Changilwa v Kanangu (Environment and Land Appeal E042 of 2021) [2024] KEELC 4516 (KLR) (21 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4516 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E042 OF 2021

LL NAIKUNI, J

MAY 21, 2024

FORMERLY HIGH COURT APPEAL NO. 189 OF 2010

BETWEEN

MARY WANYAMA CHANGILWA .... APPELLANT

AND

NEWMAN PETER MWANG'OMBE KANANGU .... RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Mary Wanyama Changilwa – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 26th August, 2010 and a Record of Appeal filed on 4th August, 2022 against Newman Peter Mwang'ombe Kanangu, the Respondent herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.

2. The Appeal emanated from the ruling from a Chamber Summons application dated 28th July, 2010 instituted by the Appellant in the lower Court. On 28th July, 2010, following intense deliberations, the Honourable J. Oburah the Senior Resident Magistrate's Court in Civil Case Number 315 of 2009 at Mombasa delivered the impugned Ruling granting summary Judgement in favour of the Respondent herein emanating from what was alleged to be a breach of Sale Agreement terms and conditions stipulated thereof. Being aggrieved by the out come of the said decision, the Appellant moved High Court by lodging an appeal. Subsequently, the appeal was transferred before this Court as being the proper forum with the jurisdiction to entertain and make a determination thereof. It is instructive to note that the main pith and substance (substratum) of this appeal revolves around what has become very prevalence within the Coastal region – "The Doctrine of House without land" ("Nyumba bila

shamba”). Thus, the Honourable Court will endeavor to deliberate on the said concept in the course of this Judgement hereof.

3. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent. On 17th March, 2024 the parties having fully complied with court’s direction it slated for highlighting the written submissions which the parties discharged effectively.

II. The Appellant’s case.

4. From the filed Memorandum of Appeal, the Appellant averred as follows:-

    a. That the Learned Senior Magistrate erred in Law and in Fact in granting ruling to the respondent herein despite overwhelming evidence that the appellant had not received the full purchase price of the sale of the house on plot No. 622/44 Kongowea Maweniwhich was Kshs. 200,000/- and the balance was to be made to the appellant within 60 days from that date which was never paid to the Appellant.

    b. That the Learned Senior Magistrate erred in Law and in Fact in concluding that the defendant was paid the balance of Kshs. 200,000/- through a cash deposit into account of Ciesco Building and Construction account was of the Fanuel Mkangula Changilwa which amount the Appellant was not aware of the payment.

    c. That the Learned Senior Magistrate erred in Law and in Fact in failing to appreciate that this was not a clear case to warrant summary judgment at an application stage and totally failing to consider the affidavit sworn by the Defendant Appellant herein.

5. The Appellant prayed that the Honourable Court to allow this appeal and set aside the whole Ruling of the Lower Court refer the civil case to retrial before another court of competent jurisdiction.

6. From the filed pleadings, the Ruling emanated the Notice of Motion application by the (Plaintiff/ Applicant) Respondent herein dated 26th September, 2019 seeking for summary Judgment to be entered for vacant possession of the said suit premises being a Swahili House on the Plot No. 622/44 Kongowea Maweni. The application was based on the grounds that the (Applicant) Respondent herein had purchased the same from the Respondent who had blatantly refused to give vacant possession.

7. The said application was brought under the provision of Order XXXV Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* and was supported by the affidavit sworn by the Applicant. The Application was vehemently opposed and the Respondent filed a replying affidavit sworn on 31st March, 2010.

III. Brief facts

8. Before embarking on the full analysis of this matter, it is imperative that the Honourable Court extrapolates on the brief facts of the case. From the filed pleadings in the lower court the Appellant once owned the house on Land Reference – Plot No. 622/4 Kongowea Maweni within the suit property in what is now commonly known within the Coastal Region of Kenya as “house without land”. The Appellant sold the house to the Respondent who claimed to have fully paid up the purchase price.

9. Indeed, the Respondent insisted the payments were done through cash deposit. He held that the payments were done through a cash deposit into the bank account of Ciesco Building and construction. According to the Respondent, the account belonged to one Fanuel Mkongula Chingilwa. The Appellant refuted knowing the said bank account nor the payments made there as

alleged. According to her, there was still an outstanding balance of the purchase price an amount of Kenya Shillings Two Hundred (Kshs. 200,000/-) which was to be made to her within 60 days from that date but which was never paid from the Respondent. Despite of this she failed to provide vacant possession. Arising from her refusal to provide vacant possession, she then became a tenant and the rental arrears accumulated. In the given circumstances, the Respondent instituted a civil suit before the trial court being CMCC No. 315 of 2009. The lower court delivered a Ruling on a Summary Judgement to the effect that the Respondent was misleading and thus defrauding for her to claim that she had not received the said outstanding balance of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200, 000,00/=). Being aggrieved by the said decision, the Appellant preferred an appeal before HCCC Appeal No. 189 of 2009. For some reason or other, she never got to be diligent on it. The same was dismissed for want of prosecution. She later on made emphatic efforts to reinstate the appeal to appoint the High Court eventually caused it to be transferred to this Court.

IV. The Submissions

10. On 17th March, 2024, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied, all the Counsels were granted ample opportunity file their written submissions, pursuant to that the Honourable Court reserved a Judgment on 21st May, 2024.

11. By the time of penning down the Judgement, only the Respondent had managed to file their written submissions. Thus, the Honourable Court has proceeded to make a decision based on merit hereof.

A. The Written Submission by the Respondent

12. The Respondent through the law firm of Messrs. B. W. Kenzi & Co. Advocates filed their written submissions dated 15th February, 2024 and filed the same way. Mr. B. W Kenzi Advocate commenced his submissions by stating that essentially, the Appeal was against the Ruling of Senior Resident Magistrates Mr. J. Oburah delivered on 28th July, 2010. The Memorandum of Appeal is at page 2-3 of the record. The Appellant was challenging the Ruling which gave summary Judgement to the Respondent and prayed that the court finds there were no proper grounds for summary Judgement and refer civil case Number 315 of 2009 for full trial. The appeal was opposed and the Respondent set down the chronology of events which were clearly supported by the Record.

13. According to the Learned Counsel, the journey between the Appellant and Respondent started on 26th May 2008 when the Appellant sold a Swahili house without land on Plot Number 622/44 Kongowea Maweni to the Respondent. (The Agreement annexed at page 9 of the Record). The purchase price for the house was a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-). Upon the execution of the said sale agreement the Appellant received a deposit being a sum Kenya Shillings Six Hundred Thousand (Kshs. 600,000/-) leaving an outstanding balance of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) was to be paid within 60 days. Subsequently, the Respondent made the payment on 2nd September 2008 but this time he deposited the money in the Account of a Company trading in the names and style of "Cieco building & Construction co Limited". which was owned by a son of the Appellant one "Fanuel Mkangula" and Ostensibly on instructions of the Appellant. (The deposit Slip was annexed at page 11 of the Record).

14. However, despite of this, the Appellant refused to give vacant possession and the Respondent wrote a demand letter to her through his advocate B.W Kenzidated 13th October 2008. (The letter annexed at page 38 of the Record).The Appellant opted to refund the total sum of Kenya Shillings Eight Thousand (Kshs. 800,000/-) plus 5 months' rent totaling to a sum of Kenya Shillings Eight Thirty

Six Thousand (Kshs. 836,000/-) which the Respondent accepted and the same was reduced in an agreement on 16th December 2008. The Agreements was a clear undertaking by “Fanuel Mkangula the proprietor of Ciesco Building and Construction. It was duly signed by the Appellant. (The agreement annexed at page 40 of the record).

15. In furtherance of the agreement to refund the purchase price, the law firm of Messrs. M. Ananda& CO. forwarded four Postdated cheques to the Respondent through B.W KenziAdvocate Addressed to the Respondent each for a sum of Kenya Shillings Two Hundred and Nine Thousand (Kshs. 209,000/-). The cheques on presentation to the banks were dishonored. The letter was at page 41 of the record. (The cheques annexed at page 42 of the Record and notice of Dishonor at page 42).

    The Learned Counsel argued that faced with the foregoing scenario the Respondent had no choice but to pursue possession of his house through the court hence filed civil suit CMCC NO. 315 OF 2009 for vacant possession. The Respondents final pleadings were at page 25 and 27 which was an Amended Plaint seeking vacant possession. On the issues for determination, the Learned Counsel relied on four (4) issues. These were firstly whether the Magistrate right to give summary Judgement. the Learned Counsel urged the Court to answer this issue in the affirmative. The Appeal was at page 2 - 3 of the record. It was not disputed there was sale of the subject Swahili house to the Respondent by the Appellant. That was from Ground 1 of the Appeal. It was also not disputed the Appellant received a sum of Kenya Shillings Six Thousand (Kshs. 600,000/-) out of the sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) and what was disputed was the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-). (See Ground 2 of the Appeal).

16. The Appellant on one hand said she never received the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-). The Respondent says on instruction of the Appellant he deposited the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=). in an account of a company called “Ciesco building and construction company. The Respondent said the company was owned by a son of the Appellant called “Fanuel Mkangula. While the Magistrates in concluding that the Appellant was indeed paid the balance of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-). asked himself hard questions as follows:-

    i. How did the Respondent know the Appellants son account details if it was not through the Appellant.

    ii. Why was there an agreement for refund if the balance had not been received.

    iii. Why did the Appellants son issue payment cheques if payment had not been done

17. The Learned Counsel submitted that in answering the above nagging questions it was clear in the mind of the Magistrate the Appellant had received the full purchase price. They did fully associate themselves with the sentiments of the Magistrate and urged the court to dismiss the Appeal.

18. Secondly, whether there were any triable issues. On whether there are triable issues, the Learned Counsel submitted that the Appellant contention was that she was not paid the outstanding balance of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-). The 1st issue herein settled that she was paid the full price and urged the court to find that there were no triable issues.

19. Thirdly, what would be the consequences of allowing the Appeal. The Learned Counsel argued that the History of this matter was long, it started in the year 2008. The impugned Ruling was read on 28th July, 2010 over 13 years ago. The Appeal was filed on 3rd September 2010 also over 13 years ago. Subsequent to the Judgement of the court the Appellant was evicted from the suit premises. The Learned Counsel referred the court to the following;

a. Decree dated 28th July, 2010 at page 50.

b. Warrants to Bailiff to give up possession at page 58.

c. That the Appeal was dismissed on 15th February, 2017 for want of prosecution after being in court for 7 years with no steps by the Appellant.

The Appeal was reinstated in the year 2021 after11 years.

20. In conclusion, the Learned Counsel submitted that it was noteworthy to note in his 11 years of inactivity by the Appellant much water has passed under the Bridge. The Respondent sold the house to innocent purchasers who were now the new owners and has nothing to do with the house. The upshot of this Appeal was to have a full trial which would mean third parties be enjoined to the suit.

V. The Issues for Determination.

21. I have had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

22. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following two issues (2) salient issues for its determination. These are:-

a. Whether the filed appeal by the Appellant being aggrieved by the decision/ Ruling in Chamber Summons dated 28th day of July, 2010 of the Honourable Mr. J. Oburah Senior Resident Magistrate's Court in Mombasa in Civil Case Number 315 of 2009.

b. Who will bear the costs of the Appeal?

VI. Analysis and Determination

ISSUE No. (a) Whether the filed appeal by the Appellant being aggrieved by the decision/ Ruling in Chamber Summons dated 28th day of July, 2010 of the Honourable Mr. J. Oburah Senior Resident Magistrate's Court in Mombasa in Civil Case Number 315 of 2009.

23. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. This is a first appeal. In the case of "Kenya Ports Authority – Versus - Kuston (Kenya Ltd, (2009) 2 EA 212" this Court stated as follows regarding the duty of first appellate court:-

> " This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…"

24. Similarly, in the case of "Peter –Versus - Sunday Post Limited 1958 E.A. 424" Sir Kenneth O'Connor P. rendered the applicable principles as follows:-

> " It is a strong thig for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An

appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion….”

25. There are two broad issues for determination in the appeal. Firstly, “the doctrine of “House without Land” (Nyumba bila Shamba) and Secondly, whether the lower court was right in entering summary judgment against the appellant put differently, whether the Appellant has made up a case to enable the appellant court interfere with the finding of the trial court.

26. The concept is only unique in the Coastal region of Kenya. It has picked great credence in the legal sphere which cannot be ignored. It is where a person can own a house without owning the land which the house stands. (See COA Civil No. 18 of 2017 - in the case of:- “Addalhrazak Khalifa Salimu – Versus – Harun Rashid Khator & Others (2018), In HCCC (Malindi) No. 34 of 2005 – Famau Mwenye & 19 others Versus - Mariam Binti Said” W. Ouko J describes it as “The dispute arises from land tenure unique to Mombasa which has baffled scholars, practineers and even jurist. The Land system is only referred to as “House without Land”. That is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin Maxim – “Cujus est Salum ejus est Usque ad coelum (meaning ‘Whose is the soil, his is also that which is above it”).

This issue arose when one wanted to terminate of the tenancy and interpretation of the provision of Sections 3, 8, 51 and 106 of the Transfer of property Act – incidence of the absence of contract or local law or usage to the contrary of a Lease.

Many have build traditional permanent or semi-permanent (Swahili) structures, grown perennial crops and shared fruits of their labour with the owners creating a perennial relationship. .

27. With regard to the issue on Summary Judgement. The grounds upon which a court may struck out a defence and enter Summary Judgement were stated by the court of appeal in the case of “D.T. Dobie & Company (Kenya) Ltd – Versus - Joseph Mbaria Muchina & Another CA No. 37 of 1978” firmly held as follows:

> “ No suit should 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 amendment.”

28. In the case of “Coast projects – Versus - Mr. Shah Construction (K) Limited [2004] 2 KLR 118”;

> “ striking out a pleading is to be resorted to in very clear, plain, and obvious cases. It is a summary procedure and by virtue of that, it is a radical remedy and a Court of Law should be slow in resorting to this procedure.”
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> In Harit Sheth T/a Harit Sheth Advocates – Versus - Sharma Charania [2014] eKLR the Court held as follows:
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> > “This court stated that the purpose of the proceedings in an application for Summary Judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross -

examination (see also Continental Butchery Limited – Versus - Ndhiwa (1989) KLR 573"

29. The principles which guide the courts in determining an application for summary judgment are well settled. In the case of "Gupta – Versus - Continental Builders Ltd (1978)KLR 83", the Court of Appeal stated:

> " If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it as much as it is against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issue sought to be allowed to go to trial as sham or bogus defence ought to be rejected peremptorily."

30. With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure by the provision of Order 35 of the Civil Procedure Rules, subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case which the court feels justified in thinking that the defences raised are a sham.

31. From the above, the principles applicable in an application for summary judgment are that where there are no triable issues raised or where the issues raised are a sham, the court will grant an application for summary judgment to eliminate delays in the administration of justice. It is the application of these principles in the present case that will determine the outcome of the plaintiff's application herein.

32. In the amended Plaint dated 23rd March, 2009, the Respondent (Plaintiff in the trial court) avers that he purchased a Swahili house on Plot No. 622/44 Kongowea Maweni comprising of 11 rooms, one toilet and one bathroom from the Appellant herein on 26th May, 2008. In blatant breach of the said sale, the Appellant has continued to stay in the said premises and collecting rent from the tenants and has refused to give vacant possession thereof. As a result of the Appellant's refusal to give vacant possession he has continued to suffer loss of rent and occupation of the said house. The Respondent in the amended plaint went further to state that the Appellant threatened to sale the said house to third parties and if she does so he would suffer irreparable damages. The Respondent in the trial court sought for an injunction to restrain the Appellant from selling, alienating, collecting rent or otherwise dealing with the suit property and vacant possession.

33. The Appellant who was the Defendant in the trial court in response to the Respondent's claim filed a statement of defence dated 2nd April, 2009 where she admitted that she entered into an agreement between her and the Respondent on 26th May, 2008 for the purchase of a house without land on Plot No. 662/44 Kongowea, Maweni comprising of 11 rooms, one toilet and one bathroom at the purchase price of a sum of Kenya Shillings Eight Hundred Thousand (Kshs 800,000/-) where the sum of Kenya Shillings Six Hundred Thousand (Kshs 600,000/-) was paid upon signing of the said agreement and the outstanding balance of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) was to be paid within 60 days from the date of signing the sale agreement on 26th May, 2008. The Appellant in the trial court defence stated that it was a condition of the sale agreement dated 26th May, 2008 that the Respondent (Plaintiff) shall take possession of the property after completing the purchase price and that the Respondent did not complete the purchase price within the agreed 60 days or at all and therefore the Respondent was in breach of the sale agreement and/ breach of contract.

34. In the defence, the Appellant averred that the Respondent should not have been entitled to an order for injunction and/ or vacant possession for he was guilty of breach of contract aforesaid and the Appellant was ready and willing to refund the sum of the sum of Kenya Shillings Six Hundred Thousand (Kshs 600,000/-) paid as Deposit to the Respondent. The Appellant prayed for the dismissal of the Respondent's case with costs.

35. First, a Court must determine whether or not the Defendant Statement of facts are bare denials and in the circumstances not sufficient to deny the Plaintiff Summary Judgment relief. Under this test in the case of "Janet Edwards – Versus - Jamicca Beverages Ltd c.a. 2002/037", the Court in discussing the physiology of Summary Judgment and the whole rule as a litigation tool held inter alia that:

> " The Civil Procedure Rules represents an attempt to modernize litigation by emphasizing efficiency, proportionality and reduction of costs while maintaining principles of fairness. It does this by asking that the parties to plead in a manner which enables the Court to carry out its duty to manage cases actively, by identifying issues early, and deciding which issues need a trial. The vice of the bare denial, defence is that no one knows which issues are joined, which issues can be resolved summarily, which issues do not need resolution. This is the era of cards face-up and on the table litigation so that all can see the cards."

36. In the case "Misort Africa Limited - Versus - Ps National Treasury and Planning & Another [2020] eKLR", the court had this to say:

(11) The key consideration in determining an application to strike out a Defense is the consideration as to whether the said Defense raises triable issues. In the case of "Job Kwach – Versus - Nation Media Group Ltd" it was held as follows: -

> " Before the grant of summary judgment 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 judgment or in any other manner. What then is a defence that raised no bona fide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as "subject to liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court."[own emphasis]

37. With the above stated legal principles, I now turn to the proceedings before the lower court as I am entitled to do, this being a first appeal, so as to come to my own conclusion thereon. The Learned Magistrate ruled as follows:-

> Ruling
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> "This is a ruling on the Plaintiff/Applicant's notice of motion application dated 26/9/2009 seeking that summary judgement be entered for vacant possession of the said suit premises being Swahili house on Plot No. 622/44 KONGOWEA MAWENI. It was based on the grounds that the applicant had purchased the same from the Respondent who had blatantly refused to give vacant possession. The same was brought under Order XXXV Rules 1 and 2 of the CPR and Section 3A of the CP Act and was supported by the affidavit of the applicant sworn on 26/9/2009. The application was opposed and the respondent filed a replying affidavit sworn on 31/3/2010.

I have carefully perused the affidavit, on record and the annextures attached to the applicant's. affidavit. It is not dispute that a ale agreement in respect of the suit plot was entered into between he applicant and the respondent and that a down payment of Kshs.00,000/= was made to the respondent is the applicant upon signing he agreement on 26/5/2008. The same agreement indicated that the balance of Kshs. 200,000/= was to be paid within 60 days from that ate and that the applicant was to take possession of the property after completing the purchase price. The balance of Kshs, 200,000/= according to the applicant was finally made on 2/9/2008 through a cash "deposit into the account of Ciesco Building and Construction the applicant on 23/10/2008, more than a month after settling the lance sent but a notice to the Respondent and her son, Fanuel Mkangula Changilwa T/a Ciesco Building and constitution to refund the total purchase price of kshs.800,000 together with 5 months rent from the plot to the applicant vide an agreement executed on 16/12/08 by the applicant and the respondent.

Subsequently the applicants son drew five chques which the respondent through her Advocates forwarded to the applicant's Advocates vide their. letter dated 26/6/09 which were all dishonored upon payment. To date the applicant has neither refunded the amounts nor vacated the premises. The applicant then amended her plaint before filing this application claiming vacant possession. It is clear that these was a valid agreement before the parties and that these is acknowledgement of a total sum of Kshs. 800,000/= paid otherwise there would be no basis of the Respondent forwarding cheques worth Kshs. 833,000/= to the applicant in settlement of the applicant's claim. The agreement to refund purchase price of house n plot No. 622/44 Kongowea Maweni for a total sum of Kshs.60,000/= and endorsed by the respondent is a clear testimony that he had received and acknowledged the receipt of the balance of Kshs. 200,000/= paid through her son's account T/a Ciesco Building nd Construction which was well captured in that agreement. Reasons or the agreement to refund the entire purchase sum was not disclosed in that agreement and the respondent cannot therefore laim that it was because the agreement period was over.

Thís agreement to refund the purchase price was made 3 months after e balance of the purchase price was made and after a demand for cant possession had been made. It is therefore misleading and defrauding for the Respondent.to claim in her Affidavit that she did t receive the balance of Kshs. 200,000/=. If the Respondent felt at the balance of Kshs. 200,000/= was paid outside the agreement períod then she should not have accepted the payment and should have given out Notice of the applicant to cancel the agreement on that basís. She did not do so and went ahead and received the payment rough her son and even undertook to refund the entire sum plus additional sum of Kshs. 60,000/= with interest if there was default on payment. It would not have been possible for the applicant to know the respondent's son and even and even hís account number and deposit the money and again be issued with refund cheques for the same account. without the knowledge of the Respondent. In he circumstances it is clear that the respondent is a very dishonest litigant who took the applicant's money more than three ears ago pretending to sell him a plot which she has refused to vacate and still keeps the money to herself and is out to litigate over nothing.

The undertaking to refund the purchase price in itself which was not dishonored did not block the applicant from seeking his rights under he purchase agreement for vacant possession. I therefore found hat there is no issue left before this court for trial and I accordingly allow the application for summary judgment for vacant possession of the suit plot as prayed with costs of the application and the entire suit to the applicant

J. Omburah

Senior Resident Magistrate

28/7/2010

38. The Appellant defence when weighed against the agreement signed between the Appellant and the Respondent, which forms the subject matter of the ruling and the suit can stand as the agreement between he parties herein was not conditional upon the agreement as the amount the Appellant was disputing had already been paid into her son's account and therefore the trial court cannot be faulted in finding and holding that the defence did not raise any triable issues in the face of the written agreement which the appellant has not denied signing and the balance of the purchase price which she sis not deny receiving.

39. From the record, I agree with the Respondent that the motion to grant the Summary Judgment was on the sole criteria. That the pleadings from this four corners the factual allegations taken together manifested no issue with real prospect of succeeding at the trial.Also contrary to the Appellant's contention, viewing the evidence in light of what had been placed before the trial Court, I reject the Appellant's assertions that the defence raised triable issues on the liquidated sum meriting a full trial of the suit. In the case of "International Fund for Agricultural Development – Versus - Ahmad Jacayeri (2001) 1 All ER 161" the Court held that: -

> " While recognizing that a fuller picture may emerge at that stage, the Court can only determine an application for Summary Judgment on the material before it. The Defendant cannot ask the Court to allow the matter to go to trial simply on the grounds that something unexpected might turn up to assist him."

40. The Courts' exercise of discretion in granting Summary Judgment will not be overturned in absence of arguable points of law and facts which is likely to affect the outcome of the suit. The Appellant made no such showing here in the "Three Rikers DC – Versus - Bank of England (2001)2 ALL ER 513". "Lord Hope concerning need inter alia that the rule on Summary Judgment is a recognized exceptions to the traditional method by which issues of fact are tried in our Courts"

> " For example, it may be clear as a matter of law at the onset that even if a party were to succeed in proving all the facts, that he offers, to prove, he will not be entitled to the remedy that he seeks. In that event a trial of the facts used be a waste of time and money, and it is proper that the action should be taken out of Court as soon as it is possible. In other cases it may be possible to say wider confidence before trial that the factual basis for the action is fanciful because it is entirely without substance."

41. This fundamental logic could not be more different to that advanced as general principles of jurisprudence. In the interpretation and construction of Order 36 of Civil Procedure Rules, on Summary Judgment. In addition to the provisions of Order 36 of the Civil Procedure Rules, the Respondent's application presumably was also determined in consonant under the scope of Order 13 Rule (1) (2) of the aforesaid Rules. This rule provides: -

> " That where admission of facts have been made in the pleadings or otherwise, whether oral or in writing, the court may at any stage of the suit either on application or of its own motion and without waiting for a full trial give such Judgment with regard to admissions."

42. The discretion is to be invoked and used when there is a clear, and unambiguous admission. (See the case of "Choctram – Versus - Nazri (1984) KLR 327, Cassan – Versus - Sachania (1982) KLR 121"). It seems to me and correctly so that there was a conscious and deliberate act by the Appellant to be bound by the admission on the statement of defence. The clear disposition on this part can be found in the case of "Continental Butchery Limited – Versus - Ndiwa (1989) KLR 573" in which the Court of Appeal held that: -

> " The purpose of Judgment on admission is to enable the Plaintiff to obtain a quick Judgment where there is plainly no defence to the claims. To justify such a Judgment, the matter must be plain and obvious and a party to a litigation is not to abide prove of his right to the fruits of Judgment at the expense of having the matter proceed to trial."

43. A look at the application for Summary Judgment and subsequent ruling by the Learned Trial Magistrate are such that the conclusions reached resonate well with the settled principles. In "Nairobi Golf Hotel (Kenya) Limited – Versus - Lalji Bhinji Sanghana, Builders and Contractors CA No. 3 of 1997" and "ICDC – Versus - Daber Enterprises CA No. 41 of 2000".

44. In summary judgment motions with the affidavits before it, the function of the courts to determine whether or not a bona fide issue has been presented for trial. If none is found, an order is made granting the motion for summary judgment. In essence the defendant must set up a bona fide defense, supported by affidavits, in order to bar the motion and expressed to be brought under order 36 Rule (i) of the Criminal Procedure Rule.

45. Partial Failure of the statement of defense or an absolute admission of liability for part of the claim is a necessary condition under order 36 Rule I of the Criminal Procedure Code. There is then enumerated a list of authorities where the courts have given guidance on indicators of the differences between a motion for summary judgement under order 36 Rule 1 and where there exists sufficient and bona fide issue to entitle the defendant leave to defend the claim.The thread entrenched in the above cases is that the court will exercise its power to strike out pleadings in cases which are playing and obvious and which when appraised from the pleadings are in sufficient to mount any defence to the claim in dispute.

46. It is the duty of the courts to ensure that no individual is prevented from taking possession and or enjoying their property. A vendor cannot refuse to give vacant possession based on a technicality. The Respondent legitimately exercised its right to seek summary judgment and an order of vacant possession and or forcible eviction of the Appellant. I am in full agreement with the court on this basic principle and I shall be guided by it. As rightly stated elsewhere in this decision the pleadings and averments by the appellant never raised any triable issues worthy. The courts discretion to entitle their leave to defend. If the defence set up is illusory or sham with bare denials in ordinally in such circumstances the defendant would not be entitled for leave to defend it. That is what happened in the instant case.

47. I have no doubt that in entering the summary judgment against the Appellant, the trial Court acted properly and cannot be faulted. Furthermore, the Respondent has since sold the property which the Appellant want to subject to a full trial to third parties and is not interested in engaging in any matter that concerns it. To this end and having adverted to the Appellant's other grounds of appeal as outlined above, I proceed to dismiss the appeal with costs to the Respondent.

ISSUE No (c) Who will bear the costs of the Appeal?

48. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision

of Section 27 (1) of the *Civil procedure Act*, Cap. 21 provides that Costs follow the event, By events it means the result of the said process, legal action or proceedings.

49. In the instant case, I find that the Appeal lack merit and are hereby dismissed with costs of the appeal to the Respondent.

VII. Conclusion and Disposition.

50. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant lacks merit and is hereby dismissed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

a. that the appeal filed through a Memorandum of Appeal dated 26th August, 2010 and a Record of Appeal filed on 4th August, 2022 herein be and hereby lacks merit and is hereby dismissed with costs.

b. That the Honourable Court shall not touch the verdict or overrule the decision by the Trial Court on the Summary Judgment issued through a ruling delivered on 28th July, 2010.

c. That the costs of the appeal to be granted to the Respondent and be borne by the Appellant.

It is so ordered accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.........21ST . ...DAY OF ....MAY...........2024.

..

HON. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Firdaus Mbula, the Court Assistant;

b. No appearance for the Appellant who is in person.

c. Mr. B. W Kenzi Advocate for the Respondent.