REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 13 OF 2019 (COMPLEX)

FRED KIITHUSI KULA .....1ST PLAINTIFF

KITHUSI KULA TRADING CO. LTD .....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED .....1ST DEFENDANT

ROSEMARY NJERI WAWERU T/A

THAARA AUCTIONEERS .....2ND DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Munyithya, Mutugi, Umara & Muzna Advocates for the Applicants

Robson Harris Advocates for the respondent

RULING

This ruling relates to a Notice of motion dated 22/09/2020 filed by the plaintiffs brought under Order 10 Rule 3, Order 2 Rule 15, Order 51 Rule 1, Section 3A of the Civil Procedure Act and all other enabling provisions of the law and upon the Supporting Affidavit of **Fred Kithusi Kula** sworn on 22/09/2020 in his capacity as the managing director of the 2nd plaintiff.

Through the Application, the Plaintiffs sought the following prayers;

a) ***THAT this honorable court be pleased to strike out the 1st Defendant's statement of defence***

b) ***THAT is honorable court be pleased to enter judgment in favor of the plaintiffs as prayed in the plaint***

c) ***THAT the costs of the application and entire suit be borne by the defendants***

In a nutshell, the 1st plaintiff **Felix Kithusi Kula** depones that summons to enter appearance together with the plaint were served upon the 1st defendant on 16/10/2019 and the 1st defendant entered appearance on 17/10/2019 through the firm of **Robson Harris & Co Advocates**. Further the 1st defendant did not file a statement of defence until 24/8/2020 which was served on 25/08/2020 when the matter had been set down for mention. That the defence had been filed out of time and ought to be struck out.

In response to the plaintiff's application, the 1st defendant filed a replying affidavit sworn by it's Legal manager **Christine Wahome** on 5/10/2020 she avers that, the plaintiffs are guilty of material non-disclosure and concealment of facts including the fact that the parties have been engaged in interlocutory issues and therefore undeserving of the orders sought.

Further she stated that, the plaintiffs filed the instant suit contemporaneously with their Notice of motion dated 9/10/2019 seeking inter-alia an order an order for temporary injunction restraining the defendants from auctioning, selling, transferring, advertising for sale or interfering with the suit property. That the first defendant in appreciating the urgency of the matter elected to file a Memorandum of appearance and its relying affidavit deposed by **Joseph Lule** on 18th October 2019. The said application was canvassed orally on 29/10/2019 and the court

issued injunctive orders restraining the defendants from auctioning, selling, transferring, advertising for sale or interfering with the suit property pending the hearing and determination of the suit. Further to the order, parties were to conduct a second valuation of the suit property o appointed by both parties to determine the market value and mortgage value of the property pending the hearing and determination of the suit.

She further avers that due to the outbreak of coronavirus and consequent shutdown and reduction of judicial operations, staff restructuring and workplace changes at various companies including the 1st defendant and lockdown of counties which greatly affected movement of persons(sic). That upon resumption of court activities the 1st defendant duly filed its statement of defence, witness statement and a bundle of documents which steps were taken well before the securing of the first date for pre-trial.

She further states that no prejudice would be suffered by the plaintiff in having the matter heard and determined on merits and that justice should be administered without undue regard to procedural technicalities and the plaintiff's Notice of Motion ought to be dismissed with costs.

On 6/10/2020, parties were directed to dispose of the application by way of written submissions with the plaintiff filing and serving their submission within 14 days and the respondent within 3 days from the date of service.

The plaintiffs submit that a plaint together with summons to enter appearance were duly served upon the 1st defendant and that there is an affidavit of service on record. That the firm of Robson Harris & Co Advocates entered appearance on 17/10/2019 and from that date had 14 days to file a defence. By ordinary calculation, the last day to file the defence should have been 2/11/2019. The 1st defendant did not file a defence until 24/8/2020 which was done without leave of the court.

Further they submitted that paragraphs 6,7,8,9 and 10 of the 1st defendant's Replying affidavit are irrelevant to the current Notice of motion and that prosecution of the interlocutory proceedings was not a bar to filing a statement of defence within the time stipulated by law.

The plaintiffs further submitted that the 1st defendant was placing blame on the Covid-19 pandemic while the same started having effect in Kenya from mid-March and that there was no explanation by the 1st defendant as to why there was delay from 2nd November 2019 to mid-March 2020. The plaintiff relied on the following authorities; **Daniel Wambua Ndabi v Peter Luka Ndutu [2004] eKLR** where the court dismissed an application in which the defendant was seeking orders to extend time to file an amended defence and the court observed that there cannot be extension of time to file an amended defence when the court has not been moved under the relevant rules to do so. **Afapack Enterprises v Punita Jayant Acharya (suing as the legal administrator of the late of theSuchila Anatrai Raval [2018] eKLR** where the court considered amount of time to ordinate delay and held that 8 months was inordinate delay. **Daniel Waite Matu v Housing Finance of Kenya [2008] eKLR** where the court found that the failure to comply with procedural provisions under Order 8 rule 1 (2) does not afford the court discretion. **Rongai workshop & Transporters Ltd v Fredrick Wanjala Another [2006] eKLR** where the court found that the defence had been served and filed out of time in order to accord the defendant to participate in the trial. Notwithstanding the delay, the court disallowed the application to strike out the defence but awarded costs to the plaintiff. **Lucy Nyokabi Kiarie v David Wahome Gitonga & 3 others [2013] eKLR** the court disallowed the application to strike out the defence but awarded costs of the application to the plaintiff.

The 1st defendant submitted that it is trite law that striking out pleadings is a draconian step which must be used as a last step and employed in the clearest of cases and where it is evident that the suit is beyond redemption. The 1st defendant relied on the following authorities **Bernard Maina Kamau v Sunripe (1976) Ltd [2014] eKLR** where the court adopted the holding in **Geminia insurance co ltd v Kennedy Otieno Onyango[2000] eKLR** where justice Musinga as he was then held;

> ***"it is trite law that striking out of pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."*** **(Blue Shield Insurance Co. Ltd v Joseph Mboya Ogutu [2009] eKLR)**

The power to strike out any pleadings or any part of a pleading under this rule is not mandatory; but permissive and confers discretionary jurisdiction to be exercised having a regard to the quality and all circumstances relating to the offending pleading.

Issues for determination

i. **Will the plaintiffs suffer any prejudice should the defence not be struck out?**

ii. **Is the delay by the 1st defendant excusable?**

Analysis and determination

It is discretionary power upon which the court may exercise its jurisdiction in striking out pleadings. It has been argued that before striking out pleadings out has to consider it to be draconian, drastic and discretionary preserve which should be only exercised as this discretion when exercised to favor the plaintiff, it has the power to put to an end to the life of a suit before hearing its merit. On the other hand, if exercised to favor the defendant, it is unfair to drag the wheels of justice where he (she) has no reasonable excuse for the delay. It is a delicate balance one should carefully consider while guided by the principles of natural justice.

In this case, I will address the two issues above jointly while guided by the principles set down in Order 2 Rule 15 of the Civil Procedure rules as follows;

15(1) At any stage of the proceedings, the court may order to be struck out or amend any proceedings on grounds 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 court process

Just as found in **Dr. Murray Watson v Rent A – Plane Ltd & Others Civil Case No. 2180 of 1984,**

> ***"the pleading is not scandalous unless, it alleges offensive, indecent, improper acts or omissions and the motive against the adversary which are unnecessary. A pleading that does not comply with the principle that a defendant is entitled to have the case against him pleaded in an intelligible manner is clearly embarrassing and cannot but prejudice and delay a fair trial unless, a pleading is incontestably bad and beyond curative remedy of a suitable amendment it ought not to be struck out."*** **(See also J. Odunga's Digest on Civil Case Law).**

A broad and purposive and fused interpretation of the power to strike out pleadings should bear in mind Article 50 of the Constitution that guarantees the right to a fair hearing. **The Court Eastern Kitui Stores Ltd v Nairobi City Council HCCC No. 564 of 1997 and the Court of Appeal in Francis Kamande v Vanguard Electrical Services Ltd CA No. 152 of 1996** observed that:

> ***"A pleading is embarrassing if it is drawn that it is not clear what the case the opposite party has to meet at the trial but not if it raises relevant matters nor can it be struck out because the other party declares it to be untrue. No suit can be dismissed unless, it is so hopeless and its plainly obvious that it discloses no cause of action and is so weak as to beyond redemption and incurable by amendment."***

The rule applies to bar a party from instituting a claim that discloses no reasonable cause of action or defence. The plaintiff's suit raises main issues on statutory breach and the plaintiffs right to redeem the charged property. Secondly, on the illegality of not issuing a valid statutory notice of sale inconformity with Section 90 (1) and 96 of the Land Act No. 6 of 2012.

It is apparent from the 1st defendant statement of defence, it has counter-manded on the various issues raised in the pleadings as to the loan agreement and the rights between a mortgagor and mortgagee to the deed governing their contractual obligations. Can the pleadings by the defendant be perceived as scandalous and embarrassing? On my part, I do not think so.

As pronounced in the case of **Lynette B. Oyier & another v Savings & Loan Kenya Ltd HCCC No. 891 of 1996 UR**:

> ***"A party applying for striking out a defence on the ground that it tends to prejudice, embarrass or delay the fair trial of the action should persuade the Court that the defence falls within the well-known meaning of those words and he should specify, whether, it's the whole defence or only parts of it, and if any parts offence the rules of pleadings."***

In the same vein for the above exposition **(see also G. V. Odunga Digest on Civil Case Law and Procedure, 2nd Edition Pg 7483 – 7487).** From an overview undertaken on the pleadings there are primary and secondary questions, which requires the Court to accord them due attention. There is a general theme advanced on the full import and tenor and intents of the charge instrument dated 21.11.2011. The question as to the extent to which the statutory power of sale had ripened and the corresponding right of redemption, conferred by the statute upon the plaintiff is a matter in respect of which evidence must led to proof existence or non-existence with the Law.

In the instant case, the defendant admits the fundamental principles in the making of a contract with the plaintiff but maintains that the attached contract has been subsequently breached necessitating it to exercise the statutory power of sale. This is based on the mortgage deed that the loan advanced to the plaintiff must be recovered or repaid back a per the terms of the loan agreement. The defendant in its written statement of defence acknowledges that the statutory power of sale had arisen in respect of the charged property by the plaintiff.

The issue on this impugned contract will certainly call for evidence from either side so that the Court has a better view to decide whether there was a breach or not of the statutory provisions with regard to the sale of the securities held with the 1st defendant. The function of the Court at this stage of the proceedings is to peruse the defence together with any attachments or annexures in support of the averments to satisfy itself on the express or implied allegations of fact in it whether they are true or not to sustain a suit at the hearing on the merits.

The significance of the written statement of defence is the fact that it avers and contends to the existence of the mortgage contract and breach thereof by the plaintiff. The defendants in the pleadings deny violating any terms of the contract and specifically the provisions under Section 90 (1) and (96) of the Land Act.

In the comparative case from **Uganda Count in Libyan Arab Bank v Intrepol Ltd (1985) HCB** the Court held interalia:

> ***"In its written statement of defence, it was clear that the defendant denied being indebted to the plaintiff in the manner alleged by the plaintiff in the plaint. This was perfectly proper defence to raise against the plaintiffs claim which raised triable issues of fact and Law fit for trial by this Court."***

I am of the conceded view that there is no ambiguity to the averments in the written statement of defence as the decision in **D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another CA No. 37 of 1978** firmly held as follows:

"No suit should 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 amendment."

In **Coast projects v Mr. Shah Construction (K) Ltd [2004] 2 KLR 118;**

> ***"striking out a pleading is to be resorted to in very clear, plain, and obvious cases. It is a summary procedure and by virtue of that, it is a radical remedy and a Court of Law should be slow in resorting to this procedure."***

It is self-evident from the above principles, that the plaintiff requires of this Court to exercise its summary procedure to struck out the defence so that he can have a freehand in the claim against the defendant. The other Common Law Courts too have had occasions to consider the legal standing of striking out pleadings or discretionary power on summary procedures. In **Three Rivers DC v Bank of England [2001] 2 ALL ER 513:**

> ***"The important words are no real prospect of succeeding. It requires the Judge to undertake an exercise of Judgment. He must decide whether to exercise the power to decide the case without a trial and give summary Judgment. It is a discretionary power, that is, one where the choice whether to exercise the power lies within the jurisdiction of the Judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no real prospect, he may decide the case accordingly."***

With this observation in mind and taking into account the elucidated principles which normally guide Courts in exercise of their discretion to decide matters of this nature, I am yet to be persuaded by the plaintiff application to strike out the defence. Clearly, the plaint and the statement of defence demonstrates existence of triable issues for determination at the trial with a prospectus of success.

ii. Is the delay by the 1st defendant excusable?

On the second ground, the plaintiff alleges that the defendant is guilty of inordinate and inexcusable delay in filing the impugned defence. Thus, the delay has further prejudiced the plaintiffs by exposing them to additional liability.

The answer to this question can be found in the approach taken by the Courts in the cases of **Salat v Independent & Boundaries Commission & 7 others [2014] eKLR, Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR, Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No. 255 of 1997 UR**. It is worthy nothing that a Court when faced with an application at stake to strike out a defence for delay, it has to appreciate that even in those circumstances the discretion is unfettered. I therefore, take into account that my exercise of discretion ought to be guided by the illuminating principles in the **Salat, Paul Wanjohi and Leo Mutiso cases (supra).**

Clearly, the Courts have entrenched the following principles expressed in **Leo Sila Mutiso case** as follows:

> ***"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, the reason for the delay, thirdly possibly, the chances of the appeal succeeding and if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted."***

The matter before Court is for the striking out of the defence due to the inordinate delay. Though the above principles are founded on leave to extend time for a party to comply with the statutory rights, I consider them to apply **Mutatis Mutandis** to the present claim. This position was fortified by the Court **Purdy v Cambrian [1999] ALL ER 1518** which was premised on the following passage:

> ***"Delay is and always has been, the enemy of justice. The Court has to seek to give effect to the overriding objective when it exercises any power given to it by the rules. This applies to application to strike out the claim whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by refence to the rigid and overloaded structure which a large body of decisions under the former rules had constructed under the new rules. The Court takes into account all relevant circumstances and in deciding what order to make, makes a broad Judgment after considering available possibilities. There are no hard and just theoretical circumstances in which the Court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case. Rather its necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective."***

It is true that the 1st defendant did not file its defence within the stipulated time and only waited up to a period of 9 and half months before filing the same. The defendant has offered no justifiable reason for this inordinate delay. I couldn't agree more with the plaintiff that the attempts to blame the same on the outbreak of the Covid -19 pandemic is a lame excuse. It is true that the country found itself in an unprecedented era of the pandemic and that there was downscaling of operations by most organizations including the judiciary, However, the effects of this were felt from mid-march 2020 about 4 months when the time to file a defence had lapsed.

Notwithstanding the foregoing, I am of the view that the plaintiffs have not demonstrated if and how there will be any prejudice suffered by themselves should the 1st defendant be allowed to file its defence out of time. What would be the essence of litigation if the life of a suit would be terminated before going through trial and determined non merit? We can only appreciate merit where both parties are given a chance to present their case. The rules of natural justice dictate that no party should be condemned unheard no matter how weak their case may seem.

This means that the issue sought to be addressed by the plaintiff before this Court on striking out the defence is not tenable. It seems to me that there is a substantial risk of an injustice and prejudice on the part of the defendant were this Court to move towards striking the

defendant statement of defence. There are good reasons for not filing the defence within a reasonable time. The scope of this Court's exercise of discretion ought in my opinion to entail the set guidelines in **Phillip Keipto Chemwolo & another v Augustine Kubende [1986] KLR 495**:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."***

In the instant application, there is convincing evidence underlying the reasons for the delay occasioning the late filing of the defence. To deny the defendant right to access to justice to adduce and challenge evidence by the plaintiff would be tantamount in blocking the doors of justice which at this stage may not augur well in the administration of justice.

It is for the foregoing reasons, and regrettably so to the plaintiff I decline to grant the declarations sought in the notice of motion dated 22.9.2020 with costs.

DATED SIGNED AND DELIVERED AT MALINDI ON 18TH DAY OF MARCH 2021

……

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Ondengo advocate for the defendant