**Autofine Limited v Ecobank Kenya Limited & another (Civil Case E177 of 2021) [2021] KEHC 389 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 389 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL CASE E177 OF 2021**

**EC MWITA, J**

**DECEMBER 16, 2021**

**BETWEEN**

**AUTOFINE LIMITED ..... PLAINTIFF**

**AND**

**ECOBANK KENYA LIMITED ..... 1ST DEFENDANT**

**CENTRAL BANK OF KENYA ..... 2ND DEFENDANT**

## RULING

1. This is a notice of motion dated 16th July 2021 by the 2nd defendant/Applicant (applicant), seeking to have its name struck out from this suit and dismissal of the suit against it. The application has been brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 2 rule (15) and 51 rule 1(b)(c) and (d) of the Civil Procedure Rules.

2. The application is based on the grounds on the face of the motion and the affidavit sworn on 16th July 2021 by Kennedy Abuga. The applicant states that the plaint as drawn is incurably defective for reason that it was wrongly joined in the suit as it was not privy to the bank-customer relationship between the plaintiff/respondent (respondent) and the 1st defendant.

3. The applicant again states that as a regulator, it does not micro manage the day to day operations of banks; that it issued Prudential Guidelines to banks, including those on customer protection, which govern relationships between banks and customers and, therefore, it cannot be liable for negligence alleged against the 1st defendant. It maintains that since the dispute is between the plaintiff and the 1st defendant, it is not a proper party to the suit since none of the particulars of negligence touch on it. For that reason, there is no cause of action against it and the suit against it is misconceived and frivolous.

4. In the supporting affidavit, it is deposed that under section 4A (1) (c) of the *Central Bank of Kenya Act*, the 2nd applicant has a supervisory and regulatory role over banking institutions including the 1st defendant, but that role does not mandate it to micro manage banking institutions.

5. It is further deposed that under section57(1) of the Central Bank Act and section 33(4) of the *Banking Act*, the applicant has mandate to issue guidelines to maintain a stable and efficient banking and financial system. In that regard, the applicant issued Prudential Guidelines in 2013 on consumer protection which govern the relationship between banking institutions and their customers to ensure consumer protection, thus fulfilled its statutory obligations.

6. The deponent asserts that the applicant is not a necessary party to this suit as such, it has been wrongly included in the suit and its name should be struck out from the suit.

7. The respondent has filed grounds of opposition dated 16th September 2021. It states that the application is misconceived since it is not necessary that the applicant be concerned in all the reliefs sought in the suit, but should also not evade those reliefs sought against it.

8. The respondent further states that the applicant is intent on delaying the suit by seeking to avoid the issue of its dereliction of duty raised in the suit and that the application is an attempt to litigate the suit in piecemeal against the overriding objectives. The respondent asserts that the grounds raised in support of the application are issues that are best addressed in response to the suit for a substantive determination of the suit.

9. By way of a preliminary objection, the respondent states that the supporting affidavit contains arguments contrary to law (Order 19 of the Civil Procedure Rules and The *Oaths and Statutory Declarations Act*), as they appear an attempt to answer its reply to defence.

10. The 1st defendant did not take any position in this application.

11. The applicant has filed written submissions in support of its application. It submits that the suit does not disclose a reasonable cause of action against it. It relies on the decision in *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR*, on what amounts to reasonable cause of action. The applicant further relies on *Kwame Kariuki & another v Hassconsult Limited & 2 others [2014] eKLR* on the same point.

12. The applicant maintains that the suit as pleaded does not disclose a cause of action against it and, therefore, is no reason to be dragged into the trial. It relies on *Benjamin Wafula v Public Health Officer & 23 others [2013] eKLR*, that where the pleadings do not disclose a reasonable cause of action against a party, a suit against that party may be struck out. It also relied on *Susan Roih v Joyce Kandie & 6 others [2018] eKLR*; *Katana Fonddo Birya v Krystalline Salt Limited & 2 others [2018] eKLR* and *Solomon Kipchoke Kipsisei & another v Lake Victoria North Water Services Board & 3 others [2019] eKLR*, among other decisions to support its position.

13. It urges that ted application be allowed, its name be struck out and the suit against it dismissed with costs.

14. The respondent has also filed written submissions dated 8th October 2021. It argues that the suit raises an arguable case against the applicant, and striking the applicant's name from the suit would amount to shooting it's suit dead and asking questions later. According to the respondent, the plaint contains well pleaded allegations against the applicant and it would be unwise to remove it from the suit at this stage.

15. The respondent again takes issue with the supporting affidavit arguing that it contains arguments contrary to law. It relies on *Kentainers Limited v VM Assani & others (NBI HCCC No. 1625 of*

*1996*), that an affidavit being evidence should not be argumentative otherwise it risks being defective. According to the respondent, an affidavit should be confined to matters of fact and not arguments which is not the case with the affidavit in support of the present application.

16. The respondent again argues that the application is incompetent. It contends that even though the application is brought under Order 2 rule 15(1) of the Civil Procedure Rules, it is supported by evidence in the form of the supporting affidavit contrary rule (2) which states that no evidence is to be adduced in an application brought under Order2 rule 15(1)(a). It is the respondent's case that the contents of the affidavit are similar to the averments in the applicant's defence and, therefore, the application is intended to delay the hearing and determination of the suit.

17. The respondent further argues that the application violates Order 1 rule 14 which requires that an application to add or strike out a party should be by way of Chamber Summons, but the applicant has moved the court through a notice of motion, which is not a mere technicality. It relies on *Raila Odinga v Independent Electoral &Boundaries Commission & others [2014] eKLR*, that Article 159(2) of the Constitution simply means that a court should not pay undue attention to procedural requirements at the expense of substantive justice, but was not meant to oust obligations to comply with procedural imperatives. (See also *Law Society of Kenya v Centre for Human Rights and Democracy & others [2014]* (SCOK), that Article 159(2) of the *Constitution* is not a panacea for all procedural shortfalls.

18. The respondent argues that the procedure required by Order 1 rule 14 in making an application of this kind, is not a mere technicality. It relies on Livingstone M Oduru & another v Musa Hassan Juma (HCCC No. 60 of 1995), that a defective application can only be struck out.

19. The respondent argues that its suit raises triable issues against the 2nd defendant/applicant as can be seen from the plaint and contends that a regulator is responsible for the actions of those it regulates within the context of the regulated activities. It relies on *Teachers Service Commission v WJ & 5 others [2020] eKLR*, that striking out the suit would amount to shooting the suit dead and asking questions later given the allegations pleaded, and it would be unwise to stifle genuine claims of negligence and liability against the party. The respondent maintains that the applicant was negligent in the discharge of its mandate and therefore liable.

20. The respondent further argues that the decisions cited by the applicant are distinguishable from the facts of this suit and are, therefore, not relevant to this application and should be disregarded. The respondent urges the court to dismiss the application and allow the suit to proceed to hearing on merit.

21. I have considered the application, the response and submissions by parties. I have also considered the decisions relied on. The applicant seeks to have its name struck out of this suit because the plaint does not disclose a reasonable cause of action against it. The respondent maintains that the application is frivolous and unmeritorious. Its case is that the plaint discloses a reasonable cause of action against the applicant and, therefore, striking out the applicant's name from the suit and dismissing the suit against it is tantamount to shooting the suit dead and asking questions later.

22. Striking out pleadings is a draconian act that must only be resorted to in very rare and clear cases, and the jurisdiction to strike out pleadings being discretionary, it must be exercised sparingly. If a party's pleadings raise even one bona fide triable issue, then the party should be given leave to defend (*Postal Corporation of Kenya v I.T.Inamdar & 2 Others [2004] eKLR*). It must always be borne in mind that a triable issue is not necessarily one that would ultimately succeed, but it need only be bona fide, (*Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another [2009] eKLR*).

23. In *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa(Civil Appeal No. 54 of 1999*), the Court of Appeal was clear that striking out a pleading is a draconian act, which may only be resorted to, in plain cases and whether or not a case is plain is a matter of fact.

24. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR*, the court expressed itself on the same point 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.

25. Conscious of the above principles that striking out pleadings is an act of last resort, I have read through the plaint from paragrap1 to 69, which set out the facts constituting the respondent's claim against the applicant and 1st defendant. There is no mention of the applicant in those paragraphs. The respondent has however pleaded particulars of negligence against the applicant blaming it for what transpired giving rise to the present suit. Those particulars of negligence constitute a claim against the applicant.

26. This court is acutely aware of the warning by Madan, JA (as he then was), in D.T. Dobie & Company Limited v Joseph Mbaria Muchina & Another [1980] eKLR, 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. 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.

27. There can be no argument that the respondent's suit pleads particulars of negligence against the applicant, although the facts in the plaint fall short of a clear cause of action against it. The principle in law is that a court should not drive a litigant away from the seat of justice merely because his suit falls short in disclosing a reasonable cause of action. However weak his case may be, the court should sustain it if it can be injected with life through amendments.

28. The long line of decisions referred above demonstrates one thing; that the court should always allow a party an opportunity to have his day in court by allowing the case to be decided on merit unless it is so hopeless that even an amendment cannot rescue it.

29. Faced with such a situation like in the present case, this court should opt for the lesser evil, not to strike out the suit but give the respondent an opportunity to amend its pleadings given that the applicant will suffer no prejudice. That is; the court should be minded of maintaining the suit rather than striking it out and as a result do justice to the parties' case.

30. This view is reinforced by the holding in the D.T. Dobie v Muchina, (supra), that the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial of the case before dismissing it for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for

that is a function reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits.

31. Similarly, in *Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR*, the Court of Appeal emphasized that striking out of a pleading, is a draconian act and an order of last resort. A court will only resort to this discretion where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules (now repealed), and is satisfied, upon assessment of the material before it, that any of the grounds enumerated exists or do not exist.

32. The respondent has on its part argued that the application is incompetent because it is supported by affidavit evidence contrary to law. According to the respondent, where a party moves the court under Order 1 rule 14 to strike out pleadings, no evidence is required. The rule states that an application to add or strike out or substitute a plaintiff or defendant may be made at any time before trial by chamber summons or at the trial of the suit in a summary manner.

33. On the other hand, Order 2 rule 15 provides:

> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> (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.

34. Rule (2) states that no evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made. It is this rule that the respondent argues the applicant has violated by filing an affidavit in support of the application. According to the respondent, there should be no evidence where an application to strike out pleadings is brought under Order 2 rule (15) (a) which it argues, is not a mere technicality of procedure but a requirement of the law.

35. Speaking to an application brought under Order VI rule 13(1) of the repealed Civil Procedure Rules in the *Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR*, (now Order 2 rule 15 (1)(a). the court stated:

> [I]n all cases brought under Order VI rule 13(1) (a), the court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The court must look at the pleadings only and not go beyond the pleadings.

36. In *Jevaj Shariff & Co. v Chotail Pharmacy Stores [1960] EA 374*, the East Africa Court of Appeal stated that:

> The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.

37. In the present application, the applicant has filed an affidavit in support of its application to strike out its name from the suit. The applicant has cited Order 2 rule (15) which means it has been brought under Order 2 rule (15) as a whole, including (b), (c) and (d). That is; applicant having cited the whole of rule 15, the application includes the claim that the suit is frivolous and scandalous. A claim that a suit is frivolous and or scandalous can only be prove through evidence at the trial and not by application and affidavits. Only where an application is brought under rule 15(1) (a) alone, is evidence excluded. That is not the case here and, therefore, the respondent's argument cannot be sustained.

38. The respondent again argues that the application has been brought by way of notice of motion instead of chamber summons as required by the rules. It is true that Order 1 rule 14 requires that an application to add or strike out a suit or substitute a plaintiff or defendant be made by chamber summons or in a summary manner during the hearing.

39. According to the respondent, the application is in violation of the rules of procedure which renders it incurably defective and incompetent. The respondent has cited decisions of the Supreme court to argue that such a default cannot be saved even by Article 159(2) of the Constitution as that Article is not the panacea for all procedural ills.

40. Whereas it is true that procedure is fundamental in the dispensation of justice, one must look at the prejudice the respondent would suffer if the application was sustained despite having been brought by way of notice of motion instead of chamber summons. This is because ordinarily, chamber Summons would be heard in chambers while a notice of motion would be adjourned to and heard in open court. However, circumstances have changed to the extent that it is no longer usual to strictly deal with applications either in chambers or open court as rules require. This is so because it is now possible for both Judges and counsel for parties or even parties acting in person, to work from home. In that regard, it would not be proper to reject an application simply because it has not complied with a procedural rule. Instead it behooves the court to render substantive justice given that no prejudice would be suffered by the other party because of such a minor procedural infraction.

41. Having considered the application, the response and submissions, as well as the decisions relied on and those cited by the court, the conclusion I come to is that this court should be slow to summon its discretion and take the draconian act of last resort to strike out the applicant from the suit. Instead, the court should give the respondent a chance to inject life into its suit and only strike the suit out if that fails. Consequently, the court makes the following orders.

    a. The application dated 16th July 2021is declined and dismissed.

    b. The plaintiff is granted leave to amend its plaint, and the amend plaint be filed and served within fourteen (14) days from the date of this order.

    c. In default of (b) above, the suit against the 2nd defendant shall stand struck out.

    d. Costs of the application be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY DECEMBER OF 2021**

**EC MWITA**

**JUDGE**