First Capital Limited v End to End Limited & 2 others (Civil Suit E023 of 2022) [2023] KEHC 22203 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 22203 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E023 OF 2022

F WANGARI, J

APRIL 27, 2023

BETWEEN

FIRST CAPITAL LIMITED ..... PLAINTIFF

AND

END TO END LIMITED ..... 1ST DEFENDANT

ABDIRAHMAN MOHAMUD ABDOW ..... 2ND DEFENDANT

AYAN KASSIM MAALIM ..... 3RD DEFENDANT

RULING

1. This ruling relates to two (2) applications. The first application (hereinafter the first application) dated July 8, 2022 and filed on July 21, 2022 sought for the following orders: -

    a. That the Honourable Court be pleased to enter summary judgement against the Defendants jointly and severally in the sum of Kenya Shillings Forty-Three Million Five Hundred and Fifty Thousand only (Kshs 43,550,000) together with interest and costs at the court rate as prompt in the plaint herein.

    b. The costs of the application be provided for.

2. The second application (hereinafter the second application) dated September 14, 2022 and filed on September 21, 2022 sought for the following orders: -

    a. That the name of the 3rd Defendant/Applicant herein Ayan Kassim Maalim be struck out from the suit;

    b. That the Honourable Court be pleased to grant any orders as it deems fit and just;

    c. That costs of the application be provided for.

3. The 1st and 2nd Defendants/Respondents opposed the application dated July 8, 2022 through a replying affidavit sworn by the 2nd Respondent on September 20, 2022 and filed on September 21, 2022. The 3rd Respondent equally opposed the application dated July 8, 2022 through a replying affidavit sworn on September 14, 2022 and filed in court on September 21, 2022.

4. As for the application dated September 14, 2022, the Plaintiff opposed the same through grounds of opposition dated October 17, 2022 and filed on October 21, 2022.

5. When the matter came up before court, it was agreed by parties that the two applications be disposed of together by way of written submissions. Both parties complied by filing detailed submissions together with authorities in support of their rival positions.

Analysis and Determination

6. I have considered the two applications, the responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -

    a. Whether either of the two applications are merited;

    b. Who bears costs?

7. The first application is said to have been brought under the provisions of Order XXXV Rule 1 (Order 35 Rule 1) and Order L Rule 1 (Order 50 Rule 1). However, a look at the prayers sought clearly shows that it is a request for summary judgement which is primarily anchored on the provisions of Order 36 of the *Civil Procedure Rules*. I am aware that prior to the Civil Procedure Rules, 2010, summary judgement was provided for under Order XXXV of the Repealed Civil Procedure Rules. Be that as it may, I am alive to the principle that citation of the wrong provision of the law does not render an application fatally defective. In *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] eKLR, the court while citing the Supreme Court decision in *Hermanus Philip Steyn v Giovanni Gnecchi - Ruscone* [2013] eKLR held thus: - "...It therefore follows that failure to cite a relevant provision does not in any way render the application defective and the court shall proceed to determine the application on its merit..."

8. In *Lagoon Development Limited v Prime Aluminium Casements Limited* [2021], the court while faced with an almost similar application herein had the following to say: - "...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..." Intertwined with summary judgement is the aspect of striking out the defence since it is only upon striking out a defence in a liquidated claim that summary judgement can be entered. Authorities are legion on striking out a pleading save to quote the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 where it was held that The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence.

9. I have looked at the Defendants' defence dated May 31, 2022 and indeed there is no denial that it obtained a facility from the Plaintiff. However, the facility was obtained for a specific purpose and which purpose was disclosed in the loan agreement dated January 14, 2021. There is a confirmation from both parties that part of the facility amounting to Kshs 20,000,000/= has been paid. A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of *Olympic Escort International Co. Ltd. & 2 Others –vs- Parminder Singh Sandhu & Another* [2009] eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated

as follows: "...It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide..."

10. It is my view that the Defendants' defence at paragraph 5 raises a triable issue and this alone is enough to disallow the application dated July 8, 2022.

11. On the second application, the 3rd Defendant has applied to have her name struck out from the suit. Her grounds in support are that she is neither a director or employee of the 1st Defendant. She further adds that she lacks any affiliation with the 1st Defendant in any way. She is neither a signatory of the 1st Defendant nor authorized to sign any official documents on its behalf. In its grounds of opposition, the Plaintiff states that the 3rd Defendant signed a personal guarantee with regard to the loan advanced to the 1st Defendant and for this reason, she is an important party in the proceedings.

12. The application is principally based on the provisions of Order 1 Rule 10 of the *Civil Procedure Rules, 2010*. Order 1 Rule 10 (2) provides as follows: -

> " The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

13. The question that falls for determination therefore is whether the 3rd Defendant is a necessary party to this suit and if so, whether any cause of action is disclosed against her. The power to strike out a party from a suit should be approached with caution. This court has to assess whether or not there is a prima face case against the 3rd Defendant. In the grounds of opposition, the Plaintiff states that the 3rd Defendant signed a personal guarantee when the 1st Defendant was obtaining the facility.

14. I am of the considered view that whether or not the 3rd Defendant has any links with the 1st Defendant or whether she guaranteed the loan is a question that cannot be determined at this juncture. I think that to ascertain this at this stage, the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the 3rd Defendant by assessing the evidence in place. This in my view is premature as evidence can only be tendered at the trial. I am of the view that the merits and demerits of the claims against the 3rd Defendant cannot be summarily decided through this application.

15. The upshot is that the application dated September 14, 2022 is premature and ought to be considered in a full trial.

16. Following the foregone discourse, the following orders do hereby issue: -

    a. Both applications, that is, the one dated July 8, 2022 and the other dated September 14, 2022 are premature and thus not merited and I proceed to dismiss both;

    b. Costs be in the cause.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF APRIL, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Gikandi Advocate for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Guyo, Court Assistant