



Paddy Distributors Limited & another v National Cement Company Limited & 2 others (Civil Case 26 of 2018) [2022] KEHC 16070 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 26 OF 2018
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

PADDY DISTRIBUTORS LIMITED 1ST PLAINTIFF

NAKURU CEMENT SUPPLIERS LTD 2ND PLAINTIFF

AND

NATIONAL CEMENT COMPANY LIMITED 1ST DEFENDANT

EQUITY BANK LTD 2ND DEFENDANT

AND

DIAMOND TRUST BANK LTD RESPONDENT

RULING

1. This ruling is in respect to the defendant's application dated February 22, 2022 seeking the following orders:-
 1. The amended plaint dated February 28, 2018, the reply to the defence and defence to counterclaim both dated March 28, 2018 filed by the plaintiffs in the main suit be and are hereby struck out
 2. Judgement be entered for the plaintiff in the counterclaim as prayed for the counterclaim dated March 22, 2018
 3. The costs of this application and of the suit be borne by the defendants in the counterclaim.
2. The application is supported by the affidavit of the applicant's managing director Mr Kaushik Pandit and is premised on the following grounds:-



1. The amended plaint filed by the plaintiffs in the main suit is frivolous, vexatious and a gross abuse of the process of the court
 2. The reply to defence and defence to counterclaim filed by the defendants in the counterclaim does not respond to and/or give proper defence at all to the factual claims made by the plaintiff in the counterclaim and its amended defence to the counterclaim.
 3. The defence to counterclaim is comprised of mere denials of a general nature that do not respond to matters of fact raised in the counterclaim in that
 - i. The defendants to the counterclaim admit at paragraph 3(i) of the amended plaint that the plaintiff in the counterclaim regularly supplied them with cement on credit terms
 - ii. On its part the plaintiff in the counterclaim has pleaded at paragraph 22 of the counterclaim that every consignment of cement was evidenced by delivery notes and invoices duly issued to the defendants in the counterclaim which invoices also provided for payment of interest on overdue accounts.
 - iii. The plaintiff in the counterclaim has availed delivery notes and invoices duly received and signed by the defendants in the counterclaim and annexed hereto that provide conclusively that the defendants in the counterclaim are truly indebted to the plaintiff in the counterclaim to the tune of Kenya shillings 121,780,651.06
 - iv. The defendants in the counterclaim do not dispute the invoices and delivery of the cement to them
 4. The defendants' amended plaint on record was therefore an afterthought and an attempt by the defendants in the counterclaim to further prolong fair disposal of this suit and is aimed at delaying payment to the plaintiff in the counterclaim for cement duly supplied and utilized by the defendants.
 5. In addition, the reply to the defence and defence to counterclaim are a sham defence only made up of mere denials which cannot amount to a defence in law as they do not raise any triable issues.
 6. The reply to defence and defence to counterclaim are frivolous, vexatious and gross abuse of the court process
 7. The respondent's case is therefore untenable and unsustainable.
 8. The application before this court is merited.
3. The respondent opposed the application through the replying affidavit of its director Mr Patrick Nthiga Mvungu who states that the plaintiff's claim as contained in the amended plaint and reply to the defence is valid as it raises triable issues that can only be determined at a full hearing. He further states that the defendant will suffer no prejudice if the matter proceeds to full hearing.
 4. The application was canvassed through written submissions which I have considered. The main issue for determination is whether the defendant's application is merited.
 5. The 1st applicant's/defendant's case is that the amended plaint is frivolous, vexatious and a gross abuse of the court process. The applicants further contended that the reply to defence and defence to counterclaim do not provide any response to the factual claims made by the defendant with respect



to the counterclaim. The applicant faulted the plaintiff/respondent for failing to respond to critical issues of fact raised in its pleadings.

6. The respondent/plaintiff on the other hand opposed the application while arguing that its case raises triable issues which can only be determined at a full hearing.
7. A perusal of the court record reveals that the plaintiff's claim is for an alleged breach of the distributorship agreement. The plaintiff's claim is for the payment of the sum of Kshs 2,000,000 which, it claims, is the extra money that it paid to the defendant. The plaintiff also claims general and aggravated damages for breach of the distributorship agreement.
8. The defendant, on its part, denied the alleged breach and counterclaimed that contrary to the plaintiff's assertions, it is the plaintiff that owed it a colossal sum of Kshs 121,780,651.06.
9. Order 2 rule 15 of the Civil Procedure Rules provides as follows: -

“ 15 At any stage of the proceedings the court may order to be struck out or
(1) 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.”

10. My understanding of the above provision is that it allows any party to apply to strike out pleading at any stage of the proceedings as long as such a party establishes that the pleadings disclose no reasonable cause of action is scandalous, frivolous or vexations or that the pleadings are prejudicial or an abuse of the court process.
11. It is trite that the power to strike out of pleadings is at the discretion of the court and that such discretion must be exercised judiciously, sparingly and only in clear cases. This is the position that was taken in Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR where it was held that:-

“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 v 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 v 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. “

12. Similarly, in *Crescent Construction Co Ltd v Delphis Bank Limited*, [2007] eKLR, the Court of Appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application for striking out a suit as it is draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

13. In *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal stated:-

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...whether or not a case is plain is a matter of fact...since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.

14. The principle that emerges from the above cited cases is that the jurisdiction to strike out pleadings is discretionary and must therefore be exercised sparingly and judicially. Applying the above principles to the instant case, I note that the following issues were not disputed: -

- a. That the applicant supplied the respondent with cement on credit terms. At paragraph 3(i) of the amended plaint the plaintiff states that it would buy cement from the 1st defendant for distribution and pay for it upfront or in the alternative secure bank guarantees from financial institutions to secure the supplies made.
- b. That Equity Bank Kenya Limited and Diamond Trust Bank Kenya Limited paid Kshs 120,000,000.00 to the applicant in respect to the bank guarantees that had been issued in favour of the applicant.
- c. The respondents admitted their indebtedness to the applicant as at January 4, 2018.

15. A perusal of the applicant’s documents reveals that the following facts which are also not disputed: -

- i. That the respondents, through their authorized agents, received delivery notes together with corresponding invoice notes from the applicant.



- ii. That hat the 2nd defendant was indebted to the applicant in the sum of Kshs 129,897,690.46 as at February 1, 2018 whilst the 1st respondent owed the applicant in the sum of Kshs 111,882,960.60.
- iii. That even though the guaranteeing banks, to wit, Equity Bank and Diamond Trust Bank remitted the sum of Kshs 120,000,000 to the applicant out of the above outstanding sums, there still remains an outstanding debt of Kshs 121,780,651.06. that is the subject of the counterclaim.
- iv. That this court (differently constituted) on February 6, 2018 noted that there was no dispute on the irrevocability of the guarantees. The court then issued the respondents with a temporary order of stay up to February 20, 2018 to enable them re-organize themselves and settle the debt failure of which the guaranteeing banks were given a go ahead to pay the guaranteed amount.
- v. The respondents did not settle the debt thus resulting in the guaranteeing banks paying the guaranteed sum of Kshs 120,000,000.00 to the applicant.

16. I perused the documents presented by the applicant in the form of delivery notes and invoices. The documents have not been challenged by the respondents. I note that the documents indicate that the respondents owe the applicant the sum of Kshs 121,780,651.06. The respondents have not tendered any evidence to show that they settled the debt.

17. I find that the applicant's case is a straightforward claim of an unpaid debt which claim has been supported by documentary proof in the form of delivery notes and invoices. It is my finding that the applicant has made out a case for the granting of the orders sought in the application dated February 22, 2022 which I hereby allow as prayed. I also award the applicant the costs of the application and the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Omino for defendant/applicant.

Mr. Nzavi for respondents

Court Assistant- Sylvia

