



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 257 OF 2017**

**EDDIE J. AMADI.....PLAINTIFF**

**-VERSUS-**

**TITUS O. KOCEYO.....DEFENDANT**

**RULING**

**Introduction**

1. The plaintiff sued the defendant herein through the plaint filed on 20<sup>th</sup> June 2017 seeking the following order:

***a) Kshs 11,232,246/- being 50% of the revenues received from the transport business then deposited in account No. 1000228636 NIC Bank, Harambee Avenue as at September 2014;***

***b) Judgment in the sum of Kshs 7,000,000/- being 50% of the purchase price of motor vehicles Scania Prime Mover KBE 702E, Schenzhen Trailer ZC 9412, Scania Prime Mover KBH 842C and Trailer ZD 1043;***

***c) Interest on (b) and (c) at court rates;***

***d) Costs of this suit and interest thereon at court rate.***

2. A summary of the plaintiff's case is that sometime on 13<sup>th</sup> July 2006, he jointly with the defendant successfully obtained the registration of the business named Koceyo & Amadi Advocates with the intent of running several businesses together including but not limited to the practice of law. He states that they jointly focused on the joint venture in heavy commercial vehicles but that through a judgment of the High Court of 30<sup>th</sup> September 2009, the parties could no longer practice law under the name and style of Koceyo & Amadi Advocates.

3. The plaintiff further states that in September 2014, he discovered that all the revenue that they had accumulated in a bank being Kshs 22,464,491 had been appropriated by the defendant without his knowledge or consent and that the defendant also unilaterally sold all the vehicles that were the subject of their joint venture. The plaintiff accuses the defendant of fraud thus necessitating the filing of this suit.

4. The defendant opposed the plaintiff's case through the statement of defence dated 4<sup>th</sup> July 2017 wherein he states that the High Court declared the alleged law firm of Koceyo & Amadi Advocates illegal, null and void *ab initio*. It is thus the defendant's position that no cause of action can be maintained or founded on the said law firm and that public policy bars the plaintiff from maintaining a cause of action against an illegal enterprise.

5. He further denies the claim that account No. 1000228636 at NIC Bank was for transport business or that the purported sum of Kshs 22,464,491 was in the said account. He also denies the claim of fraud and states that the suit is barred under the Limitation of Actions Act.

6. He further denies the authenticity of the documents attached to the plaintiff's list of documents and states that the suit is defective as it offends the provisions of Order 11 of the Civil Procedure Rules.

**Application**

7. The defendant filed the application dated 15<sup>th</sup> July 2019 seeking the following orders: -

**1. That the plaint herein dated 20th June 2017 be struck out with costs.**

**2. That in the alternative, the plaintiff/respondent be ordered to deposit security for costs of Kshs 4,000,000/- pending the hearing and determination of the suit failure to which the suit herein be dismissed with costs.**

**3. That in the alternative the plaint herein be struck out on the ground that it is barred by Statute of Limitation of Actions Act, Cap 22 Laws of Kenya and is against public policy as the same is tainted by illegality ex turpi causa.**

**4. That alternatively, the plaintiff/respondent bundle of documents dated 10<sup>th</sup> July 2019 be expunged from the court records on account of Limitation of Actions Act, Cap 22 Laws of Kenya.**

**5. That costs be to the defendant/applicant.**

8. The plaintiff/respondent opposed the application through the replying affidavit dated 5<sup>th</sup> August 2019 wherein he reiterates the contents of the plaint and states that the allegations contained in the applicant's supporting affidavit do not correspond with his statement of defence.

9. He states that the defendant illegally withdrew the sum of Kshs 22,464,491 from their business account by forging his signature on cheque leaves. He accused the defendant of selling the suit motor vehicles without his authority/approval. He further states that the court's decision made on 30<sup>th</sup> September 2009 was in respect to the practice of law and is therefore distinct from the subject matter of this case

10. Parties filed written submissions to the application which I have considered. The main issue for determination is whether the applicant has made out a case or the granting of the orders sought in the application.

#### **Striking out of pleadings.**

11. The defendant argued that the plaintiff's suit should be struck out because the claim raised therein is indecent, offensive and made for the sole purpose of abusing and/or prejudicing him. The plaintiff, on the other hand argued that pleadings are mere averments that are subject to proof by way of evidence and that having filed a defence in which he makes certain concessions and denials, there is a joinder of issues out of which specific issues arise for determination.

12. It was the plaintiff's case that substantive issues arise for determination from the pleadings whose merits can only be determined at the trial. Order 2 Rule 15(1) of the Civil Procedure Rules stipulates as follows: -

#### **Striking out pleadings.**

**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."**

13. The defendant's case was that the plaintiff's claim for 50% of the value of motor vehicles is scandalous as plaintiff is aware of the whereabouts of the said motor vehicles having been written off after they were involved in an accident. He contended that the plaintiff is guilty of selective adoption of facts regarding the said vehicles. The defendant explained, at length, the whereabouts of each of the subject motor vehicles, and the manner in which the money held in their business account was spent. The defendant also took issue with the documents contained in the plaintiff's list of documents on the basis that they relate to transactions undertaken outside the time of the cause of action.

14. My findings that the mere fact that the defendant may have a good defence and/or explanation to the claims that have been made by the plaintiff in the plaint does not mean that the plaintiff's claims are scandalous, vexatious or frivolous. I find that at this stage of the proceedings and before the hard evidence is placed before this court for its consideration, it will be premature to consider the veracity of the claims made by the plaintiff and the documents that he has lined up for presentation as part of his evidence.

15. Courts have taken the position that they will not strike out pleadings except in very exceptional circumstances. This is the position that was taken in *DT Dobie v Muchina* (1980) KLR wherein it was held: -

**"Reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which**

*gives the plaintiff his cause of complaint...A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.... It is not the practice in civil administration of the courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face.... The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the inherent power of the court and not a proper exercise of that power.... Whereas no evidence is permitted in the case of Order 6 rule 13(1) (a), it is permitted in the case where there is an allegation that it is an abuse of the court process.... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.... If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a court of justice ought not act in darkness without the full facts before it.”*

16. Guided by the dictum in the above-cited case, I find that it will serve the interest of justice to sustain the plaintiff’s suit and allow it to go to full trial rather than terminate it summarily.

17. The defendant also argued that the suit is founded on an illegality on the basis that the High Court found that the law firm of Koceyo & Amadi Advocates was an illegal entity having been formed in contravention of Sections 37 and 39 of the Advocates Act. On his part, the plaintiff argued that the said finding of the High Court was limited to the practice of their business as a law firm and not as any other business.

18. My finding is that the case before the court is not about the practice of a law firm of Koceyo and Amadi Advocates but relates to an alleged investment in transport business a fact that has not been denied by the defendant who has gone to great lengths to explain the circumstances under which the motor vehicles that were the subject of the business were disposed off.

#### **Limitation of actions.**

19. The defendant also argued that the plaintiff’s suit is time barred at it is founded on the tort of alleged misappropriation of funds which under Section 4(2) of the Limitation of Actions Act should not be filed after the end of 3 years from the date on which the cause of action accrued. The plaintiff denied the claim that the suit is time barred as it is based on the law of contract and further, that he discovered the loss of funds held in the account in 2014. The plaintiff avers as follows at paragraphs 5 and 13 of the plaint: -

*“5. The primary intent of the parties was to make use of the registered name in running several businesses together including but not limited to the practice of law.*

*13. That on or about September 2014 the plaintiff discovered that all the revenue that had accumulated in the account had been appropriated by the defendant without his knowledge or consent.”*

20. Going by the above averments in the plaint, I find that it will not be prudent to hold, at this point in the proceedings and based on the pleadings alone, that the plaintiffs suit is time barred.

#### **Security for costs**

21. The defendant also sought orders for security for costs of Kshs 4 million to be deposited by the plaintiff pending the hearing.

22. In *Kibiwott & 4 Others v Registered Trustees of Monastery Our Lady of Victory* Nakuru HCCC No. 146 of 2004 [2004] eKLR the Court set down the principle applicable in applications for security for costs as follow:

*“For a party to succeed in an application to have the opposing party be ordered to provide security for costs, he has to prove that the opposing party may not be in a position to pay the costs, to be awarded in the event the suit filed by such a party (or defence by such a party) is dismissed.”*

23. In the present case I note that the defendant did not establish that the plaintiff will not be in a position to pay his costs should the plaintiff be unsuccessful in the case. I am therefore unable to find that the defendant has made out a case for the granting of orders for security for costs.

24. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 15<sup>th</sup> July 2019 is not merited and the order that commends itself to me is to dismiss it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29<sup>th</sup> day of May 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wepo for Echesa for plaintiff/respondent

Mr. Merichi for applicant

Court Assistant: Sylvia