REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CIVIL CASE NO. 10 OF 2019

DAVID ONDIMU KOMBO...PLAINTIFF/APPLICANT

VERSUS

BELCOM AGENCIES LIMITED..DEFENDANT/RESPONDENT

RULING

1. The application for determination is for striking out of the respondent's statement of defence. It is dated 22nd September 2020 and is expressed to be brought under **Order 11 Rule 3(2) (0) I**of the **Civil Procedure Rules** and **Section 3 and 3A of the Civil Procedure Act**. The applicant's learned counsel, George Joseph Mogaka Masese, swore an affidavit in support of the application.

2. The following grounds were also set out in support of the application:

a. That the defendant/respondent has breached the terms and conditions of the Lease Agreement, namely failing to pay rent as and when it is due;

b. That the defence as filed is a sham in that the breach of the terms and conditions of the lease are now the subject of Criminal proceedings

c. That the defendant/respondent since May 2019 has failed to comply with Order eleven of the Civil Procedure Rules

d. That it is an exercise in futility to continue to have on record a defence which does not disclose a triable issue

e. That it is in the interest of justice that the defence be struck out and there be a speedy resolution to this dispute.

3. In his affidavit, the applicant's counsel averred that it is not in dispute that the relationship between the parties is governed by the terms and conditions set out in the Lease Agreement dated 26th August 2009. That it is also not in doubt that the respondent gave a "pledge to pay" to the applicant and issued him with cheques which bounced as a result of which the respondent is facing criminal charges vide Kisii CMCC No. 2418 of 2019. Therefore, the respondent has no probable defence and the defence is merely intended to buy time and prolong his illegal occupation of the applicant's premises. Counsel also contends that the respondent has failed to comply with Order 11 of the Civil Procedure Rules and it is only fair that the defence be struck out and judgment be entered in favour of the plaintiff as prayed.

4. One Abel Moranga Ongwach swore an affidavit in response to the application on 7th October 2020. He averred that the applicant leased to him a plot in 2009 for fifteen years from 1st September 2009 and his contract has not yet expired. Abel maintained that he has been paying rent as agreed and insisted that he has never breached the contract as alleged. He also contended that he had not been proved guilty in the criminal case which had no correlation to the present matter. He admitted that he had not complied with Order 11 of the Civil Procedure Rules but explained that the matter had never been fixed for mention to confirm compliance thus the application was premature. He had also been advised that Rule 9 of the Advocates Practice Rules bars an advocate from swearing an affidavit on behalf of a client who is available and capable of swearing the affidavit himself and thus the application was incompetent and ripe for dismissal.

5. A preliminary objection was also filed in opposition to the application on the grounds that the plaintiff's application was premature; offended Rule 9 of the Advocates Practice Rules and was frivolous, fictitious, bad in law and an abuse of court process.

6. The application was canvassed by way of written submission which I have duly considered.

7. I agree with the respondent's contention that the applicant's counsel erred by swearing an affidavit on contentious matters for which he had no personal knowledge. The authority cited by the respondent is good law on this position. In ***Regina Waithira Mwangi Gitatu v Boniface Ngenthe [2015]eKLR***, the court cited the case of Simon ***Isaac Ngugi vs Overseas Courier Services (K) ltd 1988 eKLR*** where it was held that a party's advocate was not competent to depose to evidentiary facts as that made him a viable witness for cross examination on the case which he is handling merely as an agent.

8. In the same vein, I note that Abel Moranga Ongwach purported to swear an affidavit as the defendant in the matter, yet he is not a party to the suit. According to the applicant, the defendant is a limited liability company and is therefore capable of suing and being sued in its own capacity.

9. The application will however not be defeated as it can stand on the grounds set out in support at the foot thereof and the respondent has filed Notice of Preliminary objection which can be treated as a response to the application. (See ***Kenya Commercial Bank v Suntra Investment Bank Ltd CIVIL SUIT NO. 380 OF 2013 [2015] eKLR***)

10. The application has been brought pursuant to **Order 11 Rule 2(0)(i)** of the **Civil Procedure Rules** which provides:

> *(2) In addition to any other general power the court may at the case conference—*
>
> *(o) make any such orders as may be appropriate including—*
>
> ***(i) striking out the action or defence;***
>
> *(ii) making an award of costs;*
>
> *(iii) striking out of any document or part of it*

11. The statement of defence on record is not accompanied by the documents listed under Order 7 Rule 5 of the Civil Procedure Rules which provides that;

> **5. Documents to accompany defence or counterclaim [Order 7, rule 5.]**
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> *The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—*
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> > *(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;*
> >
> > *(b) a list of witnesses to be called at the trial;*
> >
> > *(c) written statements signed by the witnesses except expert witnesses; and*
> >
> > *(d) copies of documents to be relied on at the trial.*
>
> *Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.*

12. A cursory perusal of the defence shows that it raises triable issues and should not be struck out at this stage. The principles that guide the court in determining whether to strike out a pleading were set out in the case of ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR***by Madan JA 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 otherwise 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 evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.*
>
> *If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*
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> *No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*

13. In***Saudi Arabian Airlines Corporation v Sean Express Services Ltd CIVIL CASE NO. 79 OF 2013 [2014] eKLR***the court held:

I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.

14. In the substantive suit, the applicant claims that the respondent has breached the terms of a lease agreement whereby the respondent leased from the applicant Kisii Town/Block III/351. The applicant claims that the respondent is in default of rent payment and is in arrears of Kshs. 2,500,000/=. He is also accused of subletting the suit premises, which is a petrol station, in contravention of the lease.

15. The applicant claims that the respondent pledged to pay Kshs. 2,500,000/= on or before 15th September 2019 to bring the arrears up to date. He did not pay the arrears as agreed and continues to illegally occupy and sublet the premises. He therefore sought a declaration that the respondent's continued occupation of the suit property and subletting is illegal and also sought an order of eviction against the defendant.

16. The defendant's filed a statement of defence dated 15th November 2019 denying the averments made in the plaint. He denied occupying the entire suit premises as claimed by the plaintiff and stated that he was a stranger to the allegation that he had sublet the property. He also asserted that he paid the rent promptly and without delay and denied that he had given a pledge to pay rent arrears of over two years also claimed by the applicant. The jurisdiction of this court to handle the matter was also contested.

17. The defence clearly raises numerous triable issue. Contrary to what is claimed by the applicant's counsel, the respondent has made no concessions. He has denied being in arrears or subletting the suit property in breach of the lease agreement. I am not persuaded that the defence is a sham. The issues raised therein are substantial issues that should be determined on merit.

18. The application dated 22nd September 2020 is therefore dismissed.

19. The defendant is directed to comply with Order 11 within the next 30 days in default the defence stands struck out.

20. Costs shall be in the cause.

Dated, signed and **delivered** at **Kisii** this **25th**day of **February 2021.**

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A. K. NDUNG'U

JUDGE