



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E038 OF 2021

TSS INVESTMENTS LTD.....PLAINTIFF/APPLICANT

-VERSUS-

BLACKSTONE TRADING COMPANY LTD.....DEFENDANT

RULING

1. Before the court for determination is the Plaintiff's **Notice of Motion** application dated **25th May, 2021** brought under the provisions of **Sections 1A, 1B, 3 3A & 63**, all of the **Civil Procedure Act** and **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010**. In that application the Plaintiff seeks for the following orders:-

a) That the Defendant's statement of defence dated 21st May, 2021 be struck out for disclosing no reasonable defence in law, for being frivolous, vexatious and otherwise an abuse of the court process;

b) Upon grant of prayer (1) above, judgment be entered against the defendant for Kshs.20,847,325.00 as at 30th September, 2019 plus interest at commercial rate of 14% per annum from 30th September, 2019 until payment in full;

c) In the alternative and without prejudice to (1) and (2) above, judgment on admission be entered against the defendant on the admitted sum of Kshs.15,503,488.36 as at 6th March 2019 together with interest thereon at commercial rates of 14% per annum from 6th March, 2019 until payment in full.

d) The costs of this application and the suit be awarded to the Plaintiff.

2. The application is supported by the grounds contained in the application together with the Supporting Affidavit of **Nurein Tahir Sheikh Said** sworn on **25th May, 2021**. The Plaintiffs case is that it instituted the present suit vide a **Plaint** dated **14th April, 2021** seeking to recover unpaid rent of Kshs.20,847,325.00 as at **30th September, 2019** from the Defendant. That although the Defendant has filed a Statement of Defence on **21st May, 2021** questioning the Plaintiff's title, denying any rent dues and also alluding to the existence of a similar suit being **MSA ELC No.128 of 2019**, the Plaintiff avers that a blind eye should be turned on because the Defendant had admitted being in rent arrears for Kshs.15,503,488.36 in **HCCC No.20 of 2019** when the Plaintiff had sued in its capacity as the landlord. Lastly, that the claim in **Mombasa ELC No.128 of 2019** was for vacant possession and since the same was granted, the suit is of no relevance. The Plaintiff is convinced that there was express admission of the rent arrears in **Mombasa HCCC No.20 of 2019** hence the present defence is a sham and void pursuant to **Section 121** of the **Evidence Act**.

3. The Respondent opposed the application through the **Replying Affidavit** of its Managing Director **Ally Mwangi** sworn on the **18th June, 2021**. It is the Defendants case that there is a pending suit being **Mombasa ELC No.128 of 2019** filed by the Plaintiff seeking the alleged rent arrears and until that suit is determined, the present suit remains an abuse of the court process. In addition to that, the Statement of Defence is said to challenge the Plaintiff's locus in leasing out the plot from which the arrears are now being demanded hence it cannot be gainsaid that the statement raise no triable issues or is otherwise is an abuse of the court process. Lastly, the deponent reminded the court that striking out of pleadings though discretionary, should be exercised sparingly in the clearest of cases.

4. The application was disposed by way of written submissions with the Plaintiff filing its submissions on **28th June, 2021** whilst those for the Respondent were filed on **16th July, 2021** which I have considered.

Analysis and Determination

5. Having set out the respective parties' positions as above, it is my most considered view that the issues for determination are as follows:-

a) *Whether the defence filed in this case should be struck out for raising no triable issues;*

b) *Whether judgment should be entered on admission as sought;*

c) *Who bears the cost of the application.*

6. As regards the first issue on whether the Statement of Defence filed on **21st May, 2021** should be struck out, I have taken the position that striking out of pleading is an exercise of the court's discretion and should be exercised sparingly and in very exceptional circumstances. This is in alignment with the rules of natural justice which require that the court must not drive away any litigant however weak his or her case may be, from the seat of justice. However, a balance must be had between this principle and the policy consideration that a Plaintiff should not be kept away from his Judgment by an unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case.

7. In the same connection, **Order 2 Rule 15** of the **Civil Procedure Rules, 2010** permits a party to apply for striking out of pleadings and 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 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.”

8. Clearly it cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. Therefore in this case, the court has to be satisfied that the defence is a complete sham and raises no bona fide triable issue worth a trial by the court.

9. Applying the above test, the basis upon which the Plaintiff seeks to strike out the defence is on the ground that it had leased some property to the defendant and the Defendant cannot deny those facts which are witnessed in the lease agreement. Therefore the defendant is precluded from denying that the Plaintiff is the landlord and has the capacity to demand for the outstanding rent arrears.

10. On the other hand, the Defendant reiterates that the Plaintiff has no locus to demand the rent arrears and in addition to that, there is also a pending suit being **Mombasa HCCC No.128 of 2019** in which the plaintiff should have sought those arrears. Therefore, the Defendant seeks to nullify the lease agreement on the ground that the Plaintiff lacked the authority to lease property which does not belong to him.

11. In my view the challenge on the Plaintiff's eligibility to claim the arrears under the lease agreement between itself and the defendant remains a complete demurrer and the whole defence in plain eye-sight is an assembly of mere denials. The Defendant does not deny executing the **Lease Agreement** dated **19th March, 2018** with the Plaintiff and it is through that lease agreement that it gained access to **Plot No.LR No. 373/I/MI Chai road**. It is also not denied that the Defendant has been in occupation of the said property until sometimes in **2019** and in all that period, it had been paying and/or was duty bound to pay rent as agreed to with the Plaintiff. The Defendant does not rebut that before the lease was determined, the Plaintiff attempted to levy distress for the outstanding arrears but the same was interjected by an injunctive order issued in **Mombasa HCCC No.20 of 2019**.

12. I have considered the pleadings in **Mombasa HCCC No.20 of 2019** and it comes out that the interim injunction was issued under the belief that the Plaintiff had attached goods worth more than the outstanding rent arrears. Therefore, clearly the Defendant had acknowledged the binding effect of the terms in the lease agreement and cannot turn around to challenge the validity of the agreement when it is its turn to honour its part of bargain by paying the rent arrears under the guise that the Plaintiff is not the proprietor of the subject land. In any event the fact that the subject property is registered in the name of another entity other than the Plaintiff has neither caused the Defendant any loss nor has it exempted the Defendant from paying the outstanding loss.

13. In the upshot this court maintains that looking at the defence and the **generalized denials**, it is a mere sham and the same is a perfect candidate for striking out.

14. However, the order to make on the sustenance of the defence is dependant on the determination on the issue for Judgment on admission which is addressed as herein below;

15. **Order 13 Rule 2** of the **Civil Procedure Rules** which deals with judgment on admission provides as follows:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.”

16. In the present case, the Plaintiff sought for judgment to be entered against the Defendant for the outstanding rent arrears of Kshs.20,847,325.00 or alternatively, the court enters Judgment on admission for Kshs.15,503,488.36. The admission is said to have been made in the Defendant's pleadings in the case of **Mombasa HCCC No.20 of 2019**. The Defendant on the other hand alleged that the Plaintiff has made alternative prayers before the court and is uncertain of what it seeks from the court and does not deny that it had admitted the rent arrears.

17. Firstly, I am unable to agree with the Defendant that an application can be rendered incompetent for including an alternative prayer as there is no express law to that effect. Similarly, challenging the competency of an application under such a ground can be wished away or depreciated by **Article 159(2)(d)** of the **Constitution** which encapsulates the principle of substantial justice without undue regard to technicalities of procedure.

18. Now turning to the core issue, I am of the view that the prayer for the outstanding rent arrears for Kshs.20,847,325.00 cannot be allowed at this juncture since the same is subject to proof as per the required standard in civil cases and the court can only pronounce itself on the same upon consideration of the evidence placed before it.

19. As regards the alternative prayer seeking Judgment on admission, I am content to cite the work of court in the case of **Guardian Bank Limited vs. Jambo Biscuits Kenya Limited [2014] eKLR** that:-

“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that;-

“...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.” Chesoni Ag. JA went on to add that:-

”...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be ‘of course there was’”. Cassam v Sachania (1982) KLR 191 –

“The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment”

20. Turning to the facts of the present case, the basis of the prayer for Judgment on admission is the Defendant's Plaintiff in **Mombasa HCCC No.20 of 2019** where it pleaded that it was in rent arrears for Kshs.15,503,488.36 as at **6th March, 2019**. **Paragraph 5** of the **Plaint** dated **22nd March, 2019** by the Defendant herein against the Plaintiff reads as follows:-

“5. On or about the 6th March, 2019, the Plaintiff was in arrears of rent to the tune of Kshs.15,503,488.36. the 2nd Defendant went to the plaintiff’s premises which is a warehouse used for storage of interalia maize, rice and fertilizer and proclaimed an assortment of goods.”

21. The Defendant/Respondent under paragraph seven (7) of its statement of

defence admits having filed the Plaintiff in **Mombasa HCCC No.20 of 2019** but merely denies the allegation by the Plaintiff with respect to the admission of the outstanding arrears.

22. I am of the view that **Mombasa HCCC No.20 of 2019** which the defendant has admitted was filed with the authority of the Defendant Company, that the **Plaint** thereof is a clear and unequivocal admission of the rent arrears in the sum of Kshs.15,503,488.36. It is not ambiguous in the plain eye sight of any person that the Defendant Company admits that it owes the Plaintiff rent arrears in the sum of Kshs.15,503,488.36. The issue now being introduced by the Defendant that the Plaintiff lacks the locus to demand the rent arrears is sheer smoke screen in the hope that it will evade the rent arrears or push the case to a protracted hearing. The same is hereby declined.

23. In the upshot, Prayer No.3 of the application is allowed and Judgment be and is hereby entered against the Defendant on admission in the sum of Kshs.15,503,488.36.

24. The issue of interest thereon and the other amount of the outstanding rent arrears on top of Kshs.15,503,488.36 will be tried as between the parties in such a manner as the court will direct with regard to hearing the parties thereto.

25. I further direct that the defence be sustained but strictly for the trial of the issue of interest payable herein and the outstanding rent arrears on top of Kshs.15,503,488.36 only.

26. The costs of this application are awarded to the Plaintiff/Applicant.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 17TH DAY OF FEBRUARY, 2020.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Rotich counsel holding brief for Mr. Kongere for Plaintiff/Applicant

No appearance for and by the Respondent/Defendant

Court Assistant – Mr. Gitonga