Anna E Somerville-Large v ABC Financial Services Limited & another (Commercial Case E452 of 2020) [2023] KEHC 1571 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E452 OF 2020

DO CHEPKWONY, J

FEBRUARY 24, 2023

BETWEEN

ANNA E SOMERVILLE-LARGE .... PLAINTIFF

AND

ABC FINANCIAL SERVICES LIMITED .... 1ST DEFENDANT

AFRICAN BANKING CORPORATION LTD .... 2ND DEFENDANT

RULING

1. For determination is a Notice of Motion application dated June 3, 2022 ("the application") filed under order 2 rule 15 (1) and order 51 (1) both of the *Civil Procedure Rules* ("CPR"). The application seeks the following orders:

    a) Spent;

    b) The honourable court be pleased to strike out the suit against the 1st and 2nd defendants in its entirety;

    c) The costs of the application be provided for.

Background

2. It is important to provide the background of the case for purpose of clarity. According to the Amended Plaint dated June 2, 2021, the plaintiff and the defendants ("collectively the bank") entered into a bank-customer relationship when she opened a joint account with her husband at the bank's branch in Nakuru town. In the year 2012, the bank presented the plaintiff with an investment opportunity dubbed the Grand Port Investment Fund 1 ("the fund") in which the bank acted as representatives

and the sole transaction advisers as well as the placement agents for the investment company domiciled in Seychelles.

3. The plaintiff invested into the fund a sum of USD 165,000.00 for the purchase of 165 shares which was acknowledged vide a letter dated October 12, 2012 and the effective date of the investment agreement was November 1, 2012. A dispute arose when the bank failed and/or refused to pay the plaintiff the profits and capital investment to which the plaintiff terms as a breach of the investment agreement by the bank.

4. The plaintiff filed the suit seeking:-

   a) Payment of the principal sum invested into the fund of USD 165,000.00.

   b) 5th year profit at the time of the fund's closure November (1, 2017): 85% of the principal sum being USD 140,205.00.

   c) The special damages for the loss of interest on the sums owing from the date when the principal sum invested and the 5th year profit fell due till payment in full.

   d) General damages for breach of contract.

   e) General damages for breach of trust the financial distress, emotional and mental anguish as well as anxiety arising from the bank's breach of the investment agreement.

   f) Damages for fraudulent false misrepresentation against the bank.

   g) Damages for negligent misrepresentation against bank together with costs and interest of the suit.

5. The bank entered appearance and filed their Defence which was amended vide the Amended Defence dated August 25, 2021. The bank generally denied the contents of the Amended Plaint and stated that it only acted as a transaction adviser and agent, and, that its role was limited to acting as marketer for the fund. The bank holds that the plaintiff invested directly into the fund it neither had any contractual relationship with the bank and neither did it receive any monies from the plaintiff.

6. According to the bank there is no privity of contract between itself and the plaintiff, hence no reasonable cause of action has been raised against it by the plaintiff. Further, the bank holds that since the principal party which is the fund is known, it cannot be sued as its agent and therefore urges that they have wrongly joined as parties in the suit herein and they would move the court to seek the same to be struck out.

7. In the spirit of promoting alternative dispute resolution Mechanisms, this suit was referred to mediation on September 22, 2021. However, the mediation process was not successful and it was referred back to this court for determination on April 22, 2022. The bank then filed the present application dated June 3, 2022 seeking to have the suit struck out and this is what is for determination herein.

The bank's case

8. The application is supported by the affidavit of Sharon Mukami the legal officer of the bank. She holds that the bank has wrongly been sued since it did not enter into any agreement with the plaintiff. She states that the said agreement was between the plaintiff and the Grand Port Ltd as per the subscription agreement dated September 28, 2012.

9. It is also her deposition that a contract cannot confer rights or impose obligations on any person other than the parties to the contract as there is no privity of contract between the plaintiff and the defendant, thus there is no valid cause of action that arises against the defendant (bank). The bank holds that the plaintiff has not demonstrated any exceptions to the rule of privity of contract, specifically the existence of a collateral contract to the one in question which the bank was a party to or an agency relationship in which the bank transacted on behalf of the fund. The bank therefore has urged the court to strike out the suit since it does not have a reasonable cause of action as against it.

The response

10. The plaintiff filed her response to the application sworn on September 7, 2022 where she reiterated her position as per the Amended Plaint. She holds that the suit is anchored not only on breach of contract but also fraudulent misrepresentation by the bank which had superior knowledge of the matters on the investment, and which knowledge formed her decision to invest in the fund. She states that she has suffered great loss as a result of the professional advice she obtained from the bank.

11. The plaintiff states that the bank acknowledged receiving the sum of USD 165,000 for the purchase of 165 shares vide a letter dated October 12, 2012 who thereafter sent the plaintiff a copy of the fund certificate as per the share certificate and a letter dated September 9, 2013. The plaintiff further states that the bank sent updates on the expected profits on the investment which stood at USD 24,750 as at November 1, 2013. All this information, the plaintiff states that she has annexed the evidence which are marked at pages 35,36,37 and 38 of the exhibit. According to the plaintiff, she wrote to the bank several letters, which it did not respond to, as evidenced by the letters marked in the exhibits 39, 40, 41,42 and 43.

12. In respect to the application by the bank, she holds that it is defective since it is premised on order 2 rule 15(1) (a) of the Civil Procedure Rules which states "a suit does not disclose a reasonable cause of action should be struck out". The plaintiff states that sub-rule (1) (a) provides that no evidence should be admissible and therefore the supporting affidavit of Sharon Mukami which contains evidence should be struck out.

13. The plaintiff also states that in the bank- customer relationship, the bank presented itself as agents of the fund and though the law provides that an agent of a disclosed principal cannot be held personally liable, there are exceptions to this rule which are fraud, misrepresentation or deceit. The plaintiff states that this case is based on fraud and misrepresentation on the part of the bank which cannot be determined in an application as it is crucial to conduct trial so that the plaintiff can demonstrate how the fraud took place.

14. The plaintiff has thus beseeched the court to consider the main suit which raises serious issues that should be resolved at trial and not take a draconian step of striking out the suit as this will be prejudicial to her. She therefore urges the court to dismiss the application with costs.

The submissions

15. The court directed and the application was disposed of by way of written submissions. The bank filed its submissions dated October 12, 2022 whereas the plaintiff filed hers dated October 27, 2022. I find that the bank in its submissions raised two issues for determination, being:-

    a) Whether the application presents a case for striking out of respondents pleadings; and,

    b) Whether the applicants are rightfully enjoined in the suit.

    The plaintiff on her part has equally raised two issues in her submissions being;

a) Whether the application is competent; and,

b) Whether the suit discloses a reasonable cause of action against the defendants.

The respective arguments have been taken into consideration.

Analysis and determination

16. To determine the application dated June 3, 2022, I have read through and considered the grounds upon which the application is premised, the grounds of opposition thereof and the arguments by both parties for and against the application in their respective submissions alongside the cited case and statute law.

17. All these issues raised by the parties can be summarized into one main issue, which is whether the application has merit to warrant the orders sought. The application is based on order 2 rule 15 of the Civil Procedure Rules which states:-

> " [15]. "Striking out pleadings
>
> 1) 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.
>
> 2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
>
> 3) So far as applicable this rule shall apply to an Originating Summons and a Petition."

18. The above provision is not couched in mandatory terms but in discretional terms. In determining the instant application, I am minded of the fact that the court in exercise of its discretion has to determine whether or not to a pleading discloses no reasonable cause of action or defence in law, is scandalous, frivolous, vexatious, prejudicial, embarrassing or an abuse of the process of the court. See the Court of Appeal decision in the case of *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR, wherein it was stated as follows:

> " However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

19. The question that remains is whether this court should strike out this suit for failing to disclose a reasonable cause of action. The general principle guiding the court is that the court should exercise

great circumspection in striking out a suit. This should only be done in the clearest of cases where the case cannot be rescued by amendment. In this case, the main concern is whether the Plaint has raised a reasonable cause of action.

20. I wish to resonate with the definition provided in the case of *DT Dobie & Co (K) Ltd v Muchina*, [1982] KLR, where the Court of Appeal defined the term as "reasonable cause of action" to mean:-

> " an action with some chance of success when allegations in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ..." .

21. From the definition therein-above, a cause of action need not be one that has chances of success but one which is supported by facts. In this case, the Amended Plaint contains the details of the dispute from the time the bank account was opened to the investment into the fund until when the alleged breach occurred. All the claims have been pleaded and substantiated with evidence which the Plaintiff ought to be given a chance to present.

22. In the circumstances, the suit cannot be summarily dismissed on account that the bank has wrongly been sued in the case since order 1 rule 9 of the *Civil Procedure Rules* states;-

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

23. The next issue is whether the bank is the proper party in this suit. From the correspondences in the plaintiff's bundle of documents have all been exchanged between the plaintiff and the bank's representatives on behalf of the fund. Thus the principal–agent relationship between the bank and the fund has been established. The bank has also admitted this position in its Defence at paragraph 7 which reads in part;

> " ... At no point in time did the 1st or 2nd defendants present the plaintiff with any opportunity in the name and style of Grand Port Investment Fund, the 1st defendant confirms it only acted as a transaction adviser and agent whose role was limited to act as a marketer for the fund."

24. As a marketer for the fund, I find its participation in the suit as necessaryso as to provide an answer to this dispute. Delvin J in the case of *Pizza Harvest Limited v Felix Midigo* [2013]eKLR cited with approval the case of *Amon v Raphael Tuck & Sons Ltd?* [1956] 1 All ER 273:

> " What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

25. In this case in order to establish whether there were fraudulent misrepresentations and breach of contract on the part of the bank, it is imperative that it must be a party to the suit so that it can answer these questions. The plaintiff entered into a relationship with the bank which introduced the concept of the fund to her. Therefore, it cannot now denounce such relationship or its involvement with the plaintiff's investment into the fund. The issues of fraudulent misrepresentation as raised are trivial and which require to go to trial to determine them, hence the court cannot strike out a suit until such evidence has been adduced.

26. In the end, I find that the application dated June 3, 2022 lacks merit and the same is dismissed with costs.

    It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D O CHEPKWONY

JUDGE

In the presence of:

Mr Ogutu for Mr Ohaga (S L) counsel for plaintiff

Mr Wairoto counsel for respondent

Court assisant - Sakina