



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HCACEC SUIT NO. 22 OF 2019

ETHICS AND ANTI-CORRUPTION

COMMISSION.....PLAINTIFF

VERSUS

NICHOLAS KIPROP KAINO .....1<sup>ST</sup> DEFENDANT

ROSE ROTICH .....2<sup>ND</sup> DEFENDANT

RULING

1. By a Complaint filed herein on 19<sup>th</sup> September, 2018 the Plaintiff seeks to recover certain monies from the 1<sup>st</sup> to 5<sup>th</sup> Defendants which it alleges were fraudulently paid out by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, when they were the signatories to the accounts of Chebororwa Agricultural Training Centre Demonstration Farm Fund held at KCB Bank Ltd. The total amount sought to be recovered is Kshs.11,493,000/=.

2. It is alleged that at all times material to this suit the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant were husband and wife and proprietors of a business entity known as Rotkan Investments which benefitted from some of the alleged fraudulent payments. The said payments are tabulated in paragraph 7 of the Complaint.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants and also the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants all filed statements of defence in which they denied the Plaintiff's claim in toto and put it to strict proof thereof.

4. I note from the record that the statement of defence of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was struck out by this court on 29<sup>th</sup> April, 2020 following an admission by the 3<sup>rd</sup> Defendant which also bound the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. Upon striking out the defence the court entered judgment for the Plaintiff against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants for a sum of Kshs. 5, 746,500/- and directed the Plaintiff's claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be set down for hearing on a date convenient to the parties.

5. However, on 3<sup>rd</sup> February, 2021 the Plaintiff filed a Notice of Motion dated 14<sup>th</sup> December 2020 which seeks to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' defence and for summary judgment against the 1<sup>st</sup> Defendant for a sum of Kshs.4,663,000 plus interest from the date of filing suit. The application also seeks judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for a sum of Kshs.2,830,000 plus interest from the date of filing suit until payment in full.

6. The gist of the application which is expressed to be made under **Order 2 Rule 15(1), Order 36 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules** is, as stated on the grounds on its face and the Supporting Affidavit of Maleya Omondi, a Forensic Investigator at the Applicant Commission, that: -

“ .....

c) *At paragraph 18 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Statement of Defence, the 1<sup>st</sup> Defendant admits having been the Deputy Principal of Chebororwa ATC between 24<sup>th</sup> September, 2010 and February, 2015 and thereafter as the principal between February 2015 and 11<sup>th</sup> November, 2016.*

d) *In the 1<sup>st</sup> Defendant's written statement and at paragraph 21 of the joint Statement of Defence, the 1<sup>st</sup> Defendant admits*

having handed over the management of Chebororwa ATC to a new team and on 11<sup>th</sup> November, 2016 and having been redeployed to Moiben Sub-County as a Land Development Officer.

*e) That the plaintiff has presented evidence that the 16 cheques that were used to draw funds from Chebororwa ATC were all signed by the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant between 23<sup>rd</sup> February, 2017 and 19<sup>th</sup> May, 2017 at a time when the 1<sup>st</sup> Defendant had ceased being the principal of the institution.*

*f) The 1<sup>st</sup> Defendant further admits in his statement, that he met with the 3<sup>rd</sup> Defendant, at a drinking joint after he had left Chebororwa ATC and that the two held a discussion touching on the funds held at the Demonstration Fund Account of Chebororwa ACT.*

*g) There is clear and uncontroverted evidence that the 1<sup>st</sup> Defendant participated in the embezzlement of funds from Chebororwa ATC by signing cheques as “the principal” of the institution when he had in fact been transferred from the said institution.*

*h) There is uncontroverted evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are partners of Rotkan Investments, an entity that received a sum of Kshs. 2,830,000/= from Chebororwa ATC without justification.*

*i) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s Defence does not provide any reasonable defence to rebut the evidence presented by the Plaintiff except for mere denials.*

*j) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s Defence is a sham an abuse of the court process and does not raise any reasonable Defence in law and is only intended to delay the fair determination of the matter.”*

7. It is urged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Defence is a sham and an abuse of the court process and is only intended to delay the fair determination of this matter and accordingly this court should strike it out and enter judgment for the Applicant as prayed.

8. In response to the application the 1<sup>st</sup> & 2<sup>nd</sup> Respondents filed a replying affidavit sworn on 17<sup>th</sup> September, 2021 by the 1<sup>st</sup> Defendant/Respondent Nicholas Kiprop Kaino. In the affidavit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents deny any wrongdoing and reiterate their averments in the Statement of Defence. At paragraph 28 of the Replying Affidavit the 1<sup>st</sup> Respondent denies ever working under the 3<sup>rd</sup> Defendant and states that the 3<sup>rd</sup> Defendant became the District Treasury Accountant after he himself had left the Chebororwa Agricultural Training Centre. At paragraph 29 he deposes that no embezzlement of the institution’s funds took place during his tenure thereat and contends that the custodian of the DFF Bank account, books of accounts, cheque books and those responsible for drawing and banking the cheques and also withdrawing cash were the District Accountant and District Cashier. The 1<sup>st</sup> Defendant/Respondent disputes therefore that he paid out the monies claimed by the Plaintiff/Applicant. The 1<sup>st</sup> & 2<sup>nd</sup> Respondent also deny that they received the said money. In regard to the meeting it is alleged he admitted to have had with the 3<sup>rd</sup> Defendant, the 1<sup>st</sup> Respondent admits that they indeed met at a bar in Kapsowar but he denies that they discussed the issue of money belonging to the institution. While conceding that he assisted the outgoing District Accountant one Rebecca Biwot to activate the institution’s account which had gone dormant the 1<sup>st</sup> Respondent denies that he was a signatory to the account at the time material to this case.

9. The application was canvassed through written submissions. For the applicant it was submitted that the 1<sup>st</sup> Defendant/Respondent admitted in the joint statement of defence that he was the Deputy Principal of Chebororwa ATC between 24<sup>th</sup> September 2010 and February, 2015 and thereafter its Principal until 11<sup>th</sup> November, 2016 when he handed over to a new team; that between 23<sup>rd</sup> February, 2017 and 19<sup>th</sup> May 2017 while the 1<sup>st</sup> Defendant was no longer the Principal of the institution he and the 3<sup>rd</sup> Defendant signed 16 cheques which were used to draw funds from the institution’s Demonstration Fund Account and that he admitted to have met with the 3<sup>rd</sup> Defendant at a drinking joint where they held a discussion concerning the funds held in the account. It is submitted that there is uncontroverted evidence that the 1<sup>st</sup> Defendant benefited from the funds he received in the name of the Principal of Chebororwa and that both he and the 2<sup>nd</sup> Defendant benefitted from the funds received in their names and that in the circumstances the Applicant has discharged its burden of proof. Further that the defence filed does not provide any reasonable defence in law capable of rebutting the evidence presented by the applicant, is a sham and is an abuse of the court process as it consists of mere denials which lack any substance. Counsel for the applicant contends that the joint statement of defence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents does not raise any triable issues that would warrant a full and protracted trial. Counsel submitted that the defence does not challenge the facts set out in the Plaintiff’s case and is not curable by an amendment. Counsel goes on to describe the defence as lethargic and beyond redemption and urges this court to allow this application and enter judgment for the applicant in the terms set out in the Plaintiff’s case.

10. On his part, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents reiterated the averments in the defence and the facts deposed to in the Replying Affidavit of the 1<sup>st</sup> Respondent and submitted that the defence filed raises triable issues. Counsel cited several cases which he submitted set down the principles that should apply in applications of this nature and pointed out that in a ruling dated and delivered on 29<sup>th</sup> April 2020 Mumbi J, as she then was, directed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants would have an opportunity to defend the claim against them and that the suit was to be set down for hearing on a date convenient to the parties. Counsel asserted therefore that this application ought to be dismissed with costs to the respondents.

## **ANALYSIS AND DETERMINATION**

11. I have carefully considered the pleadings and rival submissions of the parties. From a cursory reading of **Order 36 Rule 1(1) of the Civil Procedure Rules** it is evident that summary judgment can only be entered where the defendant **has appeared but has not filed a**

defence and as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have filed a defence summary judgment does not avail the Applicant. **The only issue for determination therefore is whether the applicant has demonstrated sufficient grounds to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents defence on record and to enter judgment in its favour as prayed in the application. Order 2 Rule 15(1) of the Civil Procedure Rules states:-**

**“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 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.”**

12. As correctly submitted by Counsel for the parties there is a long line of cases that lay down the legal principles that guide a court in considering an application to strike out a pleading. In the case of **DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** Madan JA cautioned that a court:-

**“Must act very 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 otherwise an abuse of the process of the court and that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.”**

Therefore, while a court of law has an unfettered discretion to strike out a pleading such discretion must be exercised very cautiously and keeping in mind that the court must never compromise the rights of any part to be heard. Accordingly, in principle the discretion to strike out a suit must be exercised only in the plainest and obvious cases.

13. The above principles have been imported into applications for striking out a defence and in the case of **Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited [2013] eKLR** the court stated: -

**“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. The first guiding principle is that every court of law should pay homage to its core duty of serving substantive justice in any judicial pleading before it which explains the reasoning by Madan JA in the pleading before it which explains the reasoning by Madan in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principles and policy. Courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the Sword of the Damocles.” thirdly, in case of defence, the courts must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that ..... raises a prima facie defence and which should go to trial for adjudication.”**

14. Before it can strike out the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents defence therefore this court must carefully examine that defence in order to satisfy itself whether it raises any triable issue. If the defence raises a triable issue, then this court must grant leave to the 1<sup>st</sup> & 2<sup>nd</sup> Defendants/Respondents to defend the suit. A triable issue has been defined as:-

**“Any matter raised by the defendant that would require further interrogation by the court during a full trial and as one that need not succeed (See the case of Patel v EA Cargo Handling Services Ltd. [1974] EA at page 75 and the case of Job Kwach v National Media Group Ltd.)”**

15. Applying the above test and principles to this case it is my finding that this is not a proper case for this court to exercise its power of striking out. In his pleadings the 1<sup>st</sup> Defendant/Respondent has vehemently denied that he was working at the institution at the time the impugned cheques are alleged to have been drawn, issued and encashed. He has also vehemently disputed that he discussed anything concerning the institution’s account with the 3<sup>rd</sup> Defendant although he admits that they met. He has also denied that he and the 2<sup>nd</sup> Defendant/Respondent benefitted from any of the funds in the cheques exhibited by the plaintiff. In my view all the above are bona fide triable issues which this court should allow to go to trial as they go to the substratum of the suit and the defence. Accordingly, the application is dismissed and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby granted leave to defend the suit. It is however ordered that while costs follow the cause the costs of this application shall be in the cause.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 17TH DAY OF FEBRUARY, 2022.**

**E.N. MAINA**

**JUDGE**