REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 417 OF 2015

AHMED ABDULLE NOOR.....PLAINTIFF/RESPONDENT

VERSUS

HEALTH LINK MATCARE LTD

T/A NAIROBI WOMEN'S HOSPITAL.....DEFENDANT/APPLICANT

RULING

1. The application dated 29th August, 2019 is brought under Order 2 rule 15 (1) b & (d) and Order 51 rule 1 of Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. The application seeks the following orders:

1.That plaintiff's suit be suit be struck out on the grounds that:

(a) It is scandalous, frivolous and vexatious.

(b) It is an abuse of the court process.

2.That the costs of the entire suit and the application be borne by the plaintiff/respondent

3.That this honourable court be pleased to make any other orders that it deems fit in the interests of Justice.

3. The application is premised on the grounds set out in the application and the supporting affidavit. It is averred that the Applicant admitted that a tenancy agreement was entered into with the Respondent on the 23rd January, 2013 over premises LR No. 13424/MIN/Mombasa. It is further stated that the Applicant fell into arrears and demands for payment were made. That on 23rd March, 2019 a meeting was held between the parties with a view to finding an amicable solution to the existing rent dispute.

4. It was further stated that the parties met on 27th June, 2015 and entered into an agreement for the Applicant to determine the lease and pay the Respondent Ksh.10,000,000/= in full and final settlement and also forfeit the entire investment in the property which was estimated at Ksh.50,000,000/=. That the Applicant agreed to settle the Ksh.10,000,000/= in 12 equal monthly instalments of 833,333/= till payment in full. That the typed agreement was to be signed by the parties within 21 days from the date of the signing of the handwritten agreement. That the agreement was typed and signed by the Applicant then sent to the Respondent to execute their part but they never did so. That this caused the Applicant to temporarily halt the payments but later resumed the payments and the Respondent accepted the same. It stated that the last installment was paid on 21st November, 2017.

5. It is contended that the Applicant had already started making payments by the time this suit was filed and hence there was no need to file suit. It is further averred that the Respondent could only sue for the amount the subject of the agreement together with the interest on the balance.

6. That on 12th April,2017, the Respondent filed the application dated 21st March, 2017 seeking to execute the admitted sum of Ksh. 10,000,000/=, which application was withdrawn after the court was furnished with the evidence of payment of the said amount.

7. The application is opposed. It is stated in the replying affidavit that on 27th June, 2018 the parties entered into an agreement for the

Applicant to pay the sum of Ksh.10,000,000/= in equal monthly installments of 12 months commencing from 30th July, 2015. That the Applicant made their payments with difficulties up to November, 2017. In the meantime, the Respondent was issued with a Preliminary Decree for the payment of the Ksh.10,000,000/= and an application dated 21st March, 2017 filed seeking to execute the Preliminary Decree and the application was marked as spent on 6th November, 2018 and directions given that the Respondent could pursue the balance of the amount prayed in the paint.

8. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

9. The principles of the law applicable in an application for the striking out of pleadings were well set out in the case of **D.T.Dobie &Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR**:

> **"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.**
>
> **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."**

10. The background to the instant application is found in the plaint filed herein dated 7th December, 2015. The Respondent's claim is for special damages of Ksh.566,818,557/=; damages for breach of contract and mean profits for a total 3 1/2 years, interest and costs. The claim was denied as per the Statement of Defence dated 29th January, 2016. A reply to the Defence was filed on 17th February, 2016.

11. The Respondent subsequently filed the application dated 14th March, 2016 seeking orders for entry of judgment for an admitted sum of Ksh.29,302,048.2 and for the rest of the claim to proceed to trial. The application was opposed. Upon hearing the parties in the said application, the court vide the ruling dated 22nd November, 2016 entered judgment for the Respondent for the admitted sum of Ksh.10,000,000/= and directed that the rest of claim do proceed to trial.

12. Subsequently, the Respondent was issued with a Preliminary Decree and filed the application dated 21st March, 2017 seeking leave to execute the Preliminary Decree. The said application was marked as withdrawn on 21st March, 2017.

13. With the aforegoing, it is abundantly clear that the issue of what was ruled by the court to have been admitted has been settled. The Applicant's complaint is that the payment of Ksh.10,000,000/= was made as per the agreement between the parties herein and that therefore the suit filed herein is frivolous, vexatious and an abuse of the court process.

14. The handwritten Memorandum of Understanding between the parties dated 27th June, 2015 has been exhibited herein. The same is signed by both parties. This Memorandum of Understanding which is not denied herein reflects that the Tenant was willing to pay the Landlord the sum Ksh.10,000,000/= with effect from 30th July, 2020 in equal monthly installments over a period of 12 months. That in default, interest was to be levied on the debt at commercial rates. There was to be no further claim beyond the Ksh.10,000,000/= in respect of costs, damages and interest. A formal agreement was to be executed by both parties within 21 days from the date of the signing of the Memorandum of Understanding. The typed agreement is said not to have been signed and returned by the Respondent.

15. An analysis of the payments made reflect that the same were made during the period 4th September, 2015 to 21st November, 2017. Going by the Memorandum of Understanding that was signed by the parties, it is evident that the timelines were not honoured by the Applicant. It is explained by the Applicant that this was due to the Respondent's failure to return the duly executed agreement. On the other hand the Respondent's position is that the payment of the sum of Ksh.10,000,000/= was to be effected in 12 equal monthly installments with effect from 30th July, 2015. The import of the Memorandum of Understanding visa-a-viz the typed Agreement is a contentious issue that can only be determined at a full hearing. I am persuaded that this is not a suitable case for striking off.

16. The upshot is that I find no merits in the application and dismiss the same with costs.

DATE, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2021

B. THURANIRA JADEN

JUDGE