**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALITY DIVISION**

**CIVIL SUIT NO. E115 OF 2018**

**BEBADIS COMPANY LIMITED.....1ST PLAINTIFF/APPLICANT**

**DANIEL KIMANI KARIUKI.....2ND PLAINTIFF/APPLICANT**

**RUTH WANJIRU MAIGUA.....3RD PLAINTIFF/APPLICANT**

**VERSUS**

**SYLVIA WAMBOI KARANJA.....1ST DEFENDANT/RESPONDENT**

**THE RIDGEWAYS YARD CO. LTD ....2ND DEFENDANT/RESPONDENT**

**R U L I N G**

1. By a Notice of Motion dated 7/07/2020 brought under***, Order 2 Rule 15, Order 10 Rule 3 and 4, Order 7 Rule 12 & Order 51 Rule 1,3 of the Civil Procedure Rules 2010 and sections 1A and 1B & 3A of the Civil Procedure Act,*** the applicants sought that the defendants' memorandum of appearance, defence, amended defence and counterclaim be struck out and judgment be entered in terms of the amended plaint. They also sought that the counterclaim dated 15/06/2020 be excluded.

2. The grounds for the application were set out in the body of the Motion and the supporting affidavit of **Daniel Kimani Kariuki** sworn on 7/07/2020. These were that; the statement of amended defence and counterclaim is a sham, mere denials, frivolous, scandalous and vexatious does not disclose any reasonable defence in law or reasonable cause of action. That it will embarrass, delay the fair trial and action and an abuse of the process of the Court.

3. They contended that the statement of defence and counterclaim amounts to a disguised suit and is frivolous, vexatious and an abuse of the process of court. The claim raised ought not to be disposed by way of counterclaim but in an independent suit.

4. That the defendants have not been forthcoming on requests to provide witness statements and list of documents and were deliberately delaying the determination of the suit. They have severally failed neglected and ignored to adhere to prescribed statutory timelines set by Court.

5. That no prejudice will be suffered if the counterclaim is excluded from the suit as the pleaded matters relate to tenancy issues of which this court lacks jurisdiction to entertain.

6. The application was opposed by the defendants vide the replying affidavit of **Sylvia Wamboi Karanja** sworn on 20/07/2020. She gave a detailed history on how this matter has been prosecuted and the effort made to have it concluded. She denied the allegations made by the plaintiffs and prayed that the application be dismissed.

7. The parties filed lengthy submissions together with very useful authorities which the Court has considered. The Court has also carefully considered the record in its entirety and the depositions of the parties.

8. This suit was instituted on 12/10/2018 whereby Summons were issued and served upon the defendants on the 16/10/2018. The defendants

filed a statement of defence on 31/01/2019. On 9/12/2019, the plaintiffs applied to amend the plaint which was allowed by consent. The plaintiffs were granted until 14/1/2020 to file their amended plaint and the defendants upto 31/1/2020. The plaintiffs filed their amended Plaint on 15/01/2020. However, the defendants sought several extensions to be allowed to file their amended defence until the present application was lodged on 7/7/2020. There is dispute however, whether the amended defence was filed on 15/6/2020 or in September, 2020.

9. That background is important in view of the nature of the application before Court. The issues for determination are; ***whether the memorandum of appearance, defence and amended defence and counter claim were filed out of time and without leave; whether the defence and amended defence and counter claim raise any triable issues; Whether the amended defence and counterclaim should be struck out.***

10. On the first issue, ***Order 7 Rule 1 of the Civil Procedure Rules*** provides: -

> **"Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service'.**

11. The plaintiffs contended that the defence and the amended defence and counterclaim were filed in September, 2020 out of time and without leave. The cases of **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others [2014] Eklr** and **Moses Mwicigi & 14 Others Viebc [2016] Eklr,** were cited in support of the submission that the said pleading ought to be struck out for offending the provisions of the law.

12. On 18/12/2019, the parties were granted leave to amend their pleadings in the following terms: -

> **"That the plaintiff be and is hereby granted leave to amend its plaint as sought in the application. Such amended plaint to be filed and served on or before 14.1.2020.**
>
> **The defendant is granted leave to file an amended Defence if need be. Such Amended Defence to be filed and served by 31.1.2020".**

13. The plaintiffs only filed and served their amended plaint on 15/1/2020, as per the payment receipt on record. That was a day out of time since they had been directed to do so by 14/1/2020. On their part, the defendants kept on getting extension of time until 15/06/2020 when they filed the amended defence and counterclaim electronically. I take judicial notice that, that was during the height of the Covid – 19 pandemic and the court operations had been scaled down.

14. In view of the foregoing, I find that both the amended plaint and amended defence and counterclaim were filed outside the time given by the Court. The question is, what should be the effect of pleadings filed out of time such as in this case. I am alive to the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others (supra).**

15. In that case, the court was dealing with filing of documents in the appellate Courts. In the present case, there is always a process set out on how to punish the errant party. In the case of a defendant, the rules allow the plaintiff to apply for judgment in default.

16. The law only provides for the striking out of an unserved defence and not a belated filed defence. This is in ***Order 10 Rule 3 of the Civil Procedure Rules, 2010***.

17. In **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another Vs. Francis Bahati Diwani & 2 others (2014) Eklr,** the court held: -

> **"In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rules do not expressly provide so, which has been filed out of time is an extreme measure which is resulted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court... I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules."**

18. In the present case, the failure to file and serve the impugned pleading was contrary to a court order. The defendants kept coming before the court and pleading for more time. The court and the plaintiffs acceded to the said requests. There was no default order. Can in those circumstances the striking of the subject pleading be the recourse? I do not think so.

19. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & Others (2013) Eklr**, the Court of Appeal stated: -

> **"Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an**

**invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness."**

20. I reiterate the foregoing here and observe that, although delay in prosecution of cases is not to be encouraged, striking out a pleading for late filing will be too a draconian step to take. Unless the prejudice suffered by a plaintiff is too drastic, entering interlocutory judgment against such an errant defendant would, in my view, be the better option than to strike out the defence.

21. In this regard, I find that the failure by the defendants to file and serve their amended defence and counterclaim in time did not prejudice the plaintiffs and does not warrant an order for striking out.

22. To strike out the amended defence and counterclaim would forever bar the defendants from being heard in this rather hotly contested matter. As it were, the plaintiffs have not shown the prejudice, if any, they have suffered as a result of the late filing and service of the defendants' pleading.

23. In this regard, to accede to that prayer would be to worship the yoke of technicality at the altar of substantive justice. I reject that prayer.

24. The next issue is whether the amended defence and counterclaim should be struck out for being a sham and disclosing no reasonable defence. The plaintiffs contended that the amended defence and counterclaim was a sham, mere denials, frivolous, scandalous and vexatious and did not disclose any reasonable defence.

**25. Order 2, rule 15 of the Civil Procedure Rules 2010** provides: -

**"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."**

26. The principles applicable in the striking out of pleadings were settled in the case of **D. T. Dobie & Company Ltd v. Muchina [1992] KLR.** These are to the effect that, no suit or defence should be terminated summarily unless it is so hopeless that it plainly discloses no reasonable cause of action or it's so weak to be beyond redemption or cured by an amendment. If it can be injected with life by an amendment, it ought to proceed for the court to consider the facts at the trial. The exercise of the court's draconian powers of summary procedure should be hesitantly exercised. It is a jurisdiction to be exercised sparingly and cautiously. It is to be exercised in the clearest of cases only.

27. In the present case, the grounds upon which the application was grounded were that the amended defence was a sham, mere denials, frivolous, scandalous and vexatious and did not disclose any reasonable defence in law or reasonable cause of action, it will embarrass, delay the fair trial of the action and is otherwise an abuse of the process of court.

28. To begin with, this prayer is defective. I have always known that when one seeks the striking out of a pleading for disclosing no reasonable cause of action or defence, no evidence is to be adduced. The Motion as it stands, did not specify the grounds upon which the application was brought under ***Order 2 Rule 15 (1) (a).*** In my view, when an application is brought in an omnibus way, without specifying the grounds that specifically relate to ***Rule 1(a)*** as opposed to ***Rule 1(b), (c) and (d)***, that is embarrassing and prejudicial to a respondent. In such a situation, an applicant breaches the caveat in ***Rule 1(a)*** that bars the adducing of evidence to the prejudice of a respondent. Such an application is only fit for dismissal in limine.

29. Be that as it may, does the defence disclose any reasonable defence? Is it scandalous, vexatious and/or an abuse of the court process? I have looked at the amended defence and counterclaim. It cannot be said to be hopeless. It has not only specifically denied and traversed the plaintiffs' claim, but has raised issues which require investigation at a full trial.

30. A pleading is frivolous when it has no ground or is without substance. A matter will also be frivolous if it has no substance, it is fanciful, when the party is trifling with the court or when the defence will be wasting the court's time or is incapable of reasoned argument. (See **Dawkins v. Edward of Save Weimber [1976] 1 QBD 499).**

31. A matter will be vexatious if it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. (See**Bullen and Leake and Jacobs Precedents of Pleading (12th Edn) at 145).**

32. In **Mercy Karimi Njeru & Another v Kisima Real Estate Limited [2015] Eklr**, the court: -

***"If a pleading does not disclose any reasonable cause of action or defence it ought to be dismissed … No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption… A court of justice ought not to act in darkness without the full facts of the case before it."***

33. The plaintiffs did not show what in the amended defence and counterclaim was frivolous or vexatious. Neither is the counterclaim. As already stated, the amended defence not only denied and traversed the plaintiffs' claim, it made allegations in an attempt to justify its defence. That cannot be said to be trivial or annoying. Same with the counterclaim. I find nothing frivolous, scandalous or vexatious in that pleading. That prayer is also rejected.

34. The last prayer is to exclude the counterclaim on the grounds that the issues raised therein do not relate to the plaintiffs' suit. The jurisdiction for a counterclaim is to be found in ***Order 7 rule 3 of the Civil Procedure Rules.*** A defendant in a suit is permitted to set-up by way of counterclaim against the claims of a plaintiff, any right or claim, so as to enable the court to pronounce a final judgment in the same suit.

35. In **County Government of Kilifi Vs Mombasa Cement Limited 2017 Eklr,** the court held: -

> **"When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross- claim of any kind against A which by law is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim".**

36. In the present case, the defendants have alleged that by the actions of the plaintiffs, the defendants have suffered losses and/or damage which they have specified in the counterclaim. The actions complained of are closely intertwined with the plaintiffs' claim contrary to their assertions. It is damages allegedly suffered as a result of losses and claims made against the business due to the disputed ownership in the 1st Plaintiff and the suit currently in Court.

37. In this regard, I find that the counterclaim does not raise issues relating to tenancy matters as contended by the Plaintiffs as the issues raised therein are intertwined with the result of this suit. That prayer also fails.

38. Accordingly, I find the application to be without merit and I dismiss the same with costs. Pre-trials within 30 days.

**DATED** and **DELIVERED** virtually this **18th** day of **February, 2021.**

**A. MABEYA, FCIArb**

**JUDGE**