



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 208 of 2009

**NELSON MUTURI DUMBEYIAPLAINTIFF
V E R S U S
KENYA INDUSTRIAL ESTATES LIMITEDDEFENDANT**

R U L I N G

The Plaintiff has applied by chamber summons dated 3rd June, 2009 for an order to strike out the Defendant's defence dated 11th May, 2009. The application is brought under **Order 6, rule 13 (1) (b), (c), and (d) of the Civil Procedure Rules (the Rules)**. The grounds for the application appearing on the face thereof are set out in rather flowery language. They are:-

- “1. That the defence is a shameless denial of the most basic of facts and consequently it is scandalous.**
- 2. That the defence is calculated to annoy in denying the most obvious of facts and consequently it is vexatious.**
- 3. That the defence is a bare denial thus a frivolous pleading.**
- 4. That in law and in equity no person has a right to deliberately mislead, misinform or deceive another person yet the Defendant by its defence suggests that it has the right to deceive another person and (that) while so deceiving there is a duty on the victim of (the) deception to exercise due diligence.**
- 5. That it is trite law that a party who deliberately misleads, misinforms and/or deceives another about the locality of a property for sale cannot in the eyes of equity stand before a court to defend such deliberate misdeeds.**
- 6. That the defence preferred by the defendant is a callous aberration of the Plaintiff's right which a court of equity being a court of conscience cannot countenance.**
- 7. That the Plaintiff indeed issued the deposit cheque and held meetings with the Defendant and indeed demanded a refund of the deposit to no avail despite the Defendant's shocking denials.**
- 8. That the defence is prejudicial to the Plaintiff's rights and is thus calculated to embarrass and delay the fair trial of the action.**
- 9. That the defence constitutes an abuse of the court process”.**

There is a supporting affidavit sworn by the Plaintiff.

The Defendant did not file any papers in response to the Plaintiff's application. But it applied by chamber summons dated 24th September, 2009 for leave to amend its defence under Order 6A, rule 3 of the Rules. The grounds for that application appearing on the face thereof are:-

- “(a) That at the time of filing of the defence, all particulars of the suit were not available.**
- (b) That upon pre-trial preparations, it has become necessary that the amendments sought herein be effected to bring all the issues in controversy before this court for determination once and for all.**
- (c) That the amendment sought will not be prejudicial to the Plaintiff.**
- (d) That it is in the interests of justice that this application be allowed.**
- (e) That no prejudice whatsoever or at all shall be visited upon the Plaintiff if the**

orders sought herein are granted”.

The Plaintiff has opposed the Defendant’s application by a replying affidavit filed on 1st October, 2009. The grounds of opposition emerging from the replying affidavit include:-

- 1. That as the Defendant has not opposed the Plaintiff’s application to strike out the defence, allowing its application to amend the defence would amount to allowing it to both approbate and reprobate in the same cause of action.**
- 2. That the proposed amendments are a “total and complete departure from the original defence” seeking to substitute the entire defence.**
- 3. That allowing the application will prejudice the Plaintiff.**
- 4. That the application is an abuse of the process of the court.**

Both applications were heard together. I will take the Defendant’s application as its answer to the Plaintiff’s application. I have read the affidavits filed in connection with the two applications. I have also considered the submissions of the learned counsels appearing, including the many cases cited.

The substance of the Plaintiff’s case as set out in the plaint is that pursuant to an advertisement placed by the Defendant’s agent, he successfully bid for a piece of land in a public auction conducted by the Defendant’s agent. He paid KShs. 150,000/00 being 25% of the purchase price of KShs. 600,000/00 and prepared the balance for payment. He has further pleaded that his decision to bid for purchase of the property was informed by the advertised location of the property, a location confirmed by the Defendant’s agent. It is further pleaded that it turned out later that the property was not at the advertised location but at some 35 kilometres away at a far inferior location. The Plaintiff has further pleaded that on discovering this he decided not to proceed with the purchase and asked the Defendant to refund the part-purchase paid, which the Defendant has refused or neglected to do. It is his case that he was entitled to cancel the purchase on account of the Defendant’s fraudulent misrepresentation and/or negligence regarding the location of the property.

In its defence the Defendant denied:-

- (i) that there was any advertisement of sale as alleged, or that particulars of the property were given as alleged;**
- (ii) that any confirmation of particulars of the property were given by the Defendant’s servants or agents;**
- (iii) that the Plaintiff participated in any auction involving the Defendant or its agents, or that any sale was concluded; or**
- (iv) that the Plaintiff paid any deposit.**

The Defendant pretty well denied all the averments of fact set out in the plaint. It also pleaded the doctrine of caveat emptor.

To the affidavit sworn in support of the Plaintiff’s application are annexed documents that leave little doubt, if any, that indeed certain properties, including the suit property herein, were advertised for sale by public auction by an auctioneer; that indeed the Plaintiff participated in the auction and successfully bid for the suit land; that he paid KShs. 150,000/00 as part-purchase price thereof; that he made arrangements to pay the balance of the purchase price; that the Plaintiff, through his advocates, subsequently entered into correspondence with the auctioneer and the Defendant regarding location of the property and refund of the part-purchase price paid.

But in the Plaintiff’s affidavit sworn in opposition to the Defendant’s application he has acknowledged that there is one important issue between the parties to be resolved. That issue is whether or not the property was at the location advertised or at a completely different location. The Plaintiff states that his suit will stand or fail upon this one issue. It is obvious that this issue will require tested evidence to be tendered. Such evidence can only be available at the trial. The Plaintiff has even suggested that to save on court’s time the issue can be referred to the chairman of the Institute of Surveyors of Kenya to appoint a “reputable land surveyor to file a report before this court on the true locality of the subject property”. He has even offered to meet the costs of such referral. Such referral can, of course, be made only by consent of the parties under Order 45 of the Rules.

It is true that the Defendant's defence as it now stands is really a general denial. But faced with the Plaintiff's application to strike it out the Defendant has quickly moved the court for leave to amend in order to properly and specifically plead its defence. The proposed amendments may indeed amount to a complete overhaul of the defence, but I see nothing wrong with that if the net effect will be to enable the court to properly adjudicate the real issue between the parties. And we should not forget that the Plaintiff himself has acknowledged that there is at least one serious issue of fact between the parties to be resolved. It is not difficult to see that there are also serious issues of law involved in the suit. Having considered all matters placed before the court, and for the reasons given above, I must refuse the Plaintiff's application by chamber summons dated 24th September, 2009. It is hereby dismissed, but costs thereof shall be in the cause. I will allow the Defendant's application by chamber summons dated 24th September 2009. But I will award costs thereof to the Plaintiff. I assess those costs at KShs. 20,000/00 which must be paid within 14 days of delivery of this ruling. In default of payment the Plaintiff may execute for the same.

The Defendant may file and serve an amended defence within seven (7) days of delivery of this ruling. The Plaintiff shall be at liberty to file a reply to the amended defence within fourteen (14) days of service of the same. Those shall be the orders of the court.

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2009

H. P. G. WAWERU
J U D G E

DELIVERED THIS 13TH DAY OF NOVEMBER, 2009