



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC.NO.1024 OF 2014**

**K-REP BANK LIMITED.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**MUMO MALEVE.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**STEVEN NGALIA KIMWELE.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KITUI...3<sup>rd</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **10<sup>th</sup> March 2016**, brought under Order 36 Rule 5, Order 2 Rule 15(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A of the Civil Procedure Act.

The Plaintiff/Applicant has sought for the following orders:-

- i. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Defence filed herein be struck out and Judgement be entered in favour of the Plaintiff in the sum of Kshs.2,707,342/= and a declaration that the security created by the 1<sup>st</sup> Defendant in favour of the Plaintiff concerning allotment letter for Plot No.102 Kaveta Bricks with the Plaintiff still in force.*
- ii. That in the alternative, Judgement be entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively as expressly admitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in favour of the Plaintiff for Kshs.2,707,342.34*
- iii. Costs of this application to be provided for.*

The application is based on the grounds stated on the face of the

application and on the *Supporting Affidavit* of **Anthony Ouma**, the *Legal Officer* of the Plaintiff/Applicant Company herein. The grounds in support are:-

- a. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Defence both dated 11<sup>th</sup> November 2014, respectively are just a*

*mere sham and full of denials.*

*b. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Defence filed herewith, is both frivolous, vexatious and intended to prejudice and delay the fair trial of this action.*

*c. In the interest of justice and fairness that Judgement be entered in favour of the Plaintiff for the claim so admitted.*

The Plaintiff/Applicant's case is that the 1<sup>st</sup> Defendant requested for a **loan** facility from the Plaintiff in the sum of **Kshs.4,942,808/=** which was secured by an **Allotment Letter** over residential **Plot No.102 Kaveta Bricks**. It was further averred that a **Legal Charge** was created and that it was an express term of the said facility contract dated **19<sup>th</sup> July 2011**, that the **Allotment Letter** of the said plot would be used as **security**. The 1<sup>st</sup> Defendant defaulted in payment and while still indebted to the Plaintiff, transferred ownership of the suit property to the 2<sup>nd</sup> Defendant without consent from the Plaintiff. Further, that the 3<sup>rd</sup> Defendant without exercising due diligence effected the transfer indicating in the letter of allotment that the 2<sup>nd</sup> Defendant was the rightful owner of the suit property. The Plaintiff urged the Court to allow its claim.

The application is **opposed** by both 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents. The 2<sup>nd</sup> Defendant/Respondent, **Stephen Ngalia Kimwele**, filed a **Replying Affidavit** on the **8<sup>th</sup> June 2015**. He averred that he was not privy to the contract between the Plaintiff and the 1<sup>st</sup> Defendant/Respondent therefore, had no contractual obligations to the Plaintiff. Further, he claimed that the suit property was free from encumbrances when he bought it. He further claimed that he was a **bona fide purchaser** for value without notice. The 2<sup>nd</sup> Defendant/Respondent argued that his defence raised triable issues and that striking it out would occasion an injustice. He urged the Court to dismiss the application with costs.

The 3<sup>rd</sup> Defendant/Respondent filed a **Replying Affidavit** on the **8<sup>th</sup> June 2015**, sworn by **Musyoka Nyamai**, the **County Secretary** in charge of the **County Government of Kitui**. He averred that the **County Government of Kitui** was not party to the contract between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent, therefore should not be faulted on it. He stated that the 2<sup>nd</sup> Defendant/Respondent purchased the suit property in a private **agreement** effected by the **Municipal Council of Kitui**. Further, he claimed that the suit property was free from encumbrances at the time of the transfer. He further averred that the Plaintiff had not indicated to the 3<sup>rd</sup> Defendant/

Respondent that they had any interest in the land. He denied that their defence admitted the Plaintiff's/Applicant's claim and pointed out that their defence raised triable issues. He claimed that this was a misjoinder and the Plaintiff/Applicant had no cause of action against the 3<sup>rd</sup> Defendant/Respondent. He urged the Court to dismiss the application with costs.

The application was canvassed by way of Written Submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

The Plaintiff/Applicant has sought for **striking out** of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's/Respondent's **Defence** filed on **13<sup>th</sup> November 2014**, and that Judgement be entered in favour of the Plaintiff/Applicant in the sum of **Kshs.2,707,342/34**. In the alternative the Plaintiff/Applicant has sought for Judgement to be entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents as expressly admitted by the two Defendants/Respondents.

The application is brought under Order 36 Rule 5 and 8 of the Civil Procedure Rules. The Court has considered the said Order 36 Rule 5 which provides that if the Defendant has admitted any part of the claim, then Judgement can be entered against the Defendant on the admitted claim. However, this Court has considered the Defence filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents. Apart from the 2<sup>nd</sup>

Defendant/Respondent admitting that he purchased the suit property from the 1<sup>st</sup> Defendant/Respondent free from any encumbrances and that he is a bona fide purchaser, the Court finds no other admission of the claim by the 2<sup>nd</sup> Defendant/Respondent.

Further, the 3<sup>rd</sup> Defendant/Respondent did also deny all the allegations made by the Plaintiff/Applicant and this Court finds no evidence of admission of any part of the claim by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents. Therefore Order 36 Rule 5 cannot apply.

The application is also premised under Order 2 Rule 15(1) of the Civil Procedure Rules which states as follows:-

***“At any stage of the proceedings, the Court may order to be struck out or amended any pleadings on the ground that:-***

***a. It disclosed no reasonable cause of action or defence in law.***

***b. It is scandalous, frivolous or vexatious.***

***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 courts and may order the suit to be stayed, dismissed or Judgement to be entered accordingly as the case may be.”***

From the above provisions of law, it is evident that the Court has discretion to strike out pleadings on the stated grounds. However, the said discretion must be exercised judicially.

Further, Courts do also take into account that striking out of pleadings is a draconian remedy and should only be resorted to in very hopeless cases and that remedy should be resorted to sparingly. See the case of Equatorial Commercial Bank Ltd..Vs..Jodam Engineering Works Ltd & 2 Others (2014) eKLR, where the Court held that:-

***“It cannot be gainsaid that the striking out of a pleading should be done sparingly.”***

The Plaintiff/Applicant has alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants'/Respondents' Defences are mere denials which raised no triable issues. However, the Court has considered the two Defences. It is evident that the 2<sup>nd</sup> Defendant/Respondent has alleged that he is a bona fide purchaser for value and bought the suit property free from any encumbrances. The 3<sup>rd</sup> Defendant/Respondent has alleged that a Letter of Allotment is not a Certificate of title and cannot be used as security to obtain a loan from the Bank. It averred that the Plaintiff's/Applicant's actions of granting a loan to the 1<sup>st</sup> Defendant/Respondent on mere strength of a Letter of Allotment was negligent on the part of the Plaintiff/Applicant. The issues raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents are not mere denials but are issues that raise reasonable Defence and this triable issues. In the case of Equatorial Commercial Bank Ltd..Vs....Jodam Engineering (supra), the Court held that:-

***“A statement of Defence is said to raise reasonable Defence if that Defence raised prima facie triable issues.”***

Further in the case of Olympic Escort International Co.Ltd & 2 Others...Vs...Parminder Singh Sandhu, the Court held that:-

***“It is trite that a triable issue is not necessarily on that the Defendant would ultimately succeed on. It need only be bona fide”.***

This Court has considered the Defences raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents and the Court

finds that they do raise triable issues and the matter should therefore be allowed to proceed to full trial and be decided on merit. The Defendants/Respondents should not be shoved from the seat of justice.

Having now carefully considered the Plaintiff's/Applicant's **Notice of Motion** application dated **10<sup>th</sup> March 2015**, the Court finds that there is no evidence of express admission of the claim by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/

Respondents as alleged by the Plaintiff/Applicant. In the case of **National Bank of Kenya...Vs...Daniel Opande Asnam(2002)eKLR**, the Court held that:-

***“The law is now settled and that is that the admission upon which a court of law will act to strike out a Defence and enter Judgement must be clear and unambiguous”.***

The Defences as drawn by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents cannot be said to amount to very clear and unambiguous admissions of the claim.

For the above reasons, the Court finds that the Plaintiff/Applicant's **Notice of Motion** dated **19<sup>th</sup> March 2015**, is **not merited**. The said application is **dismissed entirely with costs** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents.

Further, the suit property herein **falls under the jurisdiction of Machakos Environment and Land Court**. Consequently the Court **directs** that this case be **transferred to Machakos, Environment and Land Court** for final hearing and determination.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31<sup>st</sup>** day of **August, 2017**.

**L. GACHERU**

**JUDGE**

**31/8/2017**

In the presence of

M/S Sitienei holding brief for Mbaluka for Plaintiff/Applicant

No appearance for 1<sup>st</sup> Defendant/Respondent

Mr. Mwalimu for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents

Catherine - Court clerk.

**L. GACHERU**

**JUDGE**

**31/8/2017**