



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 90 OF 2016**

**MULTI TOUCH INTERNATIONAL..... PLAINTIFF**

**VERSUS**

**NAIROBI CITY GOVERNMENT.....DEFENDANT**

**RULING**

1. By a plaint dated 23/3/2016, the plaintiff sued the defendant for the recovery of Kshs. 9,957,455/- plus interest. The said amount was the balance due on some delivery of seeds by the plaintiff to the defendant for the period April, 2006 and May, 2012.
2. The defendant filed a defence denying the plaintiffs claim for which the plaintiff filed a reply on 6/5/2017. The matter was referred to mediation but the same failed. The parties then undertook pre-trials which were concluded and the matter listed for compliance on 7/12/2020.
3. On 11/12/2020, the plaintiff lodged in court a Motion on Notice dated 25/11/2020 under ***Order 2 Rule 15 (b), (c) and (d) of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act***. The application sought the striking out of the defence for being scandalous, frivolous and vexatious and an abuse of the process of the court.
4. The grounds upon which the application was predicated upon were set out in the body of the Motion and in the supporting affidavit of **Christine Wangari** sworn on 25/11/2020. These were that; there was a contract between the parties for a total sum of Kshs. 14,119,145/-, the plaintiff fully performed its part of the contract for which the defendant only paid Kshs. 4,161,690/- and there was a balance of Kshs. 9,957,455/-.
5. The plaintiff contended that the defendant had acknowledged the debt by issuing the plaintiff with an unsigned cheque which the plaintiff was supposed to hold awaiting availability of funds. That the defendant's own Committee on Pending Bills had scrutinized the plaintiff's claim and had recommended the settlement thereof.
6. In view of the foregoing, the deponent averred that the defendant's defence was scandalous, frivolous and vexatious. That it would embarrass or delay the fair trial of the suit and that it was otherwise an abuse of the court process. The deponent produced various documents in support of her averments.
7. Although the application was served, the defendant did not file any documents in response thereto. In this regard **Ms. Mokaya**, Learned Counsel for the plaintiff, who appeared on the hearing of the Motion on 25/2/2021, urged that the application be allowed as unopposed.
8. I have considered the record and the supporting affidavit. I have also carefully considered the documents produced in support of the Motion. This is an application for the striking out of a pleading.
9. The principles applicable in the striking out of pleadings are well settled. These were set out in **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.
10. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186**.

11. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59.**

13. A Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes Vs. Grant (1878) AC 345; Hardnord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

14. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

15. A pleading is an abuse of the process where it is frivolous or vexatious or both.

16. In the present case, it is alleged that the defence is scandalous and vexatious and an abuse of the process of the court. I have seen the documents produced in support of the plaintiff's claim. These include LPO's issued by the defendant, a statement of account and a payment voucher by the defendant showing the part payment of the debt, an unsigned cheque no. 047647 dated 18/1/2013 for Kshs. 9,957,455/- issued by the defendant in the name of the plaintiff and a recommendation by the defendant's own Committee on Pending Bills dated 6/11/2018 that the defendant does settle the plaintiff's claim.

17. Looking at the aforesaid evidence, there is no doubt that the plaintiff's claim is unassailable. The defendant's claim remains a mere denial. It was set up only to delay the trial of the plaintiff's claim. The defence is but frivolous and an abuse of the process of the court. It cannot stand.

18. In any event, the plaintiff's averments in the application remained uncontroverted, unchallenged and the application was unopposed.

19. In the circumstances, I find the plaintiff's application to be meritorious and I allow the same as prayed.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 25<sup>th</sup> day of March, 2021.

**A. MABEYA, FCI Arb**

**JUDGE**