



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**HCCC NO. 72 OF 2007**

**MAX INTL CO. LTD.....PLAINTIFF**

**=VERSUS=**

**BRUNO PEZZOTTA.....DEFENDANT**

**RULING**

**Introduction:**

1. On 7<sup>th</sup> November 2014, this court set aside the Ruling of Omondi J for Summary Judgment in respect to the Application dated 20<sup>th</sup> January 2009. The said Application was then fixed for hearing and is the subject of this Ruling.
2. In the Application, the Plaintiff is seeking for the following orders:

**(a) That the Defendant's/Respondent's Statement of Defence and Counter-claim dated 14<sup>th</sup> November 2007 herein be struck out and that Summary Judgment be entered in terms of the Plaintiff's plaint dated 25<sup>th</sup> September 2007.**

**(b) That the Defendant be compelled to bear the costs of the Application and the suit.**

**The Plaintiff's/Applicant's case:**

3. The Plaintiff's director has deponed in his Affidavit that on 17<sup>th</sup> April 2007, the Plaintiff entered into a contract with the Defendant for sale of the Plaintiff's land being portion number 622 at a consideration of Kshs.36,450,000; that the Defendant paid a deposit of Kshs.4,500,000 and that the balance of Kshs.31,950,000 was to be paid on or before 10<sup>th</sup> July 2007 which he defaulted.
4. It is the Plaintiff's case that the Statement of Defence and Counter-claim as filed is scandalous and does not raise any triable issues.
5. In his Supplementary Affidavit, the Plaintiff's director deponed that the Defendant admitted in his Defence and Counter-claim that he entered into an agreement of sale; that he was acquitted in respect to the criminal charges pertaining to the suit property and that there is no single triable issue that has been raised in the Defence and Counterclaim.

**The Defendant's/Respondent's case:**

6. In his Replying Affidavit, the Respondent deponed that the Application is premised on the

- presumption that the subject agreement of sale dated 12<sup>th</sup> April 2004 is legal and enforceable and that, a portion that agreeable has been challenged and denied in the Defence.
7. It is the Defendant's deposition that the proceedings that led to the acquisition of the suit property by the Plaintiff are not genuine and that if the agreement is unenforceable by reason of illegality of the alleged Judgment in CMCC No. 18A of 2004, then the suit cannot succeed.
  8. In his Supplementary Affidavit, the Defendant has stated that the agreement of sale is not enforceable and binding because it was prepared by an unqualified person; that the said agreement was never registered as a document and that the sale was frustrated and he forfeited his deposit of Kshs.4.5 million.
  9. The Defendant finally deponed that the Plaintiff has not demonstrated how the amount of Kshs.364,000 accrued.
  10. The Parties filed brief written submissions which I have considered.

#### **Analysis and findings:**

11. The Application before me was filed under the provisions of Order VI Rule 13(1) and Order XXXV Rule (c) of the repealed Civil Procedure Rules.
12. The Plaintiff is seeking for the striking out of the Statement of Defence and Counter-claim for being scandalous and for not raising a cause of action. The Plaintiff is also praying for entry of Summary Judgment.
13. The law relating to the entry of Summary Judgment is now settled. In the case of **Shah Vs Padamsi (1984) KLR 531 at page 535, Madan J.A** held as follows:

**“Except in the clearest of cases, which this one was not, it is inadvisable for the court to prefer one affidavit to another in order to grant summary judgment. Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Defendant is unlikely to succeed at trial. The court must not attempt to anticipate that the Defendant will not succeed at the trial.”**

14. In **Giciam Construction Company Vs Amalgamated Traders & Services (1983) KLR 156, Chesoni, Ag JA at page 164** stated as follows:

**“As a general principle where a defendant shows that he has a fair case for defence a reasonable ground for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that he has not raised real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to Judgment.....”**

15. In its Plaint, the Plaintiff has deponed that it is the registered proprietor of portion number 622 Malindi (the suit property); that on 12<sup>th</sup> April 2007, it entered into an agreement with the Defendant in which the Defendant agreed to purchase the suit property and that the Defendant made a down payment of Kshs.4,500,000.
16. The Plaintiff has further stated that the parties agreed that the Defendant was to forfeit the deposit of Kshs.4,500,000 in the event of default of payment of the full purchase price.
17. It is the Plaintiff's claim that vide an email dated 28<sup>th</sup> July, 2007, the Defendant admitted having delayed the transaction and agreed to pay the Plaintiff 1% interest for late payment which he never remitted.
18. The Plaintiff is praying for judgment in the sum of Kshs.364,500 being the 1% interest in penalty that the Defendant had agreed to pay together with damages for breach of contract.
19. In his Defence, the Defendant admitted having entered into the agreement of 12<sup>th</sup> April 2007. However, it is the Defendant's averment that after engaging an advocate, he was advised that the Plaintiff's title is tainted with illegalities. He could not therefore complete the transaction on that ground.

20. In the Counter-claim, the Defendant has prayed for a declaration that the transfer of the suit property by virtue of CMCC No.18A of 2004 and the subsequent transfer of the same to the Plaintiff was irregular and a nullity in law rendering the agreement between them void.
21. The Plaintiff's director has annexed on his Supplementary Affidavit the decision of the lower court in criminal case No. 345 of 2011 where he had been charged for forging the court records in Malindi CMCC No. 18A of 2004. The Plaintiff's director was acquitted in that case.
22. The only issue that I am supposed to address in the current Application is whether the Defendant has raised a triable issue in his Defence and Counter-claim to entitle him to defend the claim.
23. The Plaintiff is claiming for Kshs.364,500 being the 1% that the Defendant had agreed to pay it as a penalty "for non-fulfillment of the contractual condition, beginning from the date of effective payment for the land."
24. The said 1% penalty is not part of the sale agreement. The issue of the penalty was raised by the Defendant in his letter dated 18<sup>th</sup> July 2007 by which time he was supposed to have paid Kshs.31,950,000, having already paid a deposit of Kshs.4,500,000 as per the agreement.
25. I have read the agreement. The agreement is clear that in the event that the Defendant does not pay the balance of Kshs.31,950,000 by 10<sup>th</sup> July, 2007, he would forfeit the deposit of Kshs.4,500,000, and not any other amount.
26. The question of the penalty was raised by the Defendant himself, by which time he still had the intention of completing the transaction. However, as stated in his Defence, the issue of the validity of the title that the Plaintiff was holding came up and he never completed the transaction.
27. Considering that the payment of Kshs.364,500 by the Defendant, in addition to the forfeited amount of Kshs.4,500,000 was not part of the agreement of 12<sup>th</sup> April 2007, the Defendant has raised a triable issue as to whether the Plaintiff is entitled to the said sum, the Defendant having already forfeited Kshs.4,500,000.00 as per the agreement.
28. The court will have to determine at trial whether the promise by the Defendant to pay the penalty of 1% was on condition that he completes the agreement or was part of the money to be forfeited unless he completes the agreement. The Plaintiff will have to convince the court at trial that Kshs.365,500 was also supposed to be paid by the Defendant and then forfeited.
29. The other issue that the Defendant has raised in the Defence and Counter-claim is whether the Plaintiff is the lawful owner of the suit property.
30. It is trite law that one can only enter into a valid sale agreement as a vendor if he is the lawful owner. The legality of the Plaintiff's ownership of land will therefore have to be dealt with by the court at trial.
31. It is not clear from the Plaint and the Application how the Plaintiff arrived at the figure of Kshs.364,500 considering that the parties never agreed on whether the 1% was to be calculated on the basis of the balance of the purchase price or the full purchase price.
32. Consequently, I find and hold that the Defendant has raised triable issues in his Defence and Counter-claim and should be allowed to Defend the suit and prosecute the Counter-claim unconditionally.
33. For the foregoing reasons, I dismiss the Plaintiff's Application dated 20<sup>th</sup> January 2009 with costs.

Dated and delivered in Malindi this 19<sup>th</sup> day of June, 2015.

**O. A. Angote**

**Judge**