



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 182 OF 2019**

**MISORT AFRICA LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY**

**THE NATIONAL TREASURY AND PLANNING.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

(1) Before this Court is the Notice of Motion dated 17<sup>th</sup> October 2019 by which **MISORT AFRICA LIMITED** (the Plaintiff/Applicant) seeks for Orders as follows: -

**“1. THAT the defence herein be struck out and judgment be entered in favour of the Plaintiff as prayed.**

**2. THAT the costs of this suit and this application be granted to the Plaintiff.”**

(2) The application which was premised upon **Order 2 Rule 15(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** was premised upon the following grounds that:-

**1) The Defence dated 30<sup>th</sup> August 2019 and filed in Court on 5<sup>th</sup> September 2019 discloses no reasonable defence in law, raises no issues for trial, contains general denials and is at best, a sham defence.**

**2) The Defence is devoid of particulars as far as the key lines of defence raised are concerned.**

**(a) Particulars of the alleged delay by the Plaintiff in delivery of goods are not given.**

**(b) Particulars of provisions of the contract allegedly breached by the Plaintiff are given.**

**(c) Particulars of the plea that the entire contractual amounts have been paid are not given.**

**3) A request for particulars was served upon the Defendants on 16<sup>th</sup> September 2019. No particulars have been provided as at the date hereof.**

**4) The 1<sup>st</sup> Defendant has not filed any witness statements nor documents in support of its defence.**

**5) The defence raised is contradictory in terms; the 1<sup>st</sup> Defendant pleads that there was delay and breach on the part of the Plaintiff, and then equally pleads that the entire contractual sum was settled.**

**6) The Plaint dated 25<sup>th</sup> July 2019 and filed on 30<sup>th</sup> July 2019 has annexed to it a list and bundle of documents all of which speak to the 1<sup>st</sup> Defendant's indebtedness to the Plaintiff.**

**7) The Defence as filed is simply aimed at delaying payment to the Plaintiff for goods supplied and consumed by the 1<sup>st</sup>**

**Defendant, which the 1<sup>st</sup> Defendant admits in the very lame Defence.**

(3) The 1<sup>st</sup> Defendant/Respondent **THE PRINCIPAL SECRETARY NATIONAL TREASURY AND PLANNING** did not file any response to the application. However, the 2<sup>nd</sup> Defendant/ Respondent **THE HON ATTORNEY GENERAL** filed Grounds of Opposition dated **2<sup>nd</sup> December 2019** which opposed the application on the following grounds:-

- 1. THAT the Statement of Defence raises triable issues and striking it out will therefore not be in the interest of justice.**
- 2. THAT the issue of whether or not witness statements or documents to be relied upon have been filed can only be canvassed at the pre-trial conference and not in an application to strike out pleadings.**
- 3. THAT the Statement of Defence contains material facts incidental to the suit.**
- 4. THAT it would be a miscarriage of justice if the Statement of Defence was struck out.**
- 5. THAT the Plaintiff's Application lacks merit and is an abuse of the court process."**

(4) The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **7<sup>th</sup> January 2020** while the 2<sup>nd</sup> Defendant/Respondent filed its submissions on **18<sup>th</sup> February 2020**.

#### **BACKGROUND**

(5) The Plaintiff instituted this suit by way of the Plaint dated **25<sup>th</sup> July 2019** in which the Plaintiff prayed for judgment against the 1<sup>st</sup> Defendant for:-

**"(a) Kshs.235,683,000.00**

**(b) Interest on the sum of Kshs.221,606,400.00 at commercial rates from 7<sup>th</sup> February 2018 until payment in full in respect of the invoice dated 7<sup>th</sup> February 2018.**

**(c) Interest on the sum of Kshs.14,076,600 at commercial rates from 22<sup>nd</sup> March 2018 until payment in full in respect of the invoice dated 22<sup>nd</sup> March 2018.**

**(d) Costs."**

(6) The 2<sup>nd</sup> Defendant entered appearance in the suit on **21<sup>st</sup> August 2019** and filed a Defence to the suit dated **30<sup>th</sup> August 2019**. Thereafter the Plaintiff filed a Reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Defence dated **11<sup>th</sup> September 2020**.

(7) The Plaintiff contends that the Defence as filed discloses no reasonable defence in law, raises no issues for trial and is at best a sham. They urge that the same be struck out.

(8) The 2<sup>nd</sup> Defendant in opposing the application submits that the Defence dated **30<sup>th</sup> August 2019** raises triable issues and submits that it would not be in the interests of justice to strike out said Defence.

#### **ANALYSIS AND DETERMINATION**

(9) I have carefully considered the submissions filed in this matter as well as the relevant law. **Order 2 Rule 15** of the **Civil Procedure Rules** provides for the striking out of pleadings as follows:-

**"15(1) At any stage of the proceedings the court may order to be struck out on 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 on judgment to be entered accordingly, as the case may be."**

(10) Further **Order 13 Rule 2** of the **Civil Procedure Rules** provides:-

**"any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to**

the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such judgment, as the court may think just.”

(11) The key consideration in determining an application to strike out a Defence is the consideration as to whether the said Defence raises triable issues. In the case of **JOB KWACH –VS- NATION MEDIA GROUP LTD** it was held as follows:-

**“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”**[own emphasis]

(12) In canvassing its application to have the Defence struck out the Applicant alleges that the Defendants have not filed any witness statement nor documents in support of its Defence. This is not a ground upon which a Defence ought to be struck out. The issue of witness statements and documents is one which is properly to be addressed during pre-trial.

(13) The Plaintiff further seeks to have the Defence struck out on the basis that certain particulars have not been provided in the defence. Again I find that this is not valid grounds to strike out the defence. Rather these are issues which can be raised and/or ventilated during the trial of the suit.

(14) Lastly in its written submissions the Plaintiff dwells on the recommendations of a Report by the Committee appointed by the 1<sup>st</sup> Respondent to review/negotiate with the Applicant in respect of the Applicant’s claim arising from the contract. **Order 25 Rule (2)** provides as follows:-

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

(15) The Plaintiff in raising the issue of the Recommendations of this committee is seeking to rely on evidence which the Defendant has not had an opportunity to challenge and/or counter. Once again my view is that these are issues which ought to be reserved for trial.

(16) In the case of **DT DOBIE and COMPANY (KENYA) LTD –VS- MUCHINA (1982) KLR Madan JA** (as he then was) stated thus:-

**“...the power to strike out a pleading which ends in driving parties from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”**[own emphasis]

(17) Likewise in **SAUDI ARABIA AIRLINES COORPORATION –VS- PREMIUM PETROLEUM COMPANY LIMITED [2013] eKLR**, it was held:-

**“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading... The first guiding principle is that every court of law should pay homage to its core duty of serving substantive justice in any judicial pleading before it which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy. Courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the Sword of the Damocles” Thirdly, in case of defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that...raises a prima facie defence and which should go to trial for adjudication.”**[own emphasis]

(18) The bottom line is that summary judgment ought only be entered in very clear cut cases-what are colloquially known as “**open and shut**” cases. In my view this is not such a case. The Defence dated **30<sup>th</sup> August 2019** raises triable issues and merits as full hearing.

(19) Based on the foregoing, I find no merit in this application. The Notice of Motion dated **17<sup>th</sup> October 2019** is hereby dismissed in its entirety. Costs are awarded to the 2<sup>nd</sup> Defendant/Respondent.

It is so ordered.

**Dated in Nairobi this 29<sup>th</sup> day of September 2020.**

.....

**Justice Maureen A. Odera**