



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 35 OF 2018**

**WASHINGTONE OCHIENG.....PLAINTIFF**

**VERSUS**

**STRATHMORE UNIVERSITY.....DEFENDANT**

**RULING**

1. The defendant/applicant took out the motion dated 29<sup>th</sup> July, 2019 whereof they sought for the following orders:

***i. THAT the Plaintiff's Complaint as filed herein be struck out.***

***ii. THAT the Verifying Affidavit attached to the Complaint therein be struck out.***

***iii. THAT in the result the Plaintiff's suit against the Defendants be dismissed with costs to the Defendant.***

***iv. THAT in the alternative and without prejudice to the above, an order do issue compelling the Plaintiff to produce the documents requested for in the Notice to Produce dated 3<sup>rd</sup> June 2019 within a period stipulated by this Honourable Court.***

***v. THAT in the alternative and without prejudice to the above, an order do issue compelling the Plaintiff to respond to the interrogatories dated 3<sup>rd</sup> June 2019 within a period stipulated by this Honourable Court.***

2. The applicant filed the affidavit sworn by James Nyiha in support of the motion. When served, the respondent/plaintiff filed the replying affidavit sworn by David Oyatta dated 25<sup>th</sup> September 2019 to oppose the application.

3. I have considered the grounds set out on the face of the summons plus the facts deponed in the rival affidavits. I have considered the rival written submissions of learned counsels.

4. Mr. James Nyiha, learned counsel for the defendant gave a brief background of the matter and identified two issues for determination as follows;

***a) Whether the documents and information requested for by the defendant are relevant for the just and efficient disposal of justice in this matter.***

***b) Whether the defendant's suit should be dismissed for failure to respond to the defendant's Notice to produce and Interrogatories.***

5. On the first issue, counsel submitted that the plaintiff has failed to provide crucial and material evidence on his alleged treatment in the United States of America. Learned counsel further submitted that it is relevant to the case for the plaintiff to answer on oath the interrogatories in that respect and provide the documents requested in that regard.

6. It is the counsel's submission that failure to comply will hinder the defendant's ability to prepare witness statements and adduce evidence in rebuttal of the Plaintiff's claim. On this, learned counsel relied on the case of **Oracle Productions Ltd v Decapture and 3 others (2014) eKLR**.

7. On the second issue, learned counsel submitted that an answer to interrogatories can only be made by way of affidavit by the party to

whom the interrogatories are directed hence the document dated 21<sup>st</sup> July 2020 filed by counsel for the plaintiff cannot be rearaded as an answer to the defendant's interrogatories and the same ought to be struck out. The Counsel relied on the case of **Antony W Lubano & Another v John Kamau (2011) eKLR** the High Court held that;

***“Order 10 Rule 20, provides that any party who fails to comply with an order to answer to interrogatories or for discovery or inspection of documents shall be liable to dismissal of the suit in case it is the Plaintiff or the defence struck out if it is the defendant”***

8. The plaintiff opposed the application arguing that the defendant in their written submissions confirmed that indeed the Plaintiff served them with a bundle of documents contained in the plaintiff's further list of documents dated 13<sup>th</sup> July 2020 in which they submitted that the plaintiff has failed to provide documents requested by them in items 3,4,5 and 6 of the Notice to Produce is a blatant lie.

9. The plaintiff noted that the Plaintiff's list of documents filed incourt on 23<sup>rd</sup> February 2018 together with the said further list of documents are in response to item number 3 and therefore sufficiently provides details regarding the insurance cover. It is the plaintiff's submission that the defendant's failure to be content with those documents is not a ground for striking out pleadings.

10. The plaintiff contends that the defendants in their submissions have misled this court that the plaint and documents filed by the plaintiff do not particularize the plaintiff's claim in a manner that would enable the defendant to respond thereto sufficiently. The plaintiff further contends that on the contrary the plaint together with the witness statement are immensely supported and or corroborated by the filed documents therefore the defendant cannot take the blame for the defendant's inability to pursue its defence upon being supplied with the documents which corroborates the plaintiff's pleadings.

11. On the same the plaintiff relied on the case of **Microsoft**

***Corporation v Mitsuni Computer Garage Ltd (2001) 2 EA 460*** cited with authority in ***Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited (2016) eKLR*** wherein held:

***“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”***

12. I have duly considered the application, grounds, affidavits, both submissions and cited cases. The issue for determination iwthether the plaint and verifying affidavit should be struck out.

13. Order 2 Rule 15 of the Civil Procedure Rules which provides for striking out of pleadings states as follows: Rule 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.***

***(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.”***

14. The main grounds raised by the defendant/applicant in this application are:

**i)** The plaintiff/respondent was served with a notice to produce but has deliberately and permanently failed to produce the documents herein.

**ii)** The plaintiff/respondent was served with interrogatories but has deliberately and permanently failed to furnish the defendant the response to the said interrogatories.

15. The defendant/applicant avers that the plaintiff/respondent has refused to produce the documents being medical insurance covered in the US, details of the insurer, the level of insurance, registration of his business in Kenya and in the United States of America and finally the tax returns filed with the relevant tax authorities in Kenya and the USA.

16. The defendant/applicant contends that the failure by the plaintiff not to comply has greatly prejudiced the defendant's ability to mount a credible and strong defence against the plaintiff's case.

17. The plaintiff/respondent on the other hand contends that on several occasions they have asked the Beth Israel Deaconess Medical Centre for the original and official payment receipts regarding the plaintiff's treatment but he was informed that they could only provide records of billing and invoices a fact that was relayed to the defendant's advocates.

18. The plaintiff stated that as for the recent tax returns and copies of the certificates could not be availed since the plaintiff has been inhibited in supplying the same since he cannot travel to Kenya due to his present physical condition of which he is still undergoing treatment.

19. It is clear that the plaintiff has tried to produce the documents that he has in possession and the ones that he has not been able to produce, he has given to this court and defendant as alleged an explanation as to why the same is not available.

20. In all instances the court must accord each party who has appeared before it an opportunity to be heard by presenting his/her case. In other words, striking out pleadings must be in the clearest of cases. As it would be unfair that failure to provide the documents in questions would amount to or lead to the dispensation of the suit at this preliminary stage a fact that would be against the principles of natural justice. **Article 50 (1) of the 2010 constitution provides:**

***“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

21. I do find it unsafe at this point to strike out the Plaintiff and verifying affidavit as provided for under Order 2 Rule 15 of the Civil Procedure Rules. Each party should be accorded an opportunity to present his case for the court to make a determination on merit.

22. In the case of **BLUE SKY EPZ LIMITED –Vs- NATALIA POLYAKOVA & ANOTHER [2007] eKLR** the court held that:

***“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed.***

23. The upshot is that the application lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

..... for the Defendant