Methodist Church of Kenya - Mtwapa Branch v Kenga Advocates (Civil Suit E004 of 2021) [2022] KEHC 11832 (KLR) (Civ) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E004 OF 2021

OA SEWE, J

AUGUST 12, 2022

BETWEEN

METHODIST CHURCH OF KENYA - MTWAPA BRANCH ..... PLAINTIFF

AND

KENGA ADVOCATES ..... DEFENDANT

RULING

1. By the Notice of Motion dated July 7, 2021, the defendant/applicant moved the court pursuant to the provisions of; sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*; order 2 rule 15 (1) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 for the following orders: -

   (a) That the court be pleased to strike out with costs the plaintiff/respondent's suit filed vide an Originating Summons dated January 25, 2021 for not disclosing reasonable cause of action and/or for being scandalous, frivolous, vexatious and/or prejudicial or embarrassing and/or for otherwise being an abuse of the court process.

   (b) That costs of this application and the entire suit be borne by the plaintiff/respondent in any event.

2. The application was based on the grounds that the respondent filed this suit seeking for orders to compel the applicant to release and/or remit to the respondent a sum of kshs 1,000,000/= allegedly paid to him by Alfred Msanzu Ndoro through his advocates, M/s Stephen Oddiaga & Company Advocates, yet the respondent is aware that no monies were remitted to the applicant as two cheques of kshs 500,000/= for the said compensation and/or donation were dishonoured, prompting the filing of a suit for recovery of the said sum, being Kilifi PMCC no 271 of 2016. It was further contended by the applicant that, upon filing of the said suit, the respondent flatly refused and/or neglected and/or failed to give further instructions in the matter.

3. Thus, it was the assertion of the applicant that, in the circumstances, it is embarrassing, and/or scandalous and/or frivolous and/or prejudicial for the respondent to allege or even think that the applicant holds monies on its behalf since the suit for recovery of the said amount is pending; a fact that is well known to the respondent. The application was supported by the affidavit of Mr William C Kenga, sworn on July 7, 2021 in which the aforementioned grounds were reiterated.

4. Although no response was filed by the respondent, written submissions were filed on its behalf on November 29, 2021 in which the following issues were proposed for determination:

   (a) Whether the Originating Summons discloses a reasonable cause of action;

   (b) Whether the suit is scandalour, frivolous, vexatious and/or prejudicial or embarrassing and/or an abuse of the process of the court.

5. Mr Oyas for the respondent submitted that to deny a party a hearing should be the last resort for a court. On the authority of *D T Dobie & Co (K) Limited v Joseph Mbaria Muchina & Another*...*Carton Manufacturers Limited v Prudential Printers Limited* [2013] eKLR and *Cabro East Africa Limited v Busoga Investments Limited* [2013] eKLR, he urged the court to find that the applicant has not met the threshold required for striking out of suit. In the same vein, Mr Oyas endeavoured to show that the Originating Summons filed herein is not scandalous, frivolous or vexatious at all. He relied on *County Council of Nandi v Ezekiel Kibet Rutto & 6 Others* [2013] eKLR for the meaning of the terms "scandalous", "frivolous", and "vexatious". He thus urged the court to examine the Originating Summons in that light and to find that there is nothing therein that can be said to be scandalous, frivolous or vexatious. Counsel submitted that it is in the interest of justice that the respondent be given an opportunity to present its case.

6. The principles guiding the exercise of discretion under the aforementioned rule were well-discussed in *D T Dobie & Company (Kenya) Limited v Muchina* (*supra*) 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..."

7. With the foregoing in mind, I have perused and considered the Notice of Motion dated July 7, 2021. As has been pointed out herein above, the application seeks to strike out the respondent's suit for not disclosing a reasonable cause of action. In addition, the applicant also alleged that the suit is scandalous, frivolous, vexatious and it is meant to embarrass him. Accordingly, the application was expressed to be brought under order 2 rule 15(1) (a), (b), (c) and (d) of the *Civil Procedure Rules* which provides as follows:

   (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. Needless to state that an application for striking out pleadings brought under order 2 rule 15 (1) (a), does not require the adduction of evidence; for order 2, Rule 15 (2) clearly states that:

> No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

9. The grounds relied on by the applicant are all predicated on evidential material. For instance, it would require evidence for the court to be convinced that the two cheques allegedly paid to the applicant on behalf of the respondent were dishonoured on presentation. It would also require evidence for the court to find that there is indeed a pending suit for recovery of the sum claimed herein. In the premises, it is manifest that this is not a suitable case for striking out of the Originating Summons.

10. Moreover, it was inappropriate for the applicant to combine an application for orders under order 2 rule 15(1)(a) with prayers hinged on rule 15(2)(b), (c) or (d). The Court of Appeal had occasion to pronounce itself in this regard in *Olympic Escort International Co Ltd & 2 Others vs Parminder Singh Sandhu & Another* [2009] eKLR, in which it held that: -

> " ...Mr Wamalwa reiterated in his submissions before us that it was improper to invoke order 6 r 13 (1) (a) when there was affidavit evidence on record which the superior court analysed in arriving at its decision. Mr Sevany on the other hand found no impropriety in combining the two prayers since it was expressly stated in the application that the only basis for seeking the order for striking out was because the defence was a bare denial.
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> "We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 r 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score..."

11. For the reasons aforementioned, it is my finding that the application dated July 7, 2021 is untenable. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF AUGUST 2022.

OLGA SEWE

JUDGE