



Paradise Safari Park Limited v Attorney General & another (Civil Case 1203 of 2015) [2023] KEELC 17235 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE 1203 OF 2015
OA ANGOTE, J
APRIL 27, 2023**

BETWEEN

PARADISE SAFARI PARK LIMITED PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

SINOHYDRO CORPORATION LIMITED 2ND DEFENDANT

RULING

Background.

1. Before this Court for determination is the Plaintiff's/Applicant's Notice of Motion application dated May 25, 2022 brought pursuant to the provisions of Section 22 of the *Civil Procedure Act* and Order 2 Rule 15 (1) (c) and (d) of the *Civil Procedure Rules, 2010* seeking the following orders:
 - i. The Defences of the first and second Defendants be struck out for failure to comply with the Order for Discovery made on the 10 October 6, 2017.
 - ii. Judgement be entered for the Plaintiff against the 1st and 2nd Defendants as prayed in the Amended Plaint.
 - iii. The costs of the Application be paid by the 1st and 2nd Defendants.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Gibson Kamau, the Legal Affairs Manager of the Plaintiff, who deponed that on October 16, 2017, this Court (Justice Obaga) made an order for the discovery of certain documents in the Defendants' possession relating to the design and construction of River Kigwa, which documents are necessary for the preparation of a report by the Plaintiff's expert.



3. It was deposed by the Plaintiff's Legal Affairs Manager that the order was served on the Advocates for the 1st and 2nd Defendants on November 17, 2017; that despite numerous letters to the Defendants seeking discovery, none has been forthcoming and that the Attorney General vide his letter of October 19, 2021 responded to the letter of October 14, 2021 asking that the parties meet and agree on the documents each seeks to rely on in light of the two subsisting orders for discovery.
4. Mr Kamau deposed that the Plaintiff has equally raised the issue of non-compliance with the Order of October 16, 2017 in paragraphs 5-7 of the Replying Affidavit of Boniface Irungu sworn and filed on March 19, 2019 and paragraph 14 of the Affidavit filed on September 24, 2021 and that the documents for which discovery is sought are required by the Plaintiffs' expert witness without which the Plaintiff is unable to properly prepare for hearing and is severely prejudiced.
5. In response to the Motion, the 1st Defendant filed Grounds of Opposition in which he averred that the Motion offends the mandatory provisions for striking out pleadings as set out under Order 2 rule (15) of the *Civil Procedure Rules*; that its' Defence raises pertinent issues that can only be canvassed through hearing the dispute on merit and that dismissing the Defence will extremely prejudice the Defendant's ability to present its case.
6. According to the 1st Defendant, in order to ensure a fair trial, the court has to consider all the facts and evidence presented by all the parties herein and dismissing the Defence will hinder the court's ability to guarantee a fair trial; that the Plaintiff has never been keen on prosecuting this case and that the application is another tactic employed to further delay this matter.
7. The 2nd Defendant responded vide Grounds of Opposition in which it averred that the Defence raises pertinent and triable issues that deserve to be heard on merits; that vide a list and bundle of documents dated the October 7, 2011, the 2nd Defendant produced all the documents in support of its case and that dismissal of the Defence as sought is an extremely drastic order and tantamount to condemning a party unheard.
8. It was deposed that the application is largely a delaying tactic employed by the Plaintiff to defeat the just and expeditious resolution of the matter; that the Plaintiff has approached the Court with unclean hands having failed to comply with the Court's previous orders and that the application is an abuse of Court process and should be dismissed.

Submissions

9. The Plaintiff's Counsel submitted that vide a Ruling of 1 October 6, 2017, the Court (Obaga J) made an order for the discovery of certain documents within 45 days; that despite service of the order and several letters with regard to the same, no discovery has been made and that the Court of Appeal in *Aga Khan Health Services Kenya v Margaret Njoki Njunge & 3 others* [2016] eKLR held that where a party does not comply with an order to give discovery of documents necessary for the preparation of the case, it was proper to strike out the pleadings of the defaulting party.
10. It was submitted that the Defendants have not rendered any explanation for their non-compliance with the Court orders; that the application is properly before the Court; that contrary to the Defendants' lackadaisical attitude, the Plaintiff when asked for discovery demonstrated its inability to get the sought documents and that the Defendants have willfully and deliberately failed to comply with the orders of October 16, 2017 which warrants the striking out of their Defences.
11. The 1st Defendant's Counsel set out the issues for determination as being: whether the application complies with the requirements of the *Civil Procedure Rules* and the *Civil Procedure Act*; whether



dismissing the 1st Defendant's Defence would hinder the right to a fair trial and whether the application is merited.

12. It was submitted that the jurisdiction to strike out pleadings is discretionary and must be exercised judicially; that the Court in *Postal Corporation of Kenya v IT Inamdar & 2 others* [2004] 1 KLR 359, stated that the law is now well settled that if the Defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend the suit and that the Court in *Olympic Escort International Co Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR stated that a triable issue is not necessarily one that the Defendant would ultimately succeed on but it need only be bona fide.
13. It was submitted that dismissing the 1st Defendant's Defence would hinder its right to a fair trial because its Defence raises several pertinent issues that can only be resolved through trial; that as expressed by the Court in *Gladys Jepkosgei Boss v Star Publication Limited* [2021] eKLR, it would be unfair to condemn the 1st Defendant without hearing its side of the story and that the present application is a clear attempt by the Plaintiff to further delay the trial.
14. The 2nd Defendant's Counsel submitted that contrary to the Plaintiffs' submissions, they have produced all the relevant documents in their possession and it cannot be said that they have not complied with the court orders and that as expressed by the Court of Appeal in *Eastern Radio Services v Tiny Tots* (1967) EALR 392, a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his Defence.
15. According to the 2nd Defendant's counsel, it would be draconian to drive the 2nd Defendant away from the seat of justice without an opportunity to be heard; that the Plaintiff is attempting to have the Court elevate a technicality to dismiss the Defendant's Defence and that the Court of Appeal in *Merry Beach Limited vs Barclays Bank Limited* [2019]eKLR while addressing the question of striking out of pleadings for failure to comply with an order for discovery found that the fact that the Respondent had supplied some documents was sufficient compliance.
16. The question of whether or not other documents had been destroyed, it was submitted, would be interrogated at trial; that the provisions of article 25, 50 and 159 of the *Constitution* dictate that a party must be afforded a fair opportunity to present their case and challenge their adversary's evidence and that the 2nd Defendant's Defence raises very pertinent issues that can only be canvassed at trial.

Analysis & Determination

17. Having considered the Motion, responses and submissions by the parties, the sole issue that arises for determination is whether the 1st and 2nd Defendants' Defences should be struck out and judgment entered for the Plaintiff as prayed in the Amended Plaintiff?
18. The Plaintiff is seeking to have the 1st and 2nd Defendants' Defence struck out. The Motion is premised on order 2 rule 15(1) of the *Civil Procedure Rules* which provides as follows;

“ 15.

- (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 defense 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.”

19. The Motion is particularly brought under subsections (c) and (d) of the aforesaid Order which provide that a pleading may be struck out on account of it prejudicing, embarrassing or delaying the fair trial of the action or where it is an abuse of the process of the Court.

20. As to what constitutes a pleading that tends to prejudice, embarrass or delay fair trial, the authors of *Bullen and Leake and Jacob's Precedents of Pleadings* 12th Ed stated thus;

“Any pleading or indorsement of writ which may prejudice, embarrass or delay the fair trial of the actions may be ordered to be struck out or amended. The power is designed to prevent the pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties, and to ensure as far as the pleadings are concerned, a trial or fair terms between the parties in order to obtain a decision which is the legitimate objection of the action.”

21. In the case of *Mercy Nduta Mwangi t/Mwangi Keng'ara & Co Advocates v Invesco Assurance Company Limited* [2019] eKLR the Court while discussing the grounds for striking out a pleading enumerated in Order 2 Rule 15 stated thus;

“A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See *Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No 984 of 1999*.

A pleading is an abuse of the process where it is frivolous or vexatious or both.”

22. Having keenly considered the application, it is apparent that the Plaintiff is not impugning the Defences in themselves, there being no allegations against the Defences as contemplated under Order 2 Rule 15(c) and (d) of the Civil Procedure Rules. The Plaintiff seeks to have the Defences struck out on account of non-compliance with an order of the Court.

23. To this end, the Court opines that the application does not fall within the threshold of Order 2 Rule 15. Nevertheless, guided by Article 159(2)(d) of the *Constitution*, this default by itself does not render the application fatal.

24. So, does the Court have the mandate to strike out pleadings for non-compliance with orders of the Court, specifically the orders for discovery? According to *Black's Law Dictionary*, 7th Edition, discovery is defined as:

“the disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery



as a party of a cause or action pending or to be brought in another court, or as evidence of his rights or title in such proceeding.”

25. Section 22 of the [Civil Procedure Act](#) under the head, ‘power to order discovery and the like’ reads as follows:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.”

26. The intention of this Section is to ensure a level playing field where all the parties are fully aware of their opponent’s case and have the relevant materials to support their case. As stated by the Court in [ABN Amro Bank N.V v Kenya Pipeline Company Limited](#) [2014] eKLR;

“Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the [Civil Procedure Act](#) and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of [the Constitution](#). And as Justice Kimondo J stated in the Oracle productions case, I too conclude that “the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial.” It, therefore, serves a higher objective as the enabler of fair hearing.”

27. It is not in doubt that the discovery of documents forms part of the case management process envisioned under Order 11 of the [Civil Procedure Rules](#). Order 11 Rule 5 (b) provides as follows;

“Where orders or directions are given at a case management conference —

- (a) The judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and
- (b) where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.”

28. The power granted to a Court therein is discretionary in nature and the Court must abide by the principles governing the exercise of its discretionary powers, being that though the discretion is unfettered, it must be exercised judiciously and based on sound principles of law.



29. This position was expressed by the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR as follows:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

30. By way of brief background, the Plaintiff vide an application dated January 13, 2015, sought discovery of certain documents from the Defendants. In response, the 1st Defendant stated that the Plaintiff had failed to show the relevance of the documents sought; that it filed its list of documents on the September 30, 2011 and that all the design documents and documents related to sizing of the diversion culverts have been supplied to the Court.
31. The 2nd Defendant’s response was to the effect that vide its bundle of documents dated the October 7, 2011, it filed all the relevant documents in its possession; that vide a letter dated March 27, 2013, it forwarded further documents and that the documents on the designs related to the construction of the carriageway could not be released as it was the property of the Ministry of Roads and as such required authorization therefrom.
32. Vide its Ruling, the Court allowed the Plaintiffs’ Motion ordering the production of the documents sought in particular those relating to the designs of Thika Super Highway in the section of the area in contention within 45 days of the service of the Order on the Defendants.
33. Vide the present motion, the Plaintiff contends that despite service of the orders, they have yet to be complied with and as such, the Defendants Defences are liable to be struck out. In response, the 1st and 2nd Defendants maintain that they have supplied the Defendant with all the relevant documents and further, that their Defences raise valid questions that can only be fully determined at trial.
34. The first issue for determination by the Court is whether indeed there has been non-compliance with the Court order of 1 October 6, 2017. Whereas the Defendants assert that they are fully in compliance, it is noted that the basis for this contention are documents and correspondence pre-dating the Court Order. There is no evidence to show that the documents the court directed to be supplied to the Plaintiff were ever supplied.
35. Further, there has been no challenge to the Orders of October 16, 2017, and no documents having been filed after the issuance of the orders despite several correspondences by the Plaintiff. In the circumstances, the Court finds that the Defendants are not in compliance with the orders of the court.
36. So, is this non-compliance sufficient to warrant dismissal of the Defendants’ Defences? The Courts have had the occasion to consider the question of whether non-compliance with orders of discovery warrant the striking out of a party’s pleading.



37. The Court of Appeal in *Omar Sharif T/A Kemco Auto v Freight Forwarders Limited & another* [2008] eKLR placed reliance on the case of *Eastern Radio Service v Tiny Tots* (1967) EALR 392 stating;

“... Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that report as follows:

It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental.”

And Sir Clement De Lestang, VP stated in that case:

The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of willful default.”

38. More recently, the Court of Appeal in the case of *Aga Khan Health Services Kenya v Margaret Njoki Njung'e & 2 others* [2016] eKLR, stated thus;

“Indeed, the holding that is highlighted supports the position we have taken in this appeal that a party who wilfully disregards or fails to comply with the order of discovery can be precluded from pursuing its claim.”

39. It is clear from the foregoing decisions that striking out is indeed a possible recourse to be had by the Court where a party disobeys an order of discovery, but only where the Court is convinced that such disobedience is willful, deliberate and warrants the taking of such an extreme action.

40. The 2nd Defendant has pointed to this Court the Court of Appeal decision in *Merry Beach Limited v Barclays Bank of Kenya Limited* [2019] eKLR. In that case, the Court of Appeal agreed with the trial court's decision to refuse an invitation to strike out pleadings on account of failure to comply with discovery stating that:

“We would agree with the learned judge that having provided some of the cheques in the list, and then setting out the reasons for its inability to provide the remaining cheques, amounted to sufficient compliance in the circumstance.”

41. This can be contrasted with the present case where no compliance has been demonstrated as alleged and no explanation rendered as to the non-compliance. Nevertheless, in the spirit of Article 50 of the *Constitution* and bearing in mind that the striking out of pleadings is an extreme act to be resorted to as a last resort, the Court will grant the Defendants an opportunity to file the documents sought within 30 days of the date hereof, failure to which the Defences by the 1st and 2nd Defendants will stand dismissed.

42. Accordingly, the Motion dated May 25, 2022 fails. The defendants shall bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF APRIL, 2023.



O. A. ANGOTE

JUDGE

In the presence of;

Mr. Fraizer for Plaintiff

No appearance for 1st Defendant

Mr. Wanga for 2nd Defendant

Court Assistant - June

