



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. E002 OF 2021

ALFRED NYADIMO AGUNGA T/A Y NET INTERNATIONAL.....PLAINTIFF

-VERSUS-

CHINA COMMUNICATIONS CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **27th September 2021**. It was filed by the defendant/applicant pursuant to **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 2 Rule 15(1)(b), (c), (d) and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for the striking out of the Plaint filed herein and/or dismissal of the suit in its entirety with costs. The application is premised on the grounds that the parties have resolved the issues that led to the filing of the suit; and that, in the circumstances, maintaining this suit is an abuse of the processes of the Court.

[2] The application was premised on the affidavit sworn by the defendant's Project Manager, **Lin Zhiping** in which it was averred that, after the institution of the Plaint, the parties addressed the issues in contest and thereupon, the plaintiff/respondent wrote to the defendant a letter dated **14th July 2021** confirming that the concerns that led to the filing of this suit had been addressed and full payment made. It was further averred that, in spite of that unequivocal acknowledgement of settlement, the plaintiff has caused this suit to continue pending; to the prejudice of the defendant. A copy of the letter in issue was annexed to the Supporting Affidavit as **Annexure LZ1**.

[3] The plaintiff resisted the application vide his Replying Affidavit sworn **27th October 2021**. He averred that, although the defendant intimated to him on or about the **14th July 2021** that they had already transferred the entire amount in dispute to his account, this was not the case; and that when he checked his account he realized that only **Kshs. 87,600,000/=** had been deposited, leaving a balance of **Kshs. 100,112,768/=**. Thus, according to the plaintiff, there are valid triable issues for the Court to inquire into. Consequently, the plaintiff asserted that this application is a diversionary tactic by the defendant, intended merely to delay the determination of this case.

[4] The application was canvassed by way of written submissions; orders to that effect having been made herein on **28th September 2021**. In his written submissions filed herein on **16th November 2021**, **Mr. Ochieng**, learned counsel for the defendant, proposed the following two issues for determination:

[a] Whether there is evidence that the instant suit is frivolous and vexatious;

[b] Whether the Plaint dated **12th February 2021** should be struck out and the suit dismissed for being frivolous and vexatious.

[5] **Mr. Ochieng** took the view that the circumstances surrounding the instant suit justify the invocation of the remedy provided for under **Order Rule 15, Civil Procedure Rules**. He reiterated the defendant's contention that the matter has been settled and a written acknowledgment of such settlement made by the plaintiff. He consequently referred to **Bullen & Leake and Jacobs on Precedents of Pleadings** (12th Edition) at page 145; **County Council of Nandi v Ezekiel Kibet Rutto & 6 Others** [2013] eKLR and **Madison Insurance Company Limited v Augustine Kamanda Gitau** [2020] eKLR, as to what amounts to a scandalous, frivolous, or vexatious action. He thus urged that the defendant's application be allowed and that this suit be struck out as prayed.

[6] On his part, **Mr. Matata** for the plaintiff, relied on the cases of **D.T. Dobie & Company (Kenya) Ltd v Muchina** [1982] KLR 1, **P M M v G M M** [2017] eKLR and **Alumark Investments Ltd v Tom Otieno Anyango & 4 Others** [2018] eKLR to buttress the submission that striking out a pleading is a draconian measure that is to be exercised sparingly and cautiously. In his view the plaintiff has demonstrated that there is at least one issue for determination; namely, whether the defendant has fully paid the sums due. He therefore urged that the plaintiff be given his day in court to demonstrate that he has a genuine cause of action against the defendant. For that reason, he prayed for

the dismissal of the instant application with costs.

[7] I have carefully considered the application as well as the averments set out in the parties' respective affidavits within the backdrop of the pleadings filed herein. I have also perused and considered the written submissions filed herein by learned counsel; including the authorities relied on in support of those submissions. I note that the application has been filed under **Order 2 Rule 15(1)(b), (c) and (d)** of the **Civil Procedure Rules**, among other provisions of the law. The rule provides that:

“At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-

...

a) it is scandalous, frivolous or vexatious; or

b) it may prejudice, embarrass or delay the fair trial of the action; or

c) 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.”

[8] And, in **D.T Dobie & Company (Kenya) Limited vs. Muchina** [1982] KLR 1, the principles guiding the exercise of the Court's discretion under the aforesaid provision of the law were set out thus:

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way.” (see also **Alumark Investments Ltd v Tom Otieno Anyango & 4 Others**)

[9] Thus, it is now trite that where a valid triable issue has been raised by the pleadings, the parties ought to be given an opportunity to present their respective positions before the Court for a merit hearing as opposed to a determination on the basis of affidavits. In this case, although the document marked **Annexure LZ1** shows that the concerns that led to the institution of this suit have since been addressed, the plaintiff has raised a pertinent issue vide his Replying Affidavit filed on **29th October 2021**; namely that, he later realized on checking his bank account that not all the sums due from the defendant had been deposited in the account; and that there is still an outstanding balance of **Kshs. 100,112,768** yet to be paid by the defendant.

[10] There is nothing vexatious, scandalous or frivolous about that. To the contrary, the plaintiff is entitled to a hearing by dint of **Article 50(1)** of the **Constitution**. In **Dupoto Group Limited v Kenya Airports Authority & Another** [2013] eKLR, it was held that:

“...the overriding principle to be considered in an application for striking out pleadings is whether it raises triable issues. This is because a pleading that raises triable issues confirms existence of a reasonable cause of action, and it cannot consequently be said that the pleading is scandalous, frivolous or vexatious.” (See also **P M M M v G M M** supra)

[11] Moreover, in **D.T. Dobie & Company (Kenya) Ltd v Muchina** (supra) it was held as follows, at page 9:-

“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.”

[12] In the premises, I find no merit in the Notice of Motion dated **27th September 2021**. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY 2022.

OLGA SEWE

JUDGE