



Riverbank Solutions Limited v County Government of Kisumu (Civil Suit 11 of 2019) [2022] KEHC 10103 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 11 OF 2019**

**JN KAMAU, J
JULY 25, 2022**

BETWEEN

RIVERBANK SOLUTIONS LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

RULING

Introduction

1. In its Notice of Motion dated 12th March 2021 and filed on 29th July 2021, the Plaintiff herein sought for orders that the Defendant's Statement of Defence dated 8th November 2018 be struck out and Judgment be entered in its favour for the liquidated amount of Kshs 50, 988, 949.00/= together with costs and interest.
2. The said application was supported by an Affidavit of Sylvia Matasi that was sworn on 12th March 2021. The Plaintiff averred that the Defendant was indebted to it for the aforesaid sum of Kshs 50, 988,949.00/= for services it rendered to it. It stated that the Defendant filed a Statement of Defence dated 8th November 2019 but the same elicited mere denials and raised no triable issues. It asserted that it was clear that the claim it sought was liquidated in nature and that it was in the interest of justice and fairness that the orders sought be granted.
3. In opposition to the said application, on 24th November 2021, the Defendant filed its Replying Affidavit. The same was sworn by Edris Omondi, County Attorney, County Government of Kisumu on 24th November 2021.
4. It averred that the said application was incompetent, misconceived and an abuse of the court process purely intended to waste the court's time. It added that the said application was malicious and was meant to take the court in rounds despite the fact that the matter was before court and proceeding smoothly.



5. It contended that the Plaintiff was desirous of denying it its right to fair hearing after failing to fix a date for the matter to proceed for over one (1) year and had just woken up with an application to frustrate it. It stated that on 2nd July 2021, the Plaintiff's Advocate informed the court that the parties were negotiating and that it was only fair and just that the Plaintiff's application be dismissed with costs, the annexures be expunged from the court records and an order be issued for this matter to proceed to hearing.
6. It asserted that it entered appearance vide a Memorandum of Appearance and filed a triable Statement of Defence dated 8th November 2019 without delay and hence the Plaintiff had no reasonable ground to file the said application and ought to wait for the court to determine the suit.
7. The Plaintiff's Written Submissions were dated 7th December 2021 and filed on 9th December 2021 while those of the Defendant were undated and filed on 20th January 2022.
8. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

Legal Analysis

9. The Plaintiff submitted that the Defendant had not controverted or denied in any material way, its Witness Statement, List of Documents and Affidavit sworn in support of its application. It argued that the defendant's sole was that it did not receive the invoices it raised and was therefore not in breach of the Agreement.
10. It was its case that the Defendant had not produced any evidence to prove its averments and that the Replying Affidavit was based on non-issues as opposed to informing the court what were the triable issues it had raised in its Defence.
11. It further submitted that there existed a tripartite agreement that was entered into on 24th February 2015 between the Defendant, Kenya Commercial Bank and itself for Revenue Collection. It added that it was a term of the said Agreement that it would design, install and configure the revenue collection system which was agreed would be a payment solution to persons remitting revenue to the County Government. It stated that it was also a material term that it would be paid five (5%) per cent Commission of the total revenue collected through the provisions of the Revenue Collection Services.
12. It was emphatic that in its Defence, the Defendant seemed to deny the existence of the Agreement on one hand while on the other, it stated that it did not pay because it did not receive the invoices. It argued that there was indeed an Agreement between the parties hereto and the attempt by the Defendant to deny the existence of the said Agreement was in total bad faith. It submitted that it discharged its obligations as per the Agreement and ensured that the revenue collection system was working but it had never received payment for the same.
13. It relied on the provisions of the English & Empire Digest Vol 21 page 288 where it was stated that if a man, either in express terms or by conduct, made a representation to another of the existence of a certain state of facts which he intended to be acted upon in that way, in the belief of such a state of facts, to the damage of him who so believed & acted, he was estopped from denying the existence of such a state of facts.
14. It invoked Order 2 Rule 15(1) of the Civil Procedure Rules 2010. It also relied on the case of *Patel v E A Cargo Handling Services Ltd* [1974] EA 75 which was reiterated in *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* [2015] eKLR where the court held that a triable issue was an issue which raised a prima facie defence and which should go to trial for adjudication.



15. It also placed reliance on the case of Mpaka Road Development Ltd vs Kana [2001] 2 EA 468 (CCK) where it was held that a pleading was frivolous if it lacked seriousness and it would be vexatious if it annoyed or tended to annoy. It stated further that the Defendant was simply clutching at straws to avoid a clear and unambiguous liability, duly unequivocally admitted, which was an abuse of the court and which should not be countenanced.
16. It argued that the Defence consisted of mere denials and did not answer the Plaintiff and urged the court to take cognisance of the Defendant's conduct during the proceedings as when the matter came up on 2nd July 2021, its counsel admitted before court that she was aware that parties were negotiating but denied being aware of the negotiations on 8th July 2021.
17. On its part, the Defendant also invoked Order 2 Rule 15 of the Civil Procedure Rules and denied ever having entered into an agreement with the Plaintiff or being indebted to it. It was emphatic that its Defence had raised triable issues and the same should not be struck out at this stage. It placed reliance on the case of D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another Civil Appeal 37 of 1978 [1980] eKLR where the court held that no suit ought to be summarily dismissed unless it appeared so hopeless that it plainly and obviously disclosed no reasonable cause of action and was so weak as to be beyond redemption and incurable by amendment.
18. It also cited the case of Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR where the court stated that the act of striking a pleading completely divested a party of a hearing thus driving such a party away from the seat of judgment, which was a draconian act. It argued that having denied being in arrears or subletting the suit property in breach of the lease agreement, its defence was not a sham.
19. It explained that the present application was an abuse of the due process of the law because of the extreme delay on the Plaintiff's part to fix the matter for trial. It placed reliance on the case Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others [2009] KLR 229 where the court held that the employment of the judicial process was regarded as abuse when a party used the same to the irritation and annoyance of his opponent and the efficient and effective administration of justice.
20. It also relied on the case of Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR where the court held that a pleading or an action was frivolous when it was without substance or groundless or fanciful and was vexatious when it lacked bona fides and was hopeless or offensive and tended to cause the opposite party unnecessary anxiety, trouble and expense.
21. It was emphatic that its Defence did not amount to any abuse of the court process and was not scandalous, frivolous or vexatious or meant to prejudice or embarrass the court. It pointed out that the Plaintiff was therefore undeserving of this court's indulgence.
22. In Paragraphs (3), (4), (5) and (6) of the Statement of Defence dated and filed on 8th November 2019, the Defendant denied the Plaintiff's claim specificity and particularity. It was evident that the Defendant did not admit being indebted to the Plaintiff. It specifically denied the Plaintiff's claim. It denied having received any invoices and denied breaching any agreement as had been alleged by the Plaintiff.
23. It was in this court's considered view that the Defendant's defence could not be termed as a mere denial, sham, an abuse of the court process, vexatious or frivolous. The question of whether there was an agreement was a serious triable issue which could not be determined summarily or by way of affidavit evidence. This court was alive to the fact that a defence raising triable issues need not convince the court



that the defence would succeed but rather a triable issue was the one, which raised a prima facie defence necessitating that it should go to trial for adjudication.

24. Notably, striking out of a suit or defence or a pleading for that matter is a discretion, which should be exercised sparingly. Indeed, striking out pleadings is a draconian act which may only be resorted to in plain cases as was held in the case of *GBM Kariuki v Nation Media Group Limited & 3 others* [2012] eKLR.
25. Unless the defence is a sham, vexatious, frivolous and an abuse of the court process, a party to a civil litigation should not be deprived of his right to have his day in court and have the suit determined in full trial. The court should act cautiously and carefully consider all facts of the case without rushing to embarking on striking out a defence which raises triable issues.
26. This court took a firm view that if the suit herein proceeded to full trial, no party would be prejudiced as they would both have a fair trial as enshrined under Article 50 of *the Constitution* of Kenya, 2010 resulting in substantive justice being done to them.

Disposition

27. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 12th March 2021 and filed on 29th July 2021 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
28. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY 2022

J. KAMAU

JUDGE

