REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 87 OF 2013

TESHOME BANTIDAGN FELEKE……..…… PLAINTIFF

VERSUS

REGNOL OIL (K) LIMITED…….…….…….. .DEFENDANT

RULING

This ruling is with respect to the Plaintiff's Notice of Motion dated 12/3/2013 seeking orders that the Defendant's Statement of Defence and Counterclaim filed herein be struck out, and judgment be entered for the Plaintiff as prayed. The main grounds for the application are that the Defence and Counterclaim is scandalous, frivolous, vexatious or otherwise abusive of the process of court and/or does not disclose a reasonable cause of action or defence. Further, that the said Defence and Counterclaim is contradictory and an afterthought.

The Plaintiff in her supporting affidavit sworn on 12/3/2013 states that the Defendant offered for sale a four bedroomed maisonette at Diamond's Park in consideration of the sum of Kshs.5,150,000/= by a letter dated 8th January 2007 Further, that it was an expressly agreed term in the said offer that Plaintiff would make a down payment of Kshs.1,545,000/=, and thereafter pay the balance of Kshs.3,605,000/= and pay his legal fees, stamp duty and registration fee. The Plaintiff stated that he accepted the said terms. That consequently, on 9th January 2007 a sale agreement prepared by the Defendant's advocates was entered into between the Defendant and the Plaintiff. Further, that the Plaintiff has remitted the sum of Kshs 5,150,000/= in accordance with the said agreement. The Plaintiff annexed copies of the said letter of offer, of the sale agreement and of receipts evidencing the payments made.

The Plaintiff alleges that the Defendant thereupon unilaterally amended the sale agreement in a letter dated 15th July, 2007, and that the Plaintiff thereupon sought a transfer of the purchased property in a letter dated 18th September, 2008. He attached various correspondence exchanged between the parties to this effect. The Plaintiff claims that the Defendant is now claiming Kshs 480,000/= to release the completion documents, and he states that he has paid all the outlays under the sale agreement. He also stated that the Defendant never indicated that there were problems with the occupation certificate.

The Defendant in a replying affidavit sworn on 8/7/2013 by its Director, Mohammed Kulimia, admitted that there was a sale agreement between the parties herein which *inter alia* stated that the completion date was to be on the 7th day from the date when Nairobi City Council grants to the vendor certificate of occupation for the maisonettes. However, that the City Council of Nairobi has failed to avail the relevant plans and certificate of occupation, which has hindered their efforts in availing necessary completion documents to the Plaintiff. The Defendant also admitted that the Plaintiff has paid the full purchase price.

The Defendant states that it is not to blame for this unforeseen turn of events, and is willing to rescind the

contract and refund the purchase price as per the contract sum of Kshs.5,150,000/= to the Plaintiff, together interest at 18% per annum as per the provisions of the sale agreement. Further, that the Plaintiff has been in full occupation of the house from 27th May 2008 to date July 2013, and in the event the said contract is rescinded he accordingly will have resided in the house as a tenant for 61 months at the rent of Kshs.60,000/= per month, which sum he is to pay the Defendant. Consequently, that its Defence and Counter claim dated 18th February 2013 is competent, reasonable and proper.

The parties were directed to file written submissions on the Plaintiff's Notice of Motion. The Plaintiff's counsel in submissions dated 9th August 2013 argued that contrary to the sale agreement dated 8th January 2007, which provided that the sale agreement would only be varied by way of a collateral agreement or otherwise in writing by the Advocates of both parties, the Defendant's lawyers by a letter dated 5th July 2007 unilaterally sought to vary the agreement by among other things providing that the legal costs of the sale be borne by the Plaintiff. In addition that the Defendant have demanded for further sums of money to be paid which were not supported by the sale agreement.

The Plaintiff's counsel in addition submitted that the completion of the sale agreement was not predicated upon the obtainance of a Certificate of Occupation, and relied on clauses 5.2. and 5.3 of the sale agreement which provided for completion. The counsel also submitted that the Plaintiff under clause 13.1 of the sale agreement became entitled to possession upon payment of the entire purchase price and of Kshs 20,000/= being the payment of the deposit for electricity and water, and he could not be a tenant of the Defendant, neither was such tenancy provided in the sale agreement.

The Defendant's counsel in submissions dated 18th September 2013 argued that the main issue for determination is whether the Plaintiff had made out a *prima facie* case to warrant the grant of the prayers sought. He relied on clause 5.1 of the sale agreement to argue that there was a condition precedent in the agreement that completion date would be on the seventh day after the Nairobi City Council had granted the Defendant the certificate of occupation. The Defendant’s counsel reiterated the arguments made on their willingness to rescind the contract and on the tenancy relationship between the parties in this event, and stated in this regard that the Plaintiff had not come to court with clean hands. Lastly, the counsel relying on various judicial authorities argued that the Plaintiff's application was misconceived, frivolous and an abuse of the court process.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and Defendant. There are two issues for determination. The first issue is whether the Defence and Counterclaim filed herein should be struck out for reasons that it discloses no reasonable cause of action and is scandalous, frivolous and vexatious. The second issue for determination is whether judgment should be entered in favour of the Plaintiff.

On the issue of striking out of the Defence and Counterclaim, the applicable law is Order 2 Rule 15 (1) of the Civil Procedure Rules which provides as follows:

> **“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. “**

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

"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."

It is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.

In the present case the Plaintiff in its Plaint dated 17th January 2013 is seeking prayers for specific performance for the Defendant to transfer to the Plaintiff the parcel of land known as LR No. 209/17636, being a 4-bedroomed maisonette situated at Diamond Park South B. It is not disputed herein that the Plaintiff has paid the full purchase price and is in possession of the property that was the subject of the sale agreement between the parties.

The Defendant has however argued in its Defence and Counterclaim and with regard to the prayers sought by the Plaintiff that the certificate of occupation that was to be issued by the City Council of Nairobi was a condition precedent in the sale agreement between the parties. Further, that the fact that it has not been granted has resulted in the Defendant's failure to perform. The Defendant also claims that the Plaintiff has been in possession of the premises since 27/05/2008 to date, and is therefore a tenant and owes rent of Kshs 3,360,000/=.

I have perused the sale agreement entered into by the parties dated 9th January 2007. Completion of the agreement is provided for under clause 5 and the obligation upon the Plaintiff in this regard was to make the payments of the purchase price as agreed upon. The purchase price was Kshs 5,150,000/= and evidence has been provided by the Plaintiff of payment of this sum, and consequently of the performance of his obligations. The other obligations of completion including the grant of a certificate of occupation were on the part of the vendor. Clause 5.1 of the sale agreement on the certificate of occupation read as follows:

"The Completion Date shall be on the Seventh day from the date when the Nairobi City Council grants to the vendor a certificate of Occupation for the maisonettes"

A condition precedent has been defined in **Black's Law Dictionary, Ninth Edition** at page 334 as "an act or event other than a lapse of time, that must exist or occur before a duty to perform something promised arises" Clause 5.1 by the use of the word "when" contemplates a situation where the certificate of occupation was to be granted to the vendor as a matter of course, and by its plain reading does not make the sale agreement or completion thereof in any way subject to the said certificate of occupation. Clause 5.1 cannot therefore be described as a condition precedent.

In addition, the said agreement does not provide for any tenancy arrangement between the Plaintiff and Defendant, neither did the Defendant bring any proof of such a tenancy agreement. It is therefore my view that no triable issue has been raised by the Defence and Counterclaim and this is one of the cases where the court can properly and rightly exercise its discretion to strike out the said pleadings for being frivolous, vexatious and an abuse of the process of court.

I accordingly hereby order as follows:

1. That the Defence and Counterclaim by the Defendant dated 18th February 2013 and filed in court on 22nd February 2013 be and is hereby struck out, and that judgment is entered in favour of the Plaintiff.
2. The Defendant shall within six months of the date of this ruling complete the sale of agreement between the Plaintiff and Defendant dated 9th January 2007, and transfer to the Plaintiff all that parcel of land known as L.R. No. 209/17636 being a 4-bedroomed maisonette situated at Diamond Park South B.
3. The Defendant shall meet the costs of this suit.
4. The parties shall be at liberty to apply.

Dated, signed and delivered in open court at Nairobi this ___26th____ day of ____November_____, 2013.

P. NYAMWEYA

JUDGE