REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. E615 OF 2025

BETWEEN

THE SKYPEAK LIMITED…… PLAINTIFF

AND

RICHARD MBUI MAINA……DEFENDANT

RULING

Introduction and Background

1. By his application dated 21st October 2025, the Defendant seeks to strike out the Plaintiff's suit filed through its plaint dated 18th September 2025. The application is supported by the Defendant's affidavits sworn on 21st October 2025 and 17th November 2025. It is opposed by the Plaintiff through the replying affidavit of sworn by its director, Yunxia Gao sworn on 29th October 2025.

2. It is common ground that the Defendant is the registered owner of the property known as L.R. No. 1870/IX/63 and that he and the

Plaintiff entered into a sale agreement on 6th December 2024 at a purchase price of Kshs. 250,000,000.00. The Agreement required the Defendant to convert the title and upload it to the *Ardhisasa* platform within 30 days, that is by 6th January 2025. The Defendant did not complete the conversion and now claims that Clause 8.2 of the Agreement provided that if the conversion is not completed, "*the agreement shall stand rescinded with no residuary liability on either party.*" In short, the Defendant argues that the Agreement automatically cancelled itself on 6th January 2025 with no one owing anything, so the Plaintiff's suit has no legal basis and should be struck out.

3. In response, the Plaintiff avers that the application is incurably defective because it is supported by an affidavit and that under **Order 2 Rule 15(2)** of the ***Civil Procedure Rules*****,** an application to strike out a pleading cannot be supported by affidavit evidence and that the court must look only at the face of the pleadings themselves. That by filing an affidavit, the Defendant is improperly asking the court to conduct a mini-trial, which is not allowed at this early stage.

4. On the substantive arguments raised by the Defendant, the Plaintiff depones that the Agreement did not self-terminate on 6th January

2025 and that this claim is a false and gross misrepresentation. That the parties varied the Agreement by mutual agreement as the Defendant requested an extension of time through an email on 14th January 2025 admitting he was behind schedule and the Plaintiff consented. That the Defendant continued to act as if the Agreement was alive and that on 12th February 2025, the Defendant's advocates sent the converted title to the Plaintiff's advocates. The Plaintiff adds that the Defendant approved the Plaintiff's application to conduct a land search and if the Agreement had truly terminated in January, there would have been no reason to do this.

5. The Plaintiff states that Clause 8.3 of the Agreement on the refund of the deposit was never satisfied and for the Agreement to self-terminate, the deposit of Kshs. 25,000,000.00 had to be refunded within three days which never happened. That the deposit was only released to the Plaintiff in July 2025, after the Plaintiff itself rescinded the Agreement due to the Defendant's breach and the Plaintiff avers that the Agreement remained valid until the Plaintiff rescinded it in June 2025.

6. The Plaintiff contends that its suit discloses a valid cause of action and that it seeks recovery of the Kshs. 25,000,000.00 deposit and

other losses and that whether the Agreement was terminated and whether liability survives are questions of fact that require a full trial, not summary dismissal. It states that striking out a suit is a draconian remedy that should only be used in the clearest of cases as set out in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)** but that this is not such a case. For these reasons, the Plaintiff urges the court to dismiss the application with costs.

7. In addition to the pleadings, the parties have also filed written submissions which I have considered and note that they are a reflection of the parties' positions summarized above. Therefore, I will not rehash the same but make relevant references in my analysis and determination below

Analysis and Determination

8. The main issue for determination is whether the Plaintiff's suit ought to be struck out. The application is grounded under inter alia **Order 2 Rule 15** of the ***Rules*** as follows:

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that —

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

9. Whereas I can agree that under **Order 2 Rule 15(2)**, no evidence is admissible to support an application made under **Order 2 Rule 15(1)(a)** hence the court is limited to taking the facts set out in the

plaint on the basis they are true and correct, I am in agreement with the Defendant's submission that his application is not solely based on **Order 2 Rule 15(1)(a)**. It is also based on grounds under **Rule 15 (1)(b)** on the application being scandalous, frivolous, vexatious, **Rule 15(1)(c)** on the application delaying a fair trial and **Rule 15 (1)(d)** on abuse of process. As cited by the Defendant, the Court of Appeal, in **Sol Electronics Kenya & 2 others v Raikundalia & another [2025] KECA 970 (KLR)** upheld the same position that if an application is based on all the grounds under this ***Rule***, then affidavit evidence is permissible and there is no basis to strike out an affidavit filed in support of the application. I therefore dismiss this technical ground raised by the Plaintiff.

10. Turning to the substance of the application and as deponed by the Plaintiff, Madan JA., in ***D.T. Dobie & Company (Kenya) Limited(supra)*** held that "*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward*

for a court of justice ought not to act in darkness without the full facts of a case before it." Having gone through the application, the responses and the submissions, it is my finding that the Plaintiff's suit clearly discloses triable issues that cannot be summarily struck out. I say so for a number of reasons that will become apparent below.

11. First, the Defendant's main argument is that Clause 8.2 automatically terminated the Agreement on 6th January 2025 with no residuary liability. However, the Plaintiff has adduced contradictory evidence of emails dated 14th January 2025 and 12th February 2025 showing the Defendant requested an extension for the conversion admitting "*we are behind schedule*" and that in the later email, the Defendant's advocate confirmed conversion was completed and sent the converted title. The Plaintiff has also adduced emails of January 2025 showing the Defendant's advocate seeking a meeting on behalf the Defendant and the Plaintiff's advocate seeking an update on the matter. Further, as evidenced by the letter dated 31st July 2025, the deposit was only released in July 2025 and not within 3 days as required by Clause 8.3 of the Agreement which required the deposit to be refunded "… *within 3 days of rescission*."

12. If the Agreement truly self-terminated on 6th January 2025, I wonder why the deposit was still held in a joint escrow account in February, March, April, May, and June and why it was only released in July 2025 upon the Plaintiff's rescission? This alone creates a triable issue that deserves determination by the court.

13. Second, the Defendant cannot approbate and reprobate as it cannot simultaneously argue that the Agreement self-terminated on 6th January 2025 with no liability but that he was still entitled to seek extensions of time to perform under the same Agreement and that he continued to perform by completing the *Ardhisasa* conversion in February 2025; and that the Plaintiff was wrong to rescind later for a different breach. I am in agreement with the Plaintiff's submission that the Court of Appeal in **Regnoil Kenya Limited v Karanja [2023] KECA 112 (KLR)** held as follows:

> *50. Arising from the above principles of law, we find that the legal effect of the breach of the conditions in the sale agreement in the instant appeal was that the appellant and respondent, who were both aware of the conditions, having signed the sale agreement and having legal representation at the time, were entitled to treat the agreement as discharged. However, they both elected to continue with*

the performance of their obligations by their conduct and representations. It is notable that neither party issued a rescission notice to the other. The parties were therefore deemed to have affirmed the contract, waived their rights to rescind the contract, and were therefore estopped from terminating the contract or repudiating performance of their obligations under the sale agreement on account of the breaches.

14. Third, even looking only at the Plaint as required for a **Rule 15 (1) (a)** analysis, the Plaintiff pleads a valid written agreement for sale dated 6th December 2024, payment of Kshs. 25,000,000.00 deposit, the Defendant's failure to give vacant possession by 15th April 2025, the Plaintiff's rescission of the Agreement on 20th June 2025, specific contractual clauses entitling the Plaintiff to a refund of the deposit plus 10% penalty and indemnity for losses and particulars of specific financial losses such as legal fees, design costs, rent commitments. In my view, this is not a hopeless case but a straightforward breach of contract claim.

15. Fourth, even if Clause 8.2 operated as the Defendant claims, which is disputed, the Plaintiff's claim is not based solely on the failure to convert the title. The Plaintiff also relies on Clause 7 on failure to

give vacant possession by 15th April 2025, Clause 11.4 on the Plaintiff's right to rescind upon the Vendor's failure to complete, with a 10% penalty and Clause 16.3 on the Vendor's indemnity for losses. I find that the Defendant's application selectively focuses on Clause 8 while ignoring the rest of the Agreement and that is not a basis for striking out the entire suit.

16. The Defendant's strongest argument that the Plaintiff cannot rely on emails to vary the Agreement because Clause 19 requires amendments to be signed in the same manner as the Agreement is negated by the Court of Appeal's decision in **748 Air Services Limited v Theuri Munyi [2017] KECA 419 (KLR)** cited by the Plaintiff where the appellate court affirmed that *"...even where the contract contained a 'no oral variation' clause, the parties were at liberty to make a new contract varying the original contract by an oral agreement or by conduct."*

Conclusion and Disposition

17. In the upshot, I find that the Defendant's application dated 21st October 2025 has no merit and it is hereby dismissed with costs. The matter is to proceed to full trial where the parties can adduce evidence on whether the Agreement was varied by conduct,

whether the Defendant waived the 6th January deadline, and what losses, if any, the Plaintiff is entitled to recover.

DATED SIGNED AND DELIVERED virtually at NAIROBI this 8th DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Miriti holding brief for Okwach for the Plaintiff/Respondent
2. Mr. Kaifa holding brief for Mr. Githinji for the Defendant/Applicant
3. Amos- Court Assistant