REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT NO. 6 OF 2020

JOHNSON SIMIYU MASINDE T/AMASINDE & CO. ADVOCATES

DANIEL AUTA NYAKUNDI...PLAINTIFFS

VERSUS

CYTONN INVESTMENTS MANAGEMENT PLC...........DEFENDANT

R U L I N G

By plaint dated 27th July, 2020, the plaintiffs claim against the defendant;-

1. The 1st plaintiff Kshs 14, 716,712/- with interest thereon @15 % p.a from the 1st March, 2020 till payment in full

2. The 1st and 2nd plaintiff- Kshs 22, 215, 178/- with interest thereon @15% p.a from the 30th April, 2020 till payment in full.

3. Costs of the suit.

The defendant filed its defence on 27th August, 2020 denying all the plaintiffs' claims and that the suit be dismissed with costs to the defendant.

Subsequently, the defendant filed an application dated 27th August, 2020 (**hereinafter 'the defendant's application')** seeking;

1. That the plaint filed herein be struck out and this suit be dismissed with costs to the defendant.

2. That costs of and occasioned by this application be awarded to the defendant.

The application is supported by the grounds on the motion and the supporting affidavit of Patricia Njeri Wanjama, the defendant's Company Secretary dated 27th August, 2020.

The plaintiffs subsequently filed their application dated 14th September, 2020 **(hereinafter 'the plaintiffs' application')** in which they seek;

1. Judgement for the plaintiff as prayed in the plaint be entered on admission by the defendant.

2. The defence be struck out as disclosing no reasonable defence to the plaintiff's claims.

3. The defendant do pay costs of this application.

The application is supported by the grounds contained in the face of the motion and further by the 1st plaintiff's affidavit.

Directions were taken on 14/10/2020 and by consent counsel agreed the two applications be canvassed together and to dispose of them by way of written submissions.

The defendant states that it does not owe the plaintiffs the amount claimed, the plaintiffs and the defendant are among 3,500 partners/investors in Cytonn High yield Solutions LLP (CHYS), a separate and distinct entity from the defendant, that the plaintiffs invested

an aggregate of Kshs 34,000,000/- with CHYS formerly Cytonn Management Solution LLP vide a contribution agreement.

The applicant depones that the defendant is merely is merely providing administrative services as its principal partner, that the board extended the period of maturity due to the outbreak of the global Covid-19 pandemic and therefore there was no payment to any of the other investors. That the proceedings are prematurely before court for the reasons that the proceedings relate to a dispute which is subject to arbitration, they are in respect of a dispute which is disputed and that it seeks to pressurize the defendant to pay a debt known by the plaintiffs to be non-existent.

The plaintiffs on their part state that the defendant by its own statement of account expressly and unequivocally admitted that the accounts payable to the 1st plaintiff as at 29th June, 2020 is Kshs 14, 870, 430/= and Kshs 22, 215, 178/- to the plaintiffs as at 16th March, 2020, that by its letter dated the 31st march, 2020 the defendants informed the plaintiff that it would take 3 months to return to normalcy the defendant has made part payments to the 1st plaintiff.

The plaintiff filed their submissions on 5th January, 2021. They submit that an action may be brought upon an agreement not under seal, and therefore pleadings show the need to imply from the conduct of the parties or a set of documents that constitute the agreement.

That by letters dated 27/6/2019 and 30/4/2020, signed by the defendant, it freely admitted facts to the effect that Kshs 22,000,000/= being principal and interest payable at 15% p.a were payable to the plaintiffs and that Kshs 12,000,000/= being principal and interest at 15% p.a was payable to the 1st plaintiff as at 30th April, 2020 and 23rd September, 2019 respectively.

The plaintiffs submit that there have been a number of correspondences with the defendant on the subject of this suit and therefore there is an established contract between the parties. That CHYS as alleged by the defendant is a product and not a party liable to the plaintiffs.

On the issue of variation of contract, counsel submits that to effect a variation of contract, parties must be *ad idem*. That there was no mutuality of benefit and therefore not enforceable. That a contract cannot be varied by implied stipulations unless mutually intended and necessary to give efficiency to the contract.

On striking out, the plaintiffs submit that the suit ought not to be struck out as it discloses clear contractual relations between the plaintiffs and the defendant.

The defendant on its part in respect to the defendant's application submitted the plaintiff has not produced the agreement forming the basis of the suit, which agreement, if any, produced by the plaintiff was between the plaintiffs and CHYS which has a dispute resolution mechanism. It denies having entered into any agreement with the plaintiffs.

In respect of the plaintiffs' application, the defendant submits that it has not admitted any of the plaintiffs' claim. That no evidence is admissible in such an application but determined on the basis of the pleadings. That the defence raises the defence of privity of contract as well as want of debt.

The court having carefully considered both applications, affidavits, the rival submissions and the various authorities relied on by counsel, I have come to the conclusion that the following issues present themselves for determination.

1. Whether the defendant has made admissions entitling the plaintiff to judgment on admission?

2. Whether the plaint and defence ought to struck out.

Determination

The law on entry of judgment on admission is founded in Order 13 which provides thus; -

> ***1. Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.***
>
> ***Judgment on***
>
> ***2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.***

According to ***Mulla, The Code of Civil Procedure, Vol 2, 8th Edition***, the object of obtaining an admission is to do away with the necessity of proving facts that are admitted.

According to the author, admissions are of three kinds;

a) Admissions in pleading: those contained in the pleadings and those which are merely the consequences of the form of pleadings adopted.

b) Admission by agreement

c) Admissions by notice.

The plaintiff's application seems to fall under the first limb of the types above mentioned.

The plaintiffs contend that the defendant has expressly in its own statement of account dated 9/3/2020 and 30/4/2020 expressly, and unequivocally admitted that the accounts payable to Masinde Johnson, as at 29/6/2020 is Kshs 14, 870, 430 and that the accounts payable to the 2 plaintiffs as at 16/3/2020 was Kshs 22, 215, 274/=.

The plaintiffs submit clearly, the statement from the defendant is sufficient to guarantee them judgement on admission and that this court should enter judgement accordingly.

The defendant on its part submits that it has not admitted the plaintiffs' claim. It contends that the plaintiffs are 2 of the over 3, 500/= partners/investors in the Cytonn High Yield LLP who collectively share a common interest of getting high yields than what is otherwise in the market.

The defendant also contends that it is an independent investment company distinct from Cytonn Investments Cash Management Solutions. The defendant has annexed a certificate of change of name from Cytonn Cash Management Solutions to Cytonn High yield Solutions LLP.

Clearly, the defendant here seeks to distance itself away from the contract the subject of this suit. The defendant argues that it too is an investor in CYHS and it cannot be held liable for its debts.

I have looked at the statement dated 30th April, 2020. The letterhead is that of Cytonn Investment High Yield Solutions and signed off as Cytonn Investment Management PLC. In the statement of 9th march, 2020, the opening paragraph thereto reads;

> ***This is a polite notification on maturity of your investment in <u>Cytonn High Yield Solutions</u>.***
>
> ***On behalf of <u>Cytonn Investments</u>, I take this opportunity to thank you for taking up investments in our <u>Cytonn High Yield Solutions</u> and choosing us to deliver to your investment promise.***

The agreement entered into by the parties has been annexed to the defendant's application and clearly, the contracting parties are the plaintiffs and Cytonn Cash management Solutions LLP. The question then arises; who is responsible for the payment?

Lucy Momanyi T/A l.N. Momanyi & Company V Nurein M.A. Hatimy & Another (2003) eKLR, the court of appeal Held:

> ***"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must have no room for doubt that the parties passed out of the stage of negotiations onto a definite contract."***

In ***Choitram Vs Nazari [1984] KLR 327*** Madan, JA stated: -

> ***"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. <u>Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.</u>"*** *(emphasis added).*

In this case, the plaintiffs assert their rights on the basis of correspondences between themselves and the defendant. The defendant disowns the agreement. Clearly, the admission here do not fit the criteria of it being clear, unambiguous and unconditional.

This court therefore declines to enter the judgement on admission as sought by the plaintiff.

<u>Whether the plaint and defence ought to struck out</u>

The defendant's application seeks to strike out the plaint for disclosing no cause of action against it and that it is just and equitable to grant the relief. The defendant states it does not owe the plaintiffs any money, that together with the plaintiffs, it is a partner/investor in Cytonn High Yields Solutions whereby the defendant is the principal partner and the plaintiffs are investment partners. That if any dispute was to arise, it can only be with Cytonn High Yield Solutions.

On the other hand, the plaintiff's application seeks to have the defence struck out as disclosing no reasonable defence to the plaintiff's claim.

Order 2 Rule 15 deals with striking out of pleadings and 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."

Madan JA in ***D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1*** *while determining an application seeking to strike out a plaint for disclosing no cause of action held;-*

> ***"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."***

More recently, the court of appeal in ***Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu [2009] eKLR*** held;

> ***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.***

The defendant in this case has pleaded privity of contract in answer to the plaintiff's claim. It has pleaded that there existed no contract between itself and the plaintiff. This, the court finds is a reasonable defence worth consideration hence not a reason to strike out the defence.

The defendant on his part claims that the plaint discloses no reasonable cause of action against it. From the plaintiffs' pleadings, I discern that the foundation of the claim is an alleged breach of contract. The plaintiffs basing on various correspondences between themselves and the defendant claim the defendant owes them money and seek this courts' intervention to enforce the performance of the contract from the defendant's end.

This court is alive to the fact whenever a party discovers a deficiency in his pleadings that may prejudice his or her case, the law provides for amendment of pleadings to cure the defect. This should not be interpreted however as a leeway this court is extending to the litigants herein to put their house in order since I am aware that ours is an adversarial judicial system.

The court is alive to the provisions of Article 159 of the Constitution, 2010 which enjoins this court to administer substantive justice without undue regard to technicalities of procedure.

In the end, I make an order that applications dated 27th August, 2020 and 14th September, 2020 are both dismissed with no orders as to costs and direct that suit be set down for hearing within the next 60 days from this date.

DATED and SIGNED at BUNGOMA this 30th day July, 2021.

S N RIECHI

JUDGE