



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 7 OF 2020

SPINNERS AND SPINNERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KIMILILI WHOLESALERS (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. SPINNERS AND SPINNERS LIMITED (Plaintiff/Applicant's) Notice of Motion application dated 8th October 2020, supported by an affidavit sworn by **Gerald Kihiu**, the Plaintiff/Applicant's HR and Administration Manager, and is expressed to be brought under the provisions of **Order 2 Rule 15(1)(b)(c) & (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act**. The application seeks the following orders:

a. **THAT** the Defendant's Statement of Defence dated 9th August 2020 filed on 10th August 2020 (hereinafter referred to as 'the Defence') be and is hereby struck out and judgement entered for the Plaintiff/Applicant against the Defendant/Respondent for the sum of Kshs.25,087,180/= (Principal sum of Kshs.22,806,856 + accrued interest Kshs. 2,295,856/=), bank charges of Kshs. 4,400/=, interest at 2% per month from 1st August 2019 till payment in full and costs of the Suit as prayed for in the Plaint. the written statement of Defence herein be struck out and/or expunged from the court record.

b. **THAT** the costs of this application and of the suit be borne by the Defendants/Respondents

2. The application is premised on the grounds on its face which are *inter alia* that: the written statement of defence is baseless, frivolous, vexatious and an afterthought and may prejudice, unnecessarily embarrass and or delay fair trial of the action; it is an abuse of process of the court; the statement of defence is unsubstantiated, a mere sham constituting mere denials raising no triable issues and only intended to delay the expeditious determination of the suit.

3. The thrust of the application is that the applicant and the defendant entered into a contract for sale of goods wherein the plaintiff/applicant agreed to sell goods to the defendant/respondent. To this end, the plaintiff/applicant avers that it duly delivered the goods ordered for by the defendant/respondent and the said delivery was done pursuant to delivery notes numbers **181010189, 181010190, 191000207, 181010209, 181010211, 181010258, 181010264, 181010279, 181010280, 181010340, 181010383, 181010394, 181010563, 191000477, 191000638 and 181010812** which was duly received and stamped by the defendant/respondent upon which the plaintiff/applicant duly invoiced for payment of the goods delivered.

4. The gravamen is that despite the express terms and conditions of payment contained in the invoices, the defendant/respondent has consistently defaulted, refused, neglected and or ignored to pay the demanded amounts and in fact issued cheques that were returned unpaid in clear contravention of the express terms and conditions contained in the invoices to the effect that invoiced amounts were due on demand.

5. The Plaintiff/applicant further avers that the cheques returned unpaid amounts to an admission of the debt due and thus demonstrates that the statement of defence filed by the defendant/respondent is a sham, frivolous and vexatious. The plaintiff/applicant maintains that the allegations made by the defendant/respondent in the statement of defence denying the express terms and conditions of the invoices and alleging that the defendant would give postdated cheques as security remain unsubstantiated and uncorroborated allegations devoid of any documentary evidence and therefore lacking in merit.

6. The Defendant/Respondent (**KIMILILI WHOLESALERS (K) LIMITED**) is opposed to the application vide its replying affidavit sworn by the defendant/respondent's managing director **MANISH SHAH**, deposing that the application lacks merit, is an abuse of court process and does not meet the threshold for the striking out of the defence on record.

7. The Defendant acknowledges that indeed it entered into a contract for sale of goods whereby the plaintiff agreed to sell goods to the defendant on credit and that the plaintiff did supply goods to the defendant receipt whereof was acknowledged by the defendant on diverse dates. However, the defendant insists that there was no express terms and conditions as alleged by the plaintiff/applicant but rather that there was a term of the agreement that the plaintiff would supply goods to the defendant who would in turn sell the goods and make payments to

the plaintiff.

8. The defendant further deposes that the postdated cheques were not issued for payment but as security for the goods supplied whose payment was to be pegged to the periodic disposal and that the defendant has already made several payments to the plaintiff on account of goods already sold which payments have not been acknowledged in their statement of account. Therefore the alleged indebtedness in the sum of Kshs.22,806,508 and claims that the said amount continues to accrue interest right is contested. It is contended that the issue of interest accruing at 2% is not an issue that can be summarily dealt with but needs a full hearing to determine, and that a good defence to the plaintiff's claim that raises triable issues has been raised, which should be interrogated at full hearing.

9. The application was canvassed by way of written submissions. The crux of the Plaintiff/Applicant's submissions is that the purported defence filed by the defendant does not amount to a defence in law and as such it ought to be struck out for being an abuse of court process. To this end, the Plaintiff/Applicant relied on the cases *Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd (2014) eKLR* and *Kenya Commercial Bank v Sumtra Investment Bank Ltd (2015) eKLR*.

10. Four main issues were identified by the applicant that it considers as being crucial in proving that the defendant's statement of defence ought to be struck out and summary judgement entered in its favour.

11. It is the applicant's contention that invoices delivered to the defendant/respondent contained clear terms on payment of the goods delivered which the defendant elected to disregard including recourse to challenge the invoices within 7 days of the receipt.

12. Secondly, the applicant contends that the defendant/respondent mode of payment and the same being pegged on selling the goods is a fabrication and contrary to the express terms and conditions. In this regard, the applicant relied on the case of *Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited (2017) eKLR* where the court quoted with authority the case of *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney & Another Civil Appeal No.23 of 2005* where the court noted that verbal representations cannot be used to alter express terms of written instruments. The applicant therefore submitted that allowing the defendant to alter express terms of their written agreement and refusing to pay the debt owed amounts to unjust enrichment and relied on the case of *Stephen Karanja Kibuku v Safaricom Limited (2018) eKLR* where the court expounded on the doctrine of unjust enrichment. It is the applicant's submission that the defendant's action of issuing cheques that were returned unpaid in an attempt to settle the invoices amounts to an admission of debt due and thus demonstrates that the defence filed is a sham and frivolous. The applicant relied on the cases of *Equatorial Commercial Bank v Wilfred Nyasim Orocko (2015) eKLR* and *Jondu Enterprises v Royal Garments Industries EPZ (2014) eKLR*.

13. The applicants argue that the purported defence does not amount to a prima-facie defence in law and the same does not raise triable issues and relies on the case *Job Kilach v Nation Media Group, Salaba Agencies Ltd & Michael Rono (2015) eKLR as quoted in Mercy Karimi Njeru & another v Kisisma Real Estate Ltd (2015) eKLR*. The applicant describes the defence as a bare denial, mere sham, an abuse of court process and only intended to delay fair trial. To this end, the applicant relies on the case *Dr. Kiama Wangai v John N. Mugambi & another (2012) eKLR* holding that the defendant's pleading is evasive and or obscuring or concealing the real question in issue between the parties and as such is bound to embarrass, prejudice and or delay fair trial.

14. On the other hand, the Defendant submits that the statement of defence raises triable issues and it denies the threshold for striking out as provided under **Order 2 Rule 15(1)** has been met. As such, the Defendant avers that the statement of defence cannot be struck out without judgment being given on available evidence before the court. It is the Defendant's case that the Application has not met the principles which warrant the striking out of a defence not even proofing that the assertions that the defence is scandalous, frivolous or vexatious. The defendant argues that it should be afforded a chance to be heard and the court should aim at sustaining pleadings rather than terminating them and relies on the decision in *Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd (2014) eKLR*.

15. The defendant admits to have entered into a contract for sale of goods but denies the existence of express terms and conditions including a 2% interest when accounts become due and therefore avers that the court should subject the issues to full trial in order to determine the true position. In this regard, the defendant relies on the cases of *Bob Martin Omondi v Lorna Olilo (2020) eKLR* and *Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another (2009) Civil Appeal 306 of 2002* holding that its defence raises bona fide triable issues and summary judgment should not be granted.

16. In addition, the defendant submits that its statement of defence does not amount to an abuse of court process. To buttress this point, the defendant relied on the decision of the Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No.25 of 2007 (2009) eKLR 229* wherein the court expounded on what constitutes abuse of court process and argues that the plaintiff/applicant has not shown/proved to court how the defence filed by the defendant is a sham or an abuse of court process and therefore invites court to dismiss the application with costs to the defendant/respondent.

Analysis and determination.

17. A careful perusal of the application, the supporting Affidavit and the Replying Affidavit filed herein by the parties together with the various submissions made and the authorities cited, indicate that the only issue for determination is whether the Plaintiff/Applicant has met the threshold for striking out of the defendant's statement of defence.

18. The Notice of Motion is expressed to be brought under **Order 2 rule 15 of the Civil Procedure Code** which deals with striking out of pleadings, which provides as follows: -

“15. (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.*”

19. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in *D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1*, are to the effect that that 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.

20. The Court of Appeal in the case *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR* restated these principles as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

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

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

21. As the court observed in *Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR*

“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.”

22. The rationale behind this is the fact that striking out of a pleading and the exercise of the powers for summary procedure are draconian, coercive and drastic and therefore, striking out of a pleading must be done with tremendous caution because a litigant should never be driven from the seat of justice without being heard. See *Prafulla Enterprises Ltd v Norlake Investments Ltd, Kisumu High Court Civil Case No. 145 of 1997; LLR 7412 (HCK)*.

23. The court must therefore exercise the powers to strike out a pleading or case with the greatest care and circumspection and only in the clearest of cases should the court strike out a pleading. In *Francis Kamande v Vanguard Electrical Services Ltd. Civil Appeal No.152 of 1996 LLR 4914 [CAK]* the court observed that a suit should not be dismissed and summary judgement entered unless it is so helpless and is plainly obvious that it discloses no cause of action and is so weak to be beyond redemption and incurable by amendment.

24. It is therefore the duty of court if a defendant raises prima facie triable issues to allow that defendant to defend his or her case. Similarly, if no prima facie triable issue(s) is brought out forward to the claim of the plaintiff, then the court can forthwith enter summary judgement for it is as much against natural justice to shut out without proper cause a litigant from defending himself/herself, as it is to keep a plaintiff out of his/her dues in a proper case. See *Vaiwin Ltd v Rasikbhi Manibhai Patel Civil Appeal No. 248 of 1999 and Odunga’s Digest on Civil Case Law and Procedure, Volume 4, 2nd Edition, 2010 at 3952*.

25. The import of the above is a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The triable issue need not succeed. The court should and must avoid the temptation to anticipate the ultimate result of trial as was held in *Vaiwin Ltd v Rasikbhi Manibhai Patel (supra)*, as that is the duty of the trial court. The function of court in its jurisdiction of striking out pleadings is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose sanctions if they have not been so formulated.

26. These sentiments were echoed by Danckwerts L.J when the House of Lords considered a similar matter in *Wenlock v Moloney, [1965] 2 All E.R 871* at page 874, as follows:

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended

to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

27. Consequently, a party applying for striking out a defence on the grounds listed under Order 2 Rule 15(1) must persuade court that the defence falls within the well-known meaning of the words listed under Order 2 rule 15 (1) and he or she should specify whether it is the whole defence or only parts thereof and if parts, which ones, offend the rules of pleading. See *Lynette B. Oyier and another v Savings and Loan Kenya Limited Nairobi High Court Civil Case No.891 of 1996; LLR 8312 (HCK)*.

28. Order 2 rule 15(1) discloses the words (grounds) upon which a pleading can be struck out. In particular, a pleading can only be struck out if it discloses no reasonable cause of action or defence in law; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action and lastly if it is otherwise an abuse of the process of the court.

29. The court in *Joseph Okumu v Standard Chartered Bank (Hayanga J) HCCC No. 899 of 1994* expounded in great depth the meaning of the above grounds and the court in *Mercy Nduta Mwangi t/Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR* reiterated the same thus:

“The grounds upon which the application was based were that the defence filed was scandalous, frivolous, vexatious and was otherwise an abuse of the process of the Court.

*36. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

*37. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See *J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.**

38. But they may not be scandalous if the matter however scandalising it is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

*39. 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.**

*40. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See *Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

*41. 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.**

*42. Pleading tend 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; Hardbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).* ___*

*43. 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.**

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

30. In the instant application, both the defendant and the applicant admit that they entered into a contract for the sale of goods. Furthermore, they both admit that on various dates the plaintiff supplied goods to the defendant/respondent which the defendant/respondent acknowledged receipt of. However, the defendant denies that that the express terms and conditions contained in the invoices formed part of the terms of the contract as alleged by the plaintiff.

31. In addition, the defendant/respondent argues that according to their contract with the plaintiff/applicant, the defendant/respondent was to pay the plaintiff for the supply of goods after selling the goods. This is contested by the plaintiff/applicant who submitted that accounts

became due on demand and when overdue, the accounts attract an interest of 2% per month. This gives the figure of Kshs.25, 087,180. Is which is contested

32. The defendant further denies that it provided the returned cheques unpaid for payment purposes insisting that the post-dated cheques were simply to act as security and that the plaintiff/applicant filed the cheques prematurely.

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should 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 and incurable by amendment.”

33. Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that a Plaintiff should not be kept away from his judgment by an unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. **(See the case of Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).**

34. A careful consideration of the facts placed before the court reveals that the Defendant’s Statement of Defence does not indeed comprise of mere denials. The only common ground is that the goods were delivered to the defendant, but there is a contest as to the terms under which the deliveries were made, and the post-dated cheques issue. Were the cheques to be deposited at once or to be released in piecemeal as the goods got disposed? Did the applicant present the cheques all at once, periodically, and what was the agreement in issuance of the post-dated cheques. In my view, there are triable issues which cannot be ignored, and these issues can only be determined after evidence is adduced by both parties. Where there is even a single triable issue, the matter ought to go to full hearing, and I hold that it would be unfair to condemn the defendant without hearing its side of the story.

35. The significance of the defendant’s written statement of defence is the fact that it avers and contends to the existence of the express terms and conditions and breach thereof. The defendants further in the pleadings deny violating any terms of the contract and specifically express terms and conditions contained in the invoice issued and the sum as alleged by the plaintiff/applicant. Furthermore, the defendant/respondent denies being indebted to the plaintiff/applicant in the manner the plaintiff/applicant alleges especially the amount owed. And I am persuaded that all these issues require trial to establish the true position and amount of debt in question.

36. In this regard, I am guided by the decision of Uganda Court in **Libyan Arab Bank v Intrepol Ltd (1985) HCB** where the Court held:

“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.”

37. Whereas these triable issues need not succeed, it is also important to note that as long as a pleading raises a triable issue even if at the end of the day it may not succeed, then the suit ought to go to trial. Consequently, I hold and find that the Plaintiff/applicant notice of motion dated the 8th of October 2020 fails and is dismissed with costs to the respondent.

DELIVERED AND DATED THIS 19TH DAY OF MAY 2021

H. A. OMONDI

JUDGE

Miss Mwangi for applicant

Miss Lagat for respondent

C/A Komen