



REPUBLIC OF KENYA



Mohebi v Hussein (Civil Suit E025 of 2021) [2022] KEHC 10708 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 10708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL SUIT E025 OF 2021

MN MWANGI, J

APRIL 28, 2022

BETWEEN

MAHDI MOHEBI PLAINTIFF

AND

FAHMI YAHYA HUSSEIN DEFENDANT

RULING

1. Through a Notice of Motion application dated 27th May, 2021, anchored on the provisions of Order 2 Rule 15(1)(a) as read with Order 2 Rule 15(2) of the [Civil Procedure Rules](#) and Section 1A and 1B of the [Civil Procedure Act](#), the plaintiff prays that-
 - i. The statement of defence filed herein be struck out and Judgment be entered in favour of the plaintiff for failure to disclose any reasonable defence in law; and
 - ii. Costs of the suit and this application be awarded to the plaintiff.
2. The application is premised on the grounds on the face of it. The said grounds are that the claim flows from an acknowledgement of debt dated 31st January, 2020, wherein, the defendant admitted owing AED 1,452,995.00 and committed to pay the said sum in monthly instalments of USD 5,000.00 from 5th March, 2020 until payment in full. The said grounds also state that the defendant admitted in the statement of defence that he owes the plaintiff as evidenced in the "Acknowledgement of Debt". The plaintiff claims that the statement of defence does not raise any bona fide defence and the same is raised with a view to obstruct and frustrate the disposal of this suit.
3. In response to the instant application, the defendant filed grounds of opposition dated 2nd November, 2021, and raised the following issues -
 - i. That there are triable issues as confirmed by the reply to the defence and list of issues filed on record; and
 - ii. That the application is an abuse of process intended to short circuit the adjudication process.



4. Parties filed written submissions to dispose of the application herein. The plaintiff's submissions were filed on 31st January, 2022 by the law firm of Njoroge Mwangi & Company Advocates, while the defendant's submissions were filed on 25th February, 2022, by the firm of Moses Mwakisha & Company Advocates.
5. Mr. Njoroge Mwangi, learned Counsel for the plaintiff submitted that the agreement between the parties herein dated 31st January, 2020 is concise, clear, written, and was duly executed on each page by the parties and witnessed by an Advocate. It was further submitted that the defendant admitted owing AED 1,452,995.00 and covenanted to pay USD 5,000.00 per month until payment of the debt in full, and in default, a 21 days' notice would issue and the same would be copied to the parties' Advocates. He stated that it was further agreed that failure to comply with the 21 days' notice would render the sum due payable, and the plaintiff would have a right to legal recourse.
6. The plaintiff's Counsel submitted that after the defendant defaulted, the notice dated 23rd October, 2020 contemplated in the agreement was issued to the defendant through e-mail and WhatsApp and copied to the Advocates after the defendant refused to acknowledge a hard copy of the notice. He stated that the plaintiff's case is clear and therefore, pursuant to Order 2 Rule 15(1)(a) and (2) of the [Civil Procedure Rules](#) as read with Sections 1A and 1B of the [Civil Procedure Act](#), this Court should enter Judgment in favour of the plaintiff without the need of calling any evidence.
7. Mr. Njoroge Mwangi argued that no parole and/or extraneous evidence as suggested in the defence can be adduced to impugn an agreement that is devoid of any ambiguity, since the agreement voids any previous agreement between the parties. He cited the Court of Appeal decision in [Kulak Properties Development Ltd v Tafazzal H. Maloo & 3 others](#) [1993] eKLR, where the Court held that where a contract is in writing and the terms are clear and unambiguous, no extrinsic evidence may be called to add or detract it. The evidence of negotiations is never admissible to vary terms of a written contract.
8. Mr. Mwakisha, learned Counsel for the defendant submitted that the essence of a reply to the defence is that a party filing it wishes to controvert and/or clarify by positive averment factual matters raised in the defence, even though there would ordinarily be deemed to be a joinder of issues where the plaintiff chooses not to file such a reply. He stated that in this case, close of pleadings was signified by the plaintiff's reply to the defence filed on 26th April, 2021 and that the plaintiff thereafter on the same day filed its pre-trial questionnaire.
9. It was submitted by the defendant's Counsel that the grounds relied upon by the applicant could not be argued independently without reference to documentary evidence in the nature of the agreements alluded to by the applicant. He further submitted that the plaintiff herein was mistaking the effect of the documents filed with his list of documents, to be settled facts or evidence upon which he can mount the kind of submission on the legal principle of parole evidence.
10. Mr. Mwakisha argued that documents filed during pre-trial do not become evidence upon which the Court can act on, until either they have been produced at a hearing or, in the case of an application, brought under oath by way of a supporting affidavit and that would be the case where a party relies on Order 2 Rule 15(1)(b), (c) or (d) of the [Civil Procedure Rules](#). He contended that it was premature for the plaintiff to rely on the documents on his list of documents.
11. On the issue of parole evidence rule, Mr. Mwakisha submitted that it is not absolute, as there are exceptions and that parole evidence is admissible in actions for reformation of a contract to establish fraud or mutual mistake. He relied on the provisions of Section 98 of the [Evidence Act](#) to support his submission on the said aspect.



12. He also submitted that there are triable issues that deserve to be determined only upon hearing of evidence and production of the various documents by the parties.

Analysis and Determination

The only issue for determination is if the defendant's statement of defence should be struck out and Judgment entered in favour of the plaintiff.

13. I have considered the application and the grounds on which it is premised. I have also considered the grounds filed in opposition to the application as well as the submissions filed by Counsel for the parties. The plaintiff has moved this Court under Order 2 Rule 15(1)(a) and (2) of the [Civil Procedure Rules](#) seeking the striking out of the defendant's statement of defence. Order 2 Rule 15(1) and (2) of the [Civil Procedure Rules](#) states 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.”

- (2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.”

14. The jurisdiction to strike out pleadings is discretionary and must be exercised with extra caution so as not to deprive litigants of their rights to have disputes heard and determined on merits. The Court of Appeal in [Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu](#) [2009] eKLR, stated thus on the issue of striking out of pleadings -

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13(1)(a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge.



On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

15. The power to strike out pleadings may only be exercised after a Court has considered the alleged offending pleadings. This power should however be exercised judiciously and in very clear cases where the pleadings are plainly clear and untenable. It must however be remembered that the said power is not mandatory but permissive.
16. In this case, although the defendant admits that he entered into the agreement dated 31st January, 2020, he contends that the memorandum/agreement was vitiated by mutual mistake of fact insofar as the foundation thereof was the voidable agreement of 12th April, 2019. The plaintiff filed a reply to the defence wherein he averred and maintained that there exists no mutual mistake in the “Ascertainment and Acknowledgement” of the debt of AED 1,452,995.00 owed by the defendant.
17. Having perused the statement of defence on record, and more particularly, the issue of the mutual mistake in the “Ascertainment and Acknowledgement” of the debt of AED 1,452,995.00, which the plaintiff has specifically responded to in his reply to the defence, I am satisfied that the statement of defence raises triable issues that should go to trial. In any case, it was held by the Court of Appeal in *Isaac Awuondo v Surgipharm & another* [2011] eKLR, that a defence that raises triable issues does not mean a defence that will eventually succeed, and that if there are some issues which require evidence that are raised by the defence, the matter must be let to go to a full trial.
18. In *Moi University v Vishva Builders* Limited Civil Appeal No. 296 of 2004 (unreported), the Court of Appeal held as follows on the issue of striking out of pleadings-

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *H.D Hasmani v Banque Du Congo Belge* (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”



19. Bearing in mind the above decisions and applying the principles enunciated therein to this case, it my finding that it is only fair and just that the case herein proceeds to full hearing on merits, before the Trial Court.
19. I decline to grant the prayers sought and direct the parties to cause the matter to be set down for a pre-trial conference as required under Order 11 of the Civil Procedure Rules. Costs of this application shall be in the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2022. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wachenje holding brief for Mr. Mwakisha for the defendant

No appearance for the plaintiff

Mr. Oliver Musundi – Court Assistant.

