



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
CIVIL CASE NO. 374 OF 1997  
ROSE WATHIRU WARUINGE..... PLAINTIFF  
VERSUS  
JOHN NJENGA KIMANI ..... DEFENDANT**

**RULING**

This application by way of chamber summons brought under Order VI Rule 13(b) (c) and (d) and Order XXV Rule 1 & 2 Civil Procedure Rules seeks orders that the defence herein be struck out. The application is opposed. The parties entered into a sale agreement on 18.2.94 whereby the defendant agreed to sell and the plaintiff agreed to purchase 3 acres out of L.R. No. 2246/4 Langata pursuant to the said agreement. The plaintiff paid the defendant a sum of Sh.400,000/- part payment, which was fully acknowledged by the defendant. The sale never went through. The plaintiff claimed breach of the part of the defendant and filed this suit claiming special damages as well as general damages for breach of contract. In the alternative he sought orders for specific performance.

The defendant filed a defence claiming that the plaintiff had unilaterally altered the agreement in respect of the acreage to be excised and therefore the agreement was frustrated. The defendant contends that by reason of the plaintiff's alteration of a material part of the agreement, the sale fell through when time lapsed and no mutual extension of completion date set or agreed upon, thereby the plaintiff frustrated the contract further. Counsel for the defendants submit that the plaintiff's application is incompetent in that it does not state in general terms the grounds of the application. Further he submits that the defence raises triable issues. I have perused the defence and I am satisfied that it raises triable issues and I agree with the counsel for the defendant's submission that this suit should proceed to trial.

This application is therefore dismissed with costs.

**Dated and delivered at Nairobi this 16th day of March, 1999.**

**J.L.A. Osiemo**

**JUDGE**