Humanist Institute for Cooperation With Developing Countries (HIVOS) v Kenya National Farmers' Federation (KENAFF) (Civil Suit 372 of 2017) [2024] KEHC 9134 (KLR) (Civ) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL SUIT 372 OF 2017

FG MUGAMBI, J

JULY 26, 2024

BETWEEN

HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (HIVOS) ..... PLAINTIFF

AND

KENYA NATIONAL FARMERS' FEDERATION (KENAFF) ..... DEFENDANT

RULING

Background

1. This ruling determines the Motion application dated 12/6/2023. The application seeks to have part of the defendant's claim, premised on the Gold Standard Verified Emission Reduction Sale and Purchase Agreement (the Gold Standard Agreement) as set out in the counterclaim of 17/10/2013, struck out from the suit. In the alternative, the applicant seeks orders for clause 2(c) of the said counterclaim to be referred to arbitration.

2. The plaintiff contends that the Gold Standard Agreement of October 2013 was between the plaintiff and a third party organization known as the Kenya National Federation of Agricultural Producers (KENFAP). The defendant was not a party to the Agreement and as such, the counterclaim to the tune of Kshs. 201,600,000/= should be struck out and instead referred to arbitration. The plaintiff avers that this court would have no jurisdiction to entertain a claim based on the Gold Standard Agreement.

3. The application is opposed by the defendant on the grounds that there has been unexplained inordinate delay in bringing this application. It is the defendant's case that its counterclaim was served on the plaintiff in October 2017, almost 6 years ago and that they were aware of the said counterclaim

all through the pretrial conference and never raised any objection. The defendant therefore sees this as a tactic to respond to the said counterclaim out of time.

4. The defendant confirms that its counterclaim is in fact based on the Kenya National Domestic Biogas Implementation Programme (KENDBIP) Programme Implementation Agreement dated January 2014. That the agreement is a tripartite agreement entered into by the plaintiff, the defendant, and SNV—Netherlands Development Organization in Kenya.

Analysis and determination

5. I have carefully considered the pleadings, evidence, submissions and authorities submitted by the respective parties herein.

6. On the preliminary point raised by the defendant that the application is incurably defective, Order 15 Rule 2 provides as follows:

> "No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made."

7. It is indeed accurate to state that the application does not state the grounds on which it is premised. Order 2 Rule 15(1) provides the grounds on which the power to strike out pleadings which is, where the pleading(s):

   i. Discloses no reasonable cause of action or defence in law; or

   ii. Is scandalous, frivolous or vexatious; or

   iii. may prejudice, embarrass or delay the fair trial of the action; or

   iv. Is otherwise an abuse of the process of the court.

8. There is an omission by the plaintiff to state what provision of Rule 15 it relies on. If indeed the application relies on Rule 15(1)(a) of Order 2, it would be defective as the law provides that an application thereunder should not contain any evidence in support.

9. It is my view that the failure by the plaintiff to succinctly point out the relevant provision of the law under which the application is made though a serious omission, does not render the application in itself fatally defective and that it should be determined on its merits.

10. In support of this position, I am aligned to the finding of this court in Dominion Farm Limited V African Nature Stream & Another, Kisumu HCCC No. 21 of 2006 in which it was held that:

> "Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice."

11. Judicial pronouncements have crystalized the view that the discretion to strike out a suit (or part thereof) will be applied extremely sparingly in order not to deny any party a legitimate right to be heard.

The Court of Appeal warned in the case of the Co-Operative Merchant Bank Ltd V George Fredrick Wekesa, (CA No. 54 of 1999) that:

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact. ... Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court."

12. Further in Yaya Towers Limited V Trade Bank Limited (In Liquidation), (CA No. 35 of 2000) the same court expressed itself thus:

> "A plaintiff (respondent) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the respondent (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

13. This position was enunciated in a much earlier case in D.T. Dobie & Co Kenya Ltd V Joseph Mbaria Muchina & Another, [1980] eKLR, where Madan JA, stated:

> "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."

14. Analyzing the facts before me against these judicial pronouncements, I note that the defendant does not deny the reference to the Gold Standard Agreement in its counterclaim. What the defendant insists is that the said paragraph does not claim a breach of the Gold Standard Agreement but argues that as a result of the breach in the tripartite agreement, the defendant had suffered consequential losses under the said Gold Standard Agreement.

15. I have considered submissions with respect to the statement of defense and counterclaim filed by the defendant. At paragraphs 20 to 24 of the counterclaim, the defendant details the plaintiff's conduct in relation to the tripartite agreement and the running of the KENDBIP. These averments have not been denied.

16. According to the defendant, these actions are alleged to have caused it substantial loss and damage. My understanding is that part of these losses is the loss of income from the Gold Standards Agreement, as a consequential loss. I agree with the submission made by the defendant that this is quite different from a claim of breach of the Gold Standards Agreement by the plaintiff, to which the defendant would not be privy to.

17. As to whether this argument will be successful is a triable issue that merits examination at the full trial and not at this interlocutory stage. I take the view that striking out the portion of the counterclaim is a

drastic and uncalled-for measure. The plaintiff will in any case get an opportunity through evidence to discredit the defendant's claim. Should the court find the claim to be remote, the same will be dismissed at that point but after hearing the evidence by the parties. There is therefore no prejudice that will be occasioned by not allowing the application.

18. On the prayer that the same should be submitted to arbitration, this court has time and again held that the *Arbitration Act* is a self-contained Act with specific provisions on the procedure for a matter to be referred to arbitration.

19. Moreover, submission to arbitration is a consensual process between the parties bound in the arbitration agreement. It requires that at the earliest time possible, both parties indicate their intention to be bound by the arbitration process without submitting themselves to the jurisdiction of this court. That procedure has not been adhered to in the present case.

Disposition

20. Accordingly, the application dated 12/6/2023 is devoid of merit. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE