



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 302 OF 2018

MIDDLE EAST BANK KENYA LTD.....PLAINTIFF

VERSUS

TRANSFLEET LIMITED.....1ST DEFENDANT

JAMES ABIAM MUGOYA ISA BIRYE.....2ND DEFENDANT

RULING

1. The Notice of Motion dated **11th September 2019** is filed by the defendants. The defendants seek the striking out of the plaint.

2. I must begin by stating that the defendants are in breach of the Case Management Conference Practice Direction Rules. This is because parties concluded case management conference before the deputy registrar and just as parties awaited the certification, by a judge that this case was ready for trial the defendant filed the present application. As rightly submitted by the plaintiff's learned counsel the application is in breach of Practice Direction Rule 15 (d) which states:

“Any application to strike out pleadings or for judgment on admission shall be made at the case management conference and may not be made after completion of the case management conference.”

3. I should, in view of that breach, down my tool and refuse to entertain an application which is clearly filed in breach of the Rules. That breach notwithstanding I will briefly consider the application.

4. The defendant's application is brought under order 2 Rule 15 (1) 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;

5. The defendants submitted that the plaint as pleaded the defendants did not know “what act of defendants give rise to the cause of action against them”.

6. Various court decisions assist in determining what the court, faced with an application such as the one before me, ought to consider. The principles to guide the court were discussed in the case **Commodity House Ltd v Simba Merchandising Co (K) Ltd & another (2013) eKLR** thus:

*“The law on striking out of pleadings has been well settled by the Court of Appeal in the case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** in the finding of **Madan, Miller & Potter, JJA** wherein the court stated:-*

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

*In **D.T Dobie & Co. Ltd v Muchina** (supra), the Court of Appeal analyzed the issue of striking out of proceedings and deduced therefrom the principles that govern the Court's inherent and unfettered power to strike out a pleading which were: (a) that the remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleadings in question were unsustainable; (b) it is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.”*

7. It is also useful to consider the case **National Bank of Kenya Limited vs Alfayo Onyango Riako (2011) eKLR** as follows:

“7. Does the plaintiff’s suit disclose a reasonable cause of action against the defendant? Is it frivolous, vexatious or an abuse of court process? The Civil Procedure Rules require a pleading, such as the plaint herein, to contain “only a statement in a summary form of material facts on which the party pleading relies on for his claim”. This is borne out of the realization that the meat of the matter is reserved for the evidence before the trial court. But the pleading must on the face of it disclose a reasonable cause of action and must not be frivolous or vexatious.

For the defendant to succeed, he must show that the plaint, on a plain reading is so obviously weak and fragile and incapable of redemption. It is a jurisdiction that the court must exercise with extreme caution.”

8. Bearing the above principles in mind and the principle set out in the case **D.T. Dobie & Company v Muchina (1982) KLR**, where the court of appeal cautioned a judge considering an application for striking out pleading to act with caution and without embarking on trial and caution a judge to deal with the merits in the pleadings. This is because that is the function of the trial court.

9. I have looked at the plaint and in particular the paragraphs highlighted by the defendants. The plaint in my view is not one that can be struck out. Bearing in mind what is pleaded thereof I cannot on prima facie basis find that the plaintiff’s claim cannot succeed at trial. Indeed the plaintiff’s plaint has cause of action because the defendants were able to file detailed defence and even alleged breaches on the part of the plaintiff.

10. I form the view that the defendants’ application was for nothing else but nuisance value, perhaps to stay the commencement of trial.

11. The orders that commend themselves to me are:

a. The Notice of Motion dated 11th September 2019 is dismissed with costs.

b. In order to fulfil the overriding objective, I hereby grant a certificate that this suit is ready for trial. The parties shall henceforth not file any other documents or witness statements without leave of the court.

c. The court will give a date for full hearing of this case at the reading of this Ruling.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28th** day of **April, 2020**.

MARY KASANGO

JUDGE