



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 241 OF 2017**

**LAVINGTON SECURITY LIMITED.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA.....1<sup>ST</sup> DEFENDANT**

**LAVINGTON GUARDS SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT**

**EMMANUEL MASWACH CHELIMO.....3<sup>RD</sup> DEFENDANT**

**SIMON KIPKORIR TAIGET.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant's Notice of Motion application dated 1<sup>st</sup> July 2019 and filed on 3<sup>rd</sup> July 2019 sought the striking out of the Plaintiff against it for disclosing no cause of action. The said application was supported by the Affidavit of its Senior Legal Officer, Albert Anjichi that was sworn on 1<sup>st</sup> July 2019 and the Further Affidavit of its Manager, Central Processing that was sworn on 15<sup>th</sup> October 2019 and filed on 17<sup>th</sup> October 2019.

2. The 1<sup>st</sup> Defendant stated that on 28<sup>th</sup> March 2019, it filed a Request for Better and Further Particulars to enable it know the Plaintiff's case against it with a view to preparing fully for the trial but that when the matter came up for Pre-Trial, the Plaintiff had not complied and was thus given seven (7) more days within which to furnish it with the same. It was its contention that as at the time of filing its present application, it had only been partially supplied with the said Further and Better Particulars.

3. It pointed out that when a party fails to comply with an order to provide all Further and Better Particulars, then the said defaulting party was liable to having its suit struck out as it would amount to being frivolous and vexatious. It therefore urged this court to dismiss the suit herein for disclosing no cause of action against it.

4. In opposition to the said application, on 16<sup>th</sup> September 2019, the Plaintiff's Senior Accountant, Joel Chebon Cheronon swore a Replying Affidavit. The same was filed on even date. On 17<sup>th</sup> February 2020, he also swore a Supplementary Affidavit that was filed on 18<sup>th</sup> February 2020.

5. The Plaintiff stated that it sought additional time to supply the 1<sup>st</sup> Defendant with the Further and Better Particulars because it was an arduous task to retrieve from its archives, photocopy, collate, paginate, index, bind and file the said documents. It pointed out that on 10<sup>th</sup> July 2019, it filed eighteen (18) volumes of documents, approximately three hundred (300) pages each, with all bundles totalling in excess of five thousand one hundred (5,100) pages. It was emphatic that it had provided the 1<sup>st</sup> Defendant with all the documents it had requested for.

6. It further contended that under Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court had inherent powers to enlarge time for doing any act or taking proceedings in any matter. It was its further averment that under Article 159 of the Constitution of Kenya, 2010, the courts were mandated to exercise judicial authority guided by the principle that justice shall be granted without undue regard to procedural technicalities.

7. It termed the present application pre-mature, an abuse of the court process, unmeritorious and frivolous and asked this court to dismiss the same and asked that the matter be listed for hearing and determined on merit.

8. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were excused from the proceedings herein as the application was between the 1<sup>st</sup> Defendant and the

Plaintiff herein.

9. The 1<sup>st</sup> Defendant placed reliance on the cases of Ruth N.M. Onyancha vs Standard Limited [2007] eKLR and Barclays Bank of Kenya Limited vs Christopher Orina Kenyariri & Another [2017] eKLR where the common thread was that a suit will be struck out where a plaintiff fails to provide further and better particulars upon request. It also referred to other cases which this court found to have dealt with the merits of the case and hence it did not analyse the same.

10. On its part, the Plaintiff referred to the case of Everlyne Martha Mumo vs Eunice Cheserem & Another [2014] eKLR where it was held that where there had been a disobedience of a court order, striking out of a suit was discretionary and not mandatory. It further relied on the cases of Murang'a County Council vs Kenya Power & Lighting Co Limited [2006] eKLR where the court held that one had to distinguish between giving particulars and giving evidence and further on the case of Ukulima Savings and Credit Society Limited vs Co-operative Bank of Kenya Limited [2013] eKLR where the court therein held that a request for Better and Further Particulars should not be one that compels a plaintiff to prove its case at a preliminary stage.

11. Notably, Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows:-

**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 subrule (1)(a) but the application shall state concisely the grounds on which it is made.**

**(3) So far as applicable this rule shall apply to an originating summons and a petition.**

12. The court must at all times be cognisant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it was plain and obvious that a plaintiff disclosed no reasonable cause of action or defence in law, where a plaintiff was scandalous, frivolous, vexatious, where a plaintiff may prejudice, embarrass or delay the full trial of the action or where the plaintiff was otherwise an abuse of the court process.

13. In the case of Grace N Karianjahi vs Dr Simon Kanyi Mbuti [2002] eKLR, it was also held as follows:-

**“The Plaintiff can also be frivolous, if it has no substance, it is fanciful or that the party is simply trifling with the Court or wasting the Courts time. The Pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding. On the other hand, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are worthless or to delay the due process of the law”.**

14. In the same breathe, a court must exercise restraint and proceed very cautiously when it has been asked by a party to strike out pleadings before a matter has proceeded for full trial. Indeed, striking out pleadings before hearing of a matter is a draconian step and must be used sparingly and in the clearest of the cases as was held in the case of D.T. Dobie Co Ltd vs Muchina [1982] KLR and in the case of Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR where Musinga J (as he then was) held as follows:-

**“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”**

15. In the case of Elijah Sikona & Another vs Mara Conservancy & 5 Others [2013] eKLR, it was further held as follows:-

**“There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court”.**

16. In addition, in the case of Wedlock vs Moloney [1965] 1 WLR 1238, it was held that:-

**“...Summary jurisdiction of court was never intended to be exercised by a minute and protracted examination of**

**documents and the facts of the case in order to see if the Plaintiff really has a cause of action...”**

17. As could be seen from the aforesaid cases, the common thread was that courts must be very cautious to deny parties an opportunity to ventilate their cases no matter how weak their opponents felt their cases were. However, they were also called upon to be vigilant not to allow cases that fell within the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 to clog the already congested court diaries.

18. Order 10 Rule 2 of the Civil Procedure Rules states that:-

**“The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”**

19. A cursory look at the 1<sup>st</sup> Defendant’s Further Affidavit showed that the Plaintiff furnished certain documents that the 1<sup>st</sup> Defendant felt were not enough to counter its case. This was evident from the minute analysis of the documents the Plaintiff was said to have furnished the 1<sup>st</sup> Defendant herein.

20. The purpose of furnishing better and further particulars to a party is to give that party an inkling of what its opponent’s case against it is all about. It is not to allow that party to go on a fishing expedition to find out what its opponent’s case is and then concluding that there is no cause of action which has been disclosed against it merely because it deems its opponent’s case to be weaker than its case.

21. A party’s case is as strong as the evidence it adduces to prove its case. If it falls short of proving its case to the required standard, then that can only lead to its case being dismissed at the end of the trial after being heard on merit. A case can only be dismissed *in limine* if it is so clear that the same is vexatious, an abuse of the court process, scandalous, prejudicial to a party and disclosed no reasonable cause of action. No matter how weak a party’s case is, it must be given an opportunity to ventilate its case on merit with a view to proving its case in the best way it knows how.

22. Merely because a party takes the view that its opponent will not be successful at the end of the trial is not a good reason for a court to strike out that party’s case. A party who has been dragged through court case in a weak case will eventually be compensated by way of costs.

23. As can be seen hereinabove, a case will only be struck out at an interlocutory stage if it is clear and obvious that it has not disclosed any **“reasonable”** cause of action. This was not one such instance. The matter appeared to be hotly contested with parties taking divergent positions.

24. As the Plaintiff had complied with the order for providing further and better particulars contrary to the 1<sup>st</sup> Defendant’s assertions, it was therefore in the interests of justice that the Plaintiff herein be allowed to prove its case on merit. The fact that it sought for additional time to supply the said better and further particulars was also not a ground to strike out its suit as leave to file the same outside the initial timelines was granted by the court.

**DISPOSITION**

25. For the foregoing reasons, the upshot of this court’s Ruling was that the 1<sup>st</sup> Defendant’s Notice of Motion application dated 1<sup>st</sup> July 2019 and filed on 3<sup>rd</sup> July 2019 was not merited and the same is hereby dismissed with costs to the Plaintiff herein.

26. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2020**

**J. KAMAU**

**JUDGE**