Babira v Kencom Sacco Society Limited (Civil Case E256 of 2019)
[2021] KEHC 316 (KLR) (Commercial and Tax) (29 November 2021) (Ruling)

Neutral citation: [2021] KEHC 316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E256 OF 2019

MW MUIGAI, J

NOVEMBER 29, 2021

BETWEEN

ROSELYNE KASORANI BABIRA ..... PLAINTIFF

AND

KENCOM SACCO SOCIETY LIMITED ..... DEFENDANT

RULING

1. The Court enters judgment on admission against the Defendant as prayed for in the Plaint.

2. In the alternative to prayer 1, the court strikes out the Statement of Defense dated 25th November, 2019 and filed in court on the 26th November,2019.

   Which Application was supported by the sworn Affidavit of John Khayega Chivai dated 19th November 2020 and based on the grounds that;

   a. The Defendant admitted to their obligation register a discharge of charge clearly and unequivocally through the witness statement made by the Secretary of the Defendant dated the 25th November, 2019 and filed in court on the 26th November, 2019 in the following terms-

      '.....we took a facility from National Bank of Kenya to develop the property.....the entire development was charged to National Bank of Kenya....The Plaintiffs title is among those we are pursuing for partial discharge'.

   b. The Defendant also admitted to their obligation to register a discharge of charge in form of the letter annexed to the defendant's list of documents, where

in, the Plaintiff is listed at number 7 among other names, as being the owner of house number 95 and the letter clearly was meant to have her partial discharge of charge prepared and executed by the Defendant.

c. The admission above is clear, plain, unequivocal and/or obvious that indeed the Defendant owes the Plaintiff an obligation of completing the sale and issuing the completion documents stated in Clause 9 of the Plaint including the partial discharge on the charge.

d. The Defense dated the 25th November, 2020 is a sham, a mere denial and does not disclose any cause of action, triable issue or any Defense in law.

e. A delay in entering judgment on admission and/or striking out the defense and entering judgment against the defendant prejudice the Plaintiff owing to the fact that her property is still charged and the Defendant has failed to apply for a partial discharge of charge from National Bank of Kenya in order to protect the proprietor's right to property, 3 years after receipt of the whole purchase price.

f. It is in the interest of justice that the suit be determined summarily by either entering judgment on admission or striking out the Defense and entering judgment in favour of the Plaintiff.

REPLYING AFFIDAVIT

The Application was opposed vide the sworn Affidavit of Roselyne Jituti dated 4th June 2021 and stated that;

1. The Applicant has also filed Nairobi HCCC E531 of 2020 where she is the 12th Plaintiff and a Copy of the Plaint is marked A and the Plaintiff seeks the same and/or similar Orders in these two suits. In Nairobi HCCC E531 of 2020, the Plaintiff is seeking Orders against both National Bank of Kenya Ltd and the Defendant herein.

2. From the foregoing, it is clear to the Plaintiff that Completion Documents are with National Bank and not the Defendant. The Defendant cannot give what it is not in its possession until the issue is resolved between it and the National Bank of Kenya Ltd.

3. This is a case of an abuse of the Court Process particularly noting that the Plaintiff has not disclosed the existence of this suit in Nairobi HCCC E531 of 2020.

4. Further to the above, the Defendant has specifically pleaded at Paragraph 5 of the Defense that the Plaintiff is aware of the secured facility and the Defense cannot be held to be an admission over circumstances that the Defendant has no control over.

5. The Applicant does not specify the ground upon which it is grounded thereby leaving the Defendant guessing as to whether the ground is the Defense discloses no reasonable cause of action, scandalous/ frivolous or vexatious, prejudicial and/or an abuse of the Court's Process.

APPLICANT'S SUBMISSIONS

3. It was the Applicant's submission that its cause of action arises from the breach of Clause 9 of the Agreement for Sale of the town house known as house No. 95, erected on LR No. 12825/195 dated the 4th July, 2017 and listed in the Plaintiffs list of exhibits as No. 3. It is for this reason that the Plaintiff specifically sued the Defendant for an order of specific performance to issue against them so that they may remedy the breach of Clause 9 and complete the sale.

4. The Defendant filed a Defense dated the 25th November, 2019 wherein it was admitted that they are the developers of the suit property in paragraph 2 and specifically in paragraphs 5 that –

> "The defendant secured a facility to develop the Property and discharge of the Plaintiff's property plus many others is ongoing albeit systematically"

5. The Defense and the Witness Statement contains admissions of breach of the obligation under Clause 9 of the Agreement, more so that of obtaining a partial discharge on the Plaintiff's property. The admission is plain and obvious.

6. The Applicant relied on the Order 13 Rule 2 of the *Civil Procedure Rules* and the case of *Choitram & Another vs Nazari* Nairobi CACA No. 8 of 1982 where a similar Application was made and the court in allowing the Application held that-

> "For the purpose of Order Xll Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. 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."

7. It was the Applicant's further submission that the Defense should be struck out as it is a mere denial of the facts in pleaded in the Plaint with no reasons at all for the denial.

8. In *Muguga General Stores v Pepco Distributors Ltd*, Kisumu CACA No. 24 of 1986 where similarly the cause of action was breach of contract save for the fact that in this case it was because of non-payment, the court held;

> "a mere denial is not a sufficient defense in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

9. Furthermore, the doctrine of privity of contract clearly bars the Plaintiff from suing National Bank which was not a party to the agreement. The Plaintiff's redress lies with suing only parties to the contract and if the Defendant has any claim, such as that of delay by another person such as National Bank, which is not a party to the suit, Order I Rule 15 of the Civil Procedure Rules, 2010 requires that the bank be enjoined as a 3rd Party, on application by the Defendant. No application has been made and the issue of the completion documents being in possession of the National Bank has not been pleaded in the Defense.

RESPONDENT'S SUBMISSIONS

10. The Respondent submitted that the Plaintiff has applied for judgment on admission. The Plaintiff wants completion documents from the Defendant which are not in the possession and/or custody of the Defendant. The Plaintiff has gone further to sue both National Bank and the Defendant in Nairobi High Court Commercial and Tax Division Case No. E531 of 2020.

11. The Plaintiff wants the court to order specific performance and an order to facilitate the completion of the transaction in favor of the Plaintiff. The Plaintiff is in occupation of the premises. What is pending is the completion of the transaction which requires availability of completion documents which are with National Bank and this is a fact which has been explained to the Plaintiff in the defense and defendant's witness statement and the Plaintiff has specifically pleaded that National Bank produces it in the said Nairobi HCCC E531 of 2020.

12. It was the Respondent's further submission that the Defendant is not in possession (control) of the completion documents and hence the Defendant cannot produce what it does not have. This is an abuse of the court process. The Court should not be seen to issue Orders which cannot be enforced. Court Orders should not be issued in vain.

DETERMINATION

13. After considering the Application, the Response and the submissions filed by the parties herein, the issues for determination are whether judgment on admission should issue and the statement of defence struck out?

Order 2 rule 15 of the Civil Procedure Rules provides as follows:

(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 defense 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.

14. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu* [2009] eKLR restated these principle thus:

> "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: -
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> > "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."

15. 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."

16. Without going to the merits of the case, a look at the Defendant's defence reveals two issues that is the Respondent secured a facility to develop the property and acknowledged that the Plaintiff's property is yet to be discharged. The second issue is that it is not responsible for the delays in registration of house No. 95 from its name to the Plaintiff's name.

17. The Plaintiff argued that the above mentioned issues amounted to an admission that is clear, plain, unequivocal and/or obvious that indeed the Defendant owes the Plaintiff an obligation of completing the sale and issuing the completion documents stated in Clause 9 of the Plaint including the partial discharge on the charge.

18. Further, it was the Plaintiff's contention that the Defendant has failed to apply for a partial discharge of charge from National Bank of Kenya in order to protect the proprietor's right to property. This fact has been disproved by Defendant's letter the National Bank of Kenya requesting to have partial discharges of the titles which included the Plaintiff's title.

19. In the Choitram Vs Nazari (1984) KLR 327 the above provisions were captured under Order XII rule 6. Madan JA (as he then was) in the said decision stated thus: -

> "For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written

or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."

20. In my view, whereas the Defendant admits its obligations under the agreement with the Plaintiff, the Defendant denies being responsible for the discharge of the Plaintiff's title and that the same is to be exercised by the National Bank of Kenya. This cannot therefore be said to be an admission that is clear, plain, unequivocal and/or obvious that indeed the Defendant owes the Plaintiff an obligation of completing the sale and issuing the completion documents stated in Clause 9 of the Plaint including the partial discharge on the charge.

21. The Court notes that in this suit National bank is not a party but it is intimated that the bank holds titles for all parties involved including the Plaintiff. The court cannot issue orders to a party not party to the suit, it would be in vain. Secondly, there is suit HCCC E 531 of 2020 wherein all homeowners Plaintiff 1-19 of Development on Runda LR 12825/125 have sued both KenCom Sacco & National Bank of Kenya. Although it is alleged that this suit is an abuse of Court process HCCC E531 of 2020 was filed later and includes all parties. The Parties are better placed to pursue their claims in an all-encompassing suit. Thirdly, it has been raised that the agreement has an arbitration clause, so parties may pursue their claim in Court or in the chosen dispute resolution forum-arbitration.

22. The Defense herein raises issues to be determined during the hearing of the suit with regard to the discharge of the completion documents and the same cannot therefore be struck out.

DISPOSITION

23. The upshot of the above is that judgment is not entered for the Plaintiff and the Notice of Motion Application dated 19th November 2020 fails and is hereby dismissed.

DELIVERED SIGNED & DATED IN OPEN OURT ON 29TH NOVEMBER 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE