



REPUBLIC OF KENYA



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**Equity Bank Limited v Daytons Valuers Limited (Civil Case E272 of 2019)
[2021] KEHC 327 (KLR) (Commercial and Tax) (29 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E272 OF 2019
MW MUIGAI, J
NOVEMBER 29, 2021**

BETWEEN

EQUITY BANK LIMITED PLAINTIFF

AND

DAYTONS VALUERS LIMITED DEFENDANT

RULING

Notice Of Motion

1. The Applicant filed a Notice of Motion Application dated 17th February 2021 for orders that;
 1. The Court strikes out the Defendant's Statement of Defense dated 9th November 2020 filed herein.
 2. The Court enters judgment as against the Defendant as prayed for in the Plaintiff.
2. Which Application was supported by the sworn Affidavit of Kariuki Kingori dated 17th February 2021 and based on the grounds that;
 - a. The Statement of Defense constitutes a mere sham and the same is scandalous, frivolous and vexatious.
 - b. The Statement of Defense raises matters that are indecent, not factually true in context and was made for the mere purpose of abusing, insulting, and annoying the Plaintiff / Applicant.



- c. The Plaintiffs claim is founded on instructions issued to the Defendant on 19th September 2015 to conduct a professional valuation on a property known as Title No. Kabete/Karura/2059 ("the property") which culminated to a Valuation Report dated 21st September 2015, (Marked "EQ-I" is a Copy of the Valuation Report)
- d. The Valuation Report outlined that the property's value was Kshs.55, 000, 000. Further, that there was a three storey block of flats made up of 15 units of 3 bedrooms each which were fully occupied with a total income valued at Kshs.402, 000.
- e. Based on the Valuation Report, the Plaintiff advanced a loan facility of Kshs.15, 000, 000 vide a letter of offer dated 17th September 2015 and a further facility of Kshs.4, 000, 000 vide a letter of offer dated 8th April 2018 totaling to Kshs.19, 000, 000 to East Africa Data Handlers which amount was secured by a Charge over the property valued at Kshs.55, 000, 000.
- f. Subsequently, East Africa Data Handlers defaulted and/or breached the terms contained in the letters of offer as a consequence of which the Plaintiff sought to realize the security by way of public auction.
- g. The Plaintiff instructed Antique Auctioneers to advertise and sell the property wherein an additional valuation was prepared by Prestige Management Valuers who valued the property at a market value of Kshs.6, 000, 000 and the only improvement therein was a three bedroom terraced massionette and a detached servant's quarter. (Marked "EQ-2" is a copy of the Valuation Report prepared by Prestige Management Valuers)
- h. As a result of the aforesaid breach of contract and negligence, the Plaintiff has been occasioned loss and damage and demands for the principal sum of the loan plus interest accrued amounting to Kshs.19, 083, 083. The Plaintiff further claims for general damages for breach of contract.
- i. The Statement of Defense contains false statements of fact and is ill-founded in respect of the issue to be determined by the Court.
- j. The Statement of Defense is a sham and should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit.

Replying Affidavit

- 3. The Application was opposed vide the sworn Affidavit of Justus Munene dated 21st June 2021 and stated that;
 - a. In the present Application, the Plaintiff has adduced extensive evidence in support of the Application which evidence includes among others, two other valuation reports and a judgment whose veracity can only be established at trial by proper production and cross examination thus, the Application suffers a fatal invalidity.



- b. The Defense is well founded, merited and raises triable issues that can only be determined at trial where the Plaintiff's claims will be substantiated and interrogated. Being a suit for professional negligence, the triable issues arising from the Statement of Defense are: -
 - i. The Defendant did not overvalue the subject property.
 - ii. The impugned Valuation undertaken by the Defendant subject of this suit was in fact, higher than a previous valuation order of the same property and it cannot be said that there was under valuation at all.
 - iii. The Defendant did not breach its professional duty of care to the Plaintiff therefore, the Plaintiff did not suffer any loss on account of the Defendant's actions. Further, the loss suffered by the Plaintiff, if at all, cannot be attributed to the Defendant.
 - iv. The Plaintiff ought to pursue the customer and not the Defendant and the present suit is an attempt to recover the customer's loan from the Defendant, thus a quest at unjust enrichment.
- c. The Statement of Defense cannot therefore be termed as mere denials and a sham deserving to be struck out so that the suit proceeds as though it is not opposed when in fact, the crux of the Plaintiff's suit is in serious contention.
- d. The Plaintiff's Application to strike out the Defense is ill-advised, unfounded, impulsive, an abuse of the court process and should be dismissed such that this matter is heard and ultimately determined by the court on merit.
- e. The Defendant reiterates that the contents of the Statement of Defense raise triable issues that can only be effectively and completely adjudicated upon at trial.
- f. No prejudice will be suffered by the Plaintiff if the orders sought are not granted since it will have the opportunity to demonstrate to court that its case is well founded at the full trial.
- g. On the flipside, it will be greatly prejudicial to the Defendant if the Statement of Defence is struck out as this would mean it is condemned unheard in a suit for a colossal sum of over Kshs.20, 000, 000/=.

Applicant's Submissions (accessed on-line)

- 4. The Applicant submitted that the entire Statement of Defence is a bare denial and does not answer to the Plaintiff's claim of breach of contract and negligence. The Defendant's Statement of Defence in paragraphs 3, 4, 5 7 and 10 makes general denials to the paragraphs in the Plaintiff. These general denials do not amount to a Defence.
- 5. The Defence has failed to answer the Plaintiff and is therefore not only evasive, without substance but concealing the real questions in issue. 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.
- 6. In the case of *Margaret Njeri Mbugua versus Kirk Mweya Nyaga [2016] eKLR*, the Court of Appeal reinstated the trial magistrate's ruling striking out a defence on the basis that a mere denial or general



traverse was not sufficient in an action for a debt or liquidated amount. In arriving at its decision, the Court of Appeal cited with the approval the case of *Magunga General Stores v Pepco Distributors Limited [1986-89] EA 335*, where the court stated thus:

“A mere denial is not a sufficient defence and the defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence”

7. Further, it was the Applicant’s submission that although the power to strike out pleadings is usually exercised cautiously by the Courts, where it is established that a defence filed has no merit and is indeed a sham, such as the case herein, the Court is entitled to strike out such a defence. In the case of *Equatorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 Others [2014] eKLR* the court stated thus:

“It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which is to be resorted to in very clear and plain cases. However, it should be noted that while the Defendant is entitled to have his defence proceed to trial, the Plaintiff is equally entitled to efficacious and speedy determination of his claim. This was the position adopted in the case of *Diamond Trust Bank (k) Ltd –vs- Martin Ngombo & 8 Others [2005] eKLR* where W. Ouko, J.(as he then was) held that:

“This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence.”

The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out.”

8. The Defence does not amount to a prima-facie defence in law and the same does not raise triable issues which therefore meets the grounds to be struck out under Order 2 Rule 15 (I) of the *Civil Procedure Rules, 2010*.

Respondent’s Submissions (accessed on-line)

9. The Respondent submitted that where an Application for striking out a Defence is founded on contested evidence, the Application must fail. In the case of *Gotv Kenya Limited -v- Royal Media Services Limited & 2 others [2015] eKLR* Hon. Justice Mabeya pronounced himself on the import of Order 2 Rule 15(2) in a similar Application thus;

“ One of the grounds seeking the striking out the applications and suits is that they disclose no reasonable cause of action. Under Order 2 Rule 15(2), no evidence whatsoever is permitted for an application to strike out a pleading for disclosing no reasonable cause of action or defence under Order 2 Rule 15(1) (a). That provision is in mandatory terms. Acting contrary to that stipulation of the law is to disobey the law and the court cannot countenance such a conduct.”

10. The reference to the judgment produced by the Applicant which is not part of the documents filed in the main suit only goes to demonstrate that the Plaintiff is still filing the gaps in its case while at the same time alleging that they have made out their case and judgment should be entered as sought. The said judgment does not deal with the same issues as the present case; otherwise, the Plaintiff would have sought judgment on admission. The Respondent therefore submitted that the present Application is fatally incompetent so far as it relies on evidence and for this reason alone, the Application should be struck out.



11. The Statement of Defence raises triable issues and that is sufficient reason for the matter to proceed to full hearing as the Defendant stands to suffer great prejudice if the Statement of Defence is struck out thereby denying it the right to be heard and to adduce evidence and effectively being condemned unheard in a suit for a colossal sum of over Kshs.20, 000, 000/=.

12. In the case of *Desbro (Kenya) Limited versus Polypipes Limited & another [2018] eKLR* the court stated;

“The Defendants defence, in my view, cannot in view of the defence raised, be termed as a mere denial, sham, an abuse of the court process nor can it be termed as vexatious and frivolous. The defence, in my view, raises serious triable issues. The issues raised cannot be determined summarily or by way of an application. I am alive to the fact that a defence raising triable issues, need not convince court that the defence shall succeed, but a triable issue is the one, which raises a prima facie defence and which should go to trial for adjudication.”

Determination

13. The court considered the pleadings and the submissions filed by the parties herein, the issue for determination is whether the Defence should be struck out and judgment entered for the Plaintiff?

14. The Application herein is brought under Order 2 rule 15 of the Civil Procedure Rules which deals with striking out of pleadings and provides as follows;

15. At any stage of the proceedings the court may order to be struck out or
- (1) 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.”

15. It was the Applicant’s argument that the Statement of Defence raises matters that are indecent, not factually true in context. Further, that Statement of Defence constitutes a mere sham and the same is scandalous, frivolous and vexatious and should therefore be struck out. On the other hand, it was the Defendant’s contention that the Defence raises triable issues that can only be effectively and completely adjudicated upon at trial.

16. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of *Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR* the court held:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim.



Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the "Sword of the Damocles". Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Sheridan J Test In *Patel V E.a. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 (Duffus P.) that "...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

17. A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defense does not indeed comprise of mere denials. Whereas the Plaintiff alleged that the Defendant's Statement of Defense contains false statements of fact and is ill-founded these are issues to be determined by the Court, In *Delphis Bank Limited versus Caneland Limited [2014] eKLR*, the Court outlined the cases dealing with applications for striking out and summary judgment as follows: -

"The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application for striking out the defences was based is perhaps *D.T. Dobie & company (Kenya) Ltd vs Muchina* which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; 'The power to strike out should be exercised only after the court has considered all the 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 opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.'**//

18. Without delving into the merits of the case, the Defence raises issue with regard to the valuation report relied upon by the Plaintiff in instituting the suit herein. There are contested issues regarding various valuation reports that can only be determined after evidence is adduced by both parties. Therefore, it would be unfair to condemn the Defendant without fair hearing and each party's version tested through *viva voce* evidence. This will then give both parties a chance to present their case and exercise their right to be heard.

Disposition

19. The upshot of the above is that, I find that no basis has been made for the prayer for striking out the defense to be granted. Accordingly, the Notice of Motion Application dated 17th February 2021 is hereby dismissed and matter shall proceed to full hearing within Commercial & Tax Division.

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

M.W. MUIGAI

JUDGE

