereon. So far as I can discern from the record on the proceedings, the delay in the hearing of the application was occasioned by several factors, namely: -

a) Intervening applications for striking out of affidavit, for enlargement of time to file further affidavit, for directions as to submissions and highlighting thereof, and for interlocutory injunction (which is still pending determination, since it was filed on 2<sup>nd</sup> September 2010).

b) Apparent absence of the Plaintiff in the country and consequent lengthy delays in filing of documents. For example, the application of 17<sup>th</sup> October 2005 first came up for hearing close 2 years later on 20<sup>th</sup> June 2007; the further affidavit permitted by the court on 20<sup>th</sup> June 2007 was not sworn until 8<sup>th</sup> April 2008 and was not deemed filed until 3<sup>rd</sup> November 2008 upon an application for that purpose filed on 4<sup>th</sup> September 2008.

c) Delays in filing submissions by the parties – while the Plaintiff filed his submissions on 22<sup>nd</sup> March 2011, the Defendant filed its submissions seven months later on 31<sup>st</sup> October 2011 although the order for written submissions was first made on 27<sup>th</sup> September 2010.

4) By a Plaint dated 25<sup>th</sup> March 2005 the Plaintiff sought, in effect, the specific performance of a sale agreement of a 0.5-acre portion of the suit property LR No. 1890/1/MN which he claimed to have entered into with the Defendant Company on 16<sup>th</sup> October 1980. The Plaintiff claimed that he had registered a caveat on the title on 24<sup>th</sup> March 1984 and subsequently in the year 2000, at his own cost, undertaken survey of the plot but was denied entry when he sought to take possession of the plot. Hence this suit against the Defendant, seeking: -

a) Mandatory injunction compelling the Defendant to

- i. Allow Plaintiff to survey and sub-divide the plot and fix beacons
- ii. Release original title to Plaintiff's advocate for registration or transfer
- iii. Execute transfer in favour of the Plaintiff

b) Permanent injunction restraining the Defendant from interfering with Plaintiff's occupation and use of the plot.

5) In its defence dated 22<sup>nd</sup> July 2005 the Defendant while admitting the agreement for sale in 1980 averred principally that the same was rescinded and a refund of the purchase price in full made by the Defendant's then shareholders who had transferred the company to the present shareholders on that understanding. The Plaintiff then sought the striking out of the defence for being scandalous, frivolous, vexatious and likely to prejudice or embarrass the fair trial of the action. To that application for striking out dated 17<sup>th</sup> October 2005, the parties have filed their respective affidavits, in support and in opposition, respectively, together with corresponding written submissions on their rival contentions, supported by case law authorities.

6) The central issue in the application is therefore whether there are triable issues to justify the Defendant's unconditional leave to defend or whether the triable issues offered are sham as to entitle the Plaintiff to summary judgment as sought. Applying the principle of the rule in **Continental Butchery** case, I have established that the Defendant has raised the following bona fide triable issues: -

a) When in accordance with the agreement for sale, the cause of action arose to determine whether the suit is barred by the Statute of Limitation, the Limitation of Actions Act Cap 22;

b) Whether the sale agreement was in accordance with the Law of Contract Act, Cap 23 to enable the Plaintiff to sue upon it in terms of section 3 thereof;

c) Whether the agreement was effectively rescinded by the Defendant; and

d) Whether the full purchase price of the suit property was refunded to the Plaintiff.

7) While the determination as to whether the sale agreement complied with section 3 of the Law of Contract Act and whether the suit is barred by statute are matters of law, the latter depends on the interpretation of the terms and conditions of the sale agreement which must be proved. Rescission and refund of the purchase money must also be proved at trial, and I find these issues, to the extent that they are matters of fact, to be bona fide issues for trial. I would also heed the caution in the Court of Appeal decision in **D.T. Dobie Co. Ltd v. Muchina (1982) KLR 1**, that power to strike out pleadings without the benefit of the full facts of the case should be used sparingly.

8) Accordingly, for the reason of the existence of triable issues, and while regretting that the suit is not

brought to an expedited end, I would dismiss the Notice of Motion dated 17<sup>th</sup> October 2005 with costs to the Defendant. In view of the delay in the conclusion of the suit, I direct that the suit be listed for full hearing on priority basis within the next 30 days.

**Dated and delivered on this 10<sup>th</sup> day of October 2012.**

**EDWARD M. MURIITHI**  
**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... Court Clerk