REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 156 OF 2016

1. ROCKSTER INVESTMENT LIMITED……..….....1ST PLAINTIFF

2. JOEL W. OKWACHI SC…….....2ND PLAINTIFF

3. AMBROSE OTIENO RACHIER…….....….3RD PLAINTIFF

4. JOHN HARUN MWAU…….....4TH PLAINTIFF

5. DR. MARX OKONJI .....5TH PLAINTIFF

VERSUS

BOFA INVESTMENT LIMITED ….....DEFENDANT

R U L I N G

1. Before me is a Notice of Motion application dated 25th October 2016. The application which is stated to be brought under "Order" 1A and 3A of the Civil Procedure Act, Order 10 Rule 3 and 4(1) and Order 13 Rule 2, 36 Rule 1 and 5 of the Civil Procedure Rules is seeking for orders:-

> **(a) THAT Judgement be entered against the Defendant/Respondent as prayed in the plaint; and**
>
> **(b) THAT the costs of this application be provided for.**

2. The main grounds upon which the application is premised are that: -

> **(a) The Defendant/Respondent in violation of Order 7 Rule 1 and Order 10 Rule 3 of the Civil Procedure Rules failed to enter appearance and/or file a defence within the prescribed time.**
>
> **(b) The Defendant/Respondent by letter dated 11th March 2012, made a specific and unequivocal admission of having received Kshs 15,000,000/ from the Plaintiffs/Applicants; and**
>
> **(c) The Plaintiffs claim the liquidated amount of Kshs 15,000,000/ from the Defendants.**

3. The Application is further supported by the 5th Plaintiff/Applicant Dr. Marx Okonji is Sworn on 24th

October 2016. The Supporting Affidavit details the history of the dispute and the resultant claim and may be summarized as follows: -

(i) That on or about 22nd October 2010 the Defendant/Respondent offered the Plaintiffs individual apartments to be constructed on L.R. No 5054/183 also known as Kilifi Sea View Apartments at a consideration of Kshs 14,250,000/ per apartment;

(ii) The Plaintiff/Applicant signified their acceptance by individually signing the respective letters of offer on or about November 2010. In addition, and to signify the said acceptance, each and every one of the plaintiffs deposited a sum of Kshs 3,000,000 with the Defendant between October 2010 and February 2011;

(iii) By a letter dated 12th March, 2012 M/s Asiema & Company Advocates then representing the Defendant acknowledged receipt of the deposits totaling Kshs 15,000,000/ and

(iv) The Defendants delayed the construction and sought to fundamentally change the contract. The Plaintiffs being aggrieved by the delay and changes made to the contract have now opted out and are seeking to have the Defendant to refund the deposit paid of Kshs 15,000,000/

4. The Defendant has opposed the application. In a Replying Affidavit by its Director one Ngure Kariuki sworn on 16th January 2017, the Defendant accuses the Plaintiffs of having frustrated/breached the terms of agreement as contained in the letter of offer by causing a delay to the completion of the project when they failed to pay the balance of the purchase price. The Defendant further contends that the 1st Applicant in particular asked for alterations/changes to be done to its apartment and thereafter declined to pay for the alterations which cost the Defendant Kshs 600,000/

5. The Defendants further accuse the Plaintiffs of breaching Clause 12 of the letter of offer by declining to sign the final sale agreement without offering any reason known in law. It is the Defendant's case that it gave the Applicants notice that having failed to pay the subsequent deposits as stipulated in the letter of offer it was going to sell the apartments to other buyers. In essence, the Defendant avers that the Plaintiffs are not entitled to recover their deposits because they were in breach of the contract. While conceding that it did vide a letter dated 12th March 2012 acknowledge receipt of 20% deposit from the Plaintiffs, it is the Defendant's position that the said letter cannot be taken as an admission as it also demanded the payment of subsequent deposits which were due from the Plaintiffs.

6. Ultimately, the Defendant contends that this application is bad in law and should not be entertained by this court, as in particular, an application for summary Judgment cannot be entertained after a defence has been filed as in this case.

7. I have considered the application and the affidavit in reply. I have also considered the rival submissions filed in support of, and in opposition to the application. In this court's considered view, two issues arise for determination. These are: -

(a) Whether the Application as framed is incompetent and/or incurably defective; and

(b) Whether the Applicants are entitled to the Orders sought.

8. In regard to the first issue for determination, the Defendant has submitted that the Order 1A and 3A of the Civil Procedure Act under which the Application is purported to have been brought are strange and non-existent. It is the Defendant's position that the purpose of citing the order, rule or other Statutory provision under or by virtue of which any application is made is to invoke the court's jurisdiction. Without such jurisdiction, the court cannot act. Accordingly, in a situation like this where a non-existent provision of the law is relied upon the court's jurisdiction is not properly invoked and the application is hence incompetent.

9. The Applicants did not address me on this objection. I think it is now clear that the overriding objective of the Civil Procedure Act, Cap 21 of the Laws of Kenya as enshrined in Section 1A thereof is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act. This court is indeed mandated by Article 159(2) (d) of the Constitution of Kenya 2010, to administer justice without undue regard to procedural technicalities.

10. In ***Thomas Ratemo Ongeri & 2 others -vs- Zachariah Isaboke Njaata & Another Kisii High Court Environment and Land Court Case No. 95 of 2004 (2014) eKLR*** Okong'o, J., stated as follows: -

> **"On the Defendants argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice Pursuant to Article 159(2) (d) of the Constitution of Kenya.**

11. A similar position was adopted in ***Nancy Nyamira & Another -vs- Archer Dramond Morgan Ltd (2012) eKLR*** where Ngugi, J., held thus: -

> **"Next, the Defendant argues that the Plaintiff's application must fail because it cites the wrong provisions of the law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and not withstanding Sir (Udo) Udoma's remarks in *Salume Namukasa -vs- Yosefu Bukya (1966) EA 433*, invoking the wrong provision of the law does not necessarily spell doom to an otherwise meritorious application. This was (also) the holding in *Gitau -vs- Muriuk*i *(1986) KLR 211* which I now follow to hold that in as long as a party's invocation of the wrong provisions of the law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the court will not dismiss an application solely on account of a wrong invocation of a provision of the law on which the application is grounded."**

12. Arising from the foregoing, and while I agree with the Defendant that there is no provision under either the Civil Procedure Act or the Rules made thereunder known as Order 1A and 3A, the Defendant's argument that the application should fail for having cited the wrong provisions must be rejected.

13. The second limb of the first ground regarding the competence of the application is the Defendant's argument that the Application before the court bears no prayer for striking out the memorandum of appearance and defence and that in the absence of such a prayer the court cannot grant the orders sought for an entry of judgement as against the Defendant. It is the Defendant's case that under Order 10 Rules 3 and 4(1) of the Civil Procedure Rules, the court can only order for the striking out of either the memorandum of appearance or defence as the case may be. It is only after striking out of either of the two that the court can make other orders as it deems fit. It is accordingly the Defendant's position that there being no prayer for striking out of the memorandum of appearance and/or defence in the current application the prayer for entry of Judgement cannot therefore be granted. Again, the Plaintiffs did not address this issue in their submissions.

14. It is indeed true that the main prayer sought by the Plaintiff is for Judgement to be entered against the Defendant as prayed in the plaint. It is however not entirely true that the Plaintiffs have not sought the striking out of the memorandum of appearance or the defence filed. A careful study of the Motion brings out the fact that the Plaintiffs sought the entry of Judgement on the basis of three sets of facts and/or grounds. In the first instance, the entry of judgement is sought on the basis that the Defendant had in violation of Order 7 Rule 1 and Order 10 Rule 3 of the Civil Procedure Rules failed to enter appearance and/or to file a defense within the prescribed time. In the second instance, the request for Judgement is premised on the ground that there is a specific and unequivocal admission by the Defendant of having received the sum of Kshs 15,000,000/ from the Plaintiffs.

15. On the other hand, Ground "d" of the application which is the last ground requests for the Judgement to be entered upon the striking out of the Defence filed. The said Ground is worded as follows: -

(d)THAT in the alternative and without prejudice to the above, the alleged Defence filedout of the prescribed time be struck out for: -

(i) It does not deny nor controvert the liquidated claim of Kshs 15,000,000/

(ii) It does not raise any triable issue with regard to the claim of Kshs 15,000,000/ or at all

(iii) The alleged Defence is untenable

(iv) The alleged Counterclaim is a sham and is not supported by any list of documents or basis whatsoever and is intended to delay the repayment of the sum of Kshs 15,000,000 to the Plaintiffs/Applicants; and

(v) That in the premises, it is only fair and equitable that the Defendant/Respondent be ordered to pay to the Plaintiffs/Applicants Kshs 15,000,000/ with costs and interests forthwith.

16. I think the confusion in the prayers being sought herein may be explained by what transpired prior to the filing of this application. I note from the court record that upon the filing of this suit, Summons to Enter Appearance were issued against the Defendant on 16th June 2016. The said Summons were addressed to the Defendant in three different postal addresses and locations, namely, Mombasa, Nairobi and Kilifi. Having dispatched the same by way of Registered mail on or about 1st July 2016, the Plaintiffs moved to court on 9th August 2016 and filed a Request for Judgement as per the provisions of Order 10 rule 10 of the Civil Procedure Rules.

17. The court did not however for some reason enter the Judgement requested for and on or about 18th August 2016, the Defendant proceeded to file a Memorandum of Appearance followed by a Written Statement of Defence filed a month later on 16th September 2016. As at the time of filing this application, no Witness Statement had been filed in support of the Defence and/or Counterclaim. Whereas under Order 36 Rule 1 of the Civil Procedure Rules an application for summary Judgement should be made after the entry of appearance but before the filing of a defence, I think the circumstances herein were such that it was not clear whether the Memorandum of Appearance and the Defence could be deemed to have been duly filed. The Plaintiffs were therefore in my view perfectly in order to assume that there was no defence filed either at all or as per the rules to warrant the making of the prayer for striking out in the alternative.

18. There is no concurrence by the parties as to when the Summons to enter Appearance was served upon the defendant. Indeed, the Defendant disputes the fact that they were served at all with the summons. In the replying Affidavit filed herein, it is the Defendant's case that they never received the summons sent through the postal addresses as alleged by the Plaintiffs. They only learnt about the existence of the case from their former Advocates Messrs Kahari & Kiai Advocates when the said Advocates received a letter dated 27th June 2016 from the Plaintiff's Advocates herein informing them that this suit had been filed and seeking to know if the said former Advocates had instruction to accept service of process on behalf of the Defendants. It is only then that the Defendants proceeded to enter appearance and to file their Defence and counter claim as explained hereinabove. Since no entry of Judgement had been made by the court by the time both the Memorandum of Appearance and Defence were filed, and since the two documents are now on record, I think it is only fair that the same be deemed as duly filed and served.

19. The primary applicable law concerning summary Judgement is Article 159(2) (c) of the Constitution which commands that Justice be done without undue delay. In addition, sections 1A and 1B of the Civil Procedure Act require the courts to facilitate the just expeditions ,proportionate and affordable resolution of civil disputes. In ***Job Kilach -vs- Nation Media Group Ltd & 2 Others (2015) eKLR,*** the Court of Appeal observed that:

"Before the grant of summary Judgement, the court must satisfy itself that there are no triable

issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgement or in any other manner."

20. The main grounds upon which the Plaintiffs seek that the Defence and counterclaim be struck out are that: -

(i) The defence does not deny nor controvert the liquidated claim of Kshs 15,000,000 and

(ii) That it raises no triable issue(s) with regard to the claim of Kshs 15,000,000/

21. The Plaintiffs claim against the Defendant is that on or about 22nd October 2016 the Defendant offered their individual apartments to be constructed on L.R. No. 5054/183, Kilifi also known as Kilifi Seaview Apartments at a consideration of Kshs 14,250,000/ per apartment. The Plaintiffs accepted the offer individually and each and everyone of them made a down payment of Kshs 3,000,000/ with the sum total for the five of them being Kshs 15,000,000/. It is the Plaintiff's case that the Defendant acknowledged receipt of the sum of Kshs 15,000,000/ in a letter dated 12th March 2012 from its former Advocates. Thereafter, the Plaintiffs felt that the construction was taking too long and since in their view the defendant was trying to fundamentally change the contract, they opted out of the deal and now seek a refund of the total sum paid to the Defendant as deposit.

22. On their part, the Defendant concedes receipt of the sum of Kshs 15,000,000/ but the avers that the Plaintiffs are not entitled to recover their deposits because they were the ones who were in breach of the contract.

23. I have carefully studied the documents exchanged by the parties herein and more particularly the letter of offer dated 22nd October 2010 which remains the only contract signed by the parties herein. It is indeed clear to me that the parties had envisaged a situation where the parties could for one reason or the other fail to proceed with the contract. Clause 13 of the Letter of Offer under the title" Cancellation of Costs" provides as follows: -

"If after execution of the Agreement of Sale the Purchaser is thereafter unable to complete this transaction for any reason whatsoever including being unable to raise finance (if any) the purchaser shall forfeit out of the deposit a sum equivalent to ten per centum(10%) of the purchase price by way of agreed liquidated and ascertained damages."

24. While there is no similar clause in the contract regarding a situation where the Vendor itself was in breach, it is apparent from the clause cited herein above that it was never the intention of the parties that the deposits made were non-refundable. The contract was clear that even in a situation where the Purchaser breached the contract by failing to raise the balance of the purchase price, the Purchaser would only forfeit 10% of the purchase price out of the deposit made.

25. It is evident from the Defendant's letter to the Plaintiff dated 29th March 2012 annexed to the Plaintiff's bundle of documents that the construction project for some reason got delayed and the completion dates had to be changed contrary to the Plaintiff's expectations. Paragraph two of the said letter entitled "Estimated date of completion of construction of Lower Block" reads in part as follows: -

"As you are aware, construction begun in October 2010. However, due to inevitable circumstances beyond the control of our clients related to getting a financier, there was delay in the progress of construction. We confirm, on the instructions of our clients, that they have now secured sufficient funding from their financiers and this will enable them to complete construction of the Lower Block without interruption. Our Clients confirm that the estimated date of completion of the Lower Block is 18th January 2013."

26. In rebuttal of the Plaintiff's claim of breach of contract, the Defendants now aver at paragraph 5 of the Written Statement of Defence as follows: -

> "In reply to Paragraphs 8 and 9 of the Plaint, the defendant states that it never led the Plaintiffs to believe that construction had started in October 2010 only for it to delay. If there was any delay in beginning the construction in October 2010, which is still denied, then the delay was caused by unforeseen events by other third parties which events were beyond the control of the defendant."

27. As already indicated, the Defendant in its letter dated 12th March 2012 acknowledged receipt of the sum of Kshs 15,000,000/ as deposit for the apartments. There is nothing in the letter of offer which allows them to retain the deposit paid more so when the delay in completing the construction is conceded on their part. Their denials as contained in the Written Statement of Defence and counterclaim as well as the Replying Affidavit filed are general and would appear to be solely aimed at delaying the conclusion of this matter. In ***Magunga General Stores -vs- Pepco Distributors Ltd (1987) 2KLR 150***, where the Defendant pleaded in such a general manner, Platt, J.A., stated thus: -

> **"First of all a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reasons being given."**

28. These observations are applicable to this case. The Defendant concedes receipt of Kshs 15,000,000/ and refuses to refund the same. The ground for the said refusal are claims that the contract was frustrated by third Parties and that the Plaintiffs are themselves in breach of the contract. But a look at the contract does not even allow them to retain the sums paid as deposit. On what grounds then are they objecting to the Plaintiffs claim?

29. I agree with the Plaintiffs that the defence filed does not deny or controvert the liquidated claim of Kshs 15,000,000/. It does not raise any triable issue with regard to the claim of Kshs 15,000,000/. It is a mere, general denial which does not raise any triable issue. The counterclaim is equally ill-founded and baseless. Accordingly, I make the following orders: -

> **(i) The defence and counterclaim filed herein are hereby struck out**
>
> **(ii) Judgement is hereby entered for the Plaintiffs against the Defendant as prayed in the Plaint**
>
> **(iii) The Defendant will pay the costs of the suit as well as the costs of this application to the Plaintiffs.**

Dated and delivered at Malindi this 21st day of April 2017.

J.O. OLOLA

JUDGE