



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 27 OF 2015

NSEJERE SPORTS, LLC.....PLAINTIFF/APPLICANT

VERSUS

ALLAN KASAVULI.....1ST RESPONDENT

PATRICK NGAIRA.....2ND RESPONDENT

GEORGE ALADWA.....3RD RESPONDENT

ESTHER LUVEMBE.....4TH RESPONDENT

TIMOTHY LILUMBI.....5TH RESPONDENT

AFC LEOPARDS FOOTBALL CLUB.....6TH RESPONDENT

RULING

1. There are multiple applications filed in this suit which appears to have had a checkered history but the application to which this ruling relates is the Notice of Motion dated 20th March 2019. In the motion, the plaintiff (applicant) *Nsejere Sports, LLC* seeks the following orders:

i. THAT the defendants /Respondents' statements of defence be declared irregular, unlawful, incompetent and/or fatally defective.

ii. THAT the defendants /Respondents' statements of defence be struck out for failing to comply with the mandatory provisions of the Civil Procedure Rules.

iii. THAT judgment be entered in favour of the plaintiff/applicant as prayed in the plaint.

iv. THAT the costs of the application be provided for.

2. The application is expressed to be anchored on Sections 3A and 3B of the *Civil Procedure Act*, Order 2 Rule 15, Order 7 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. It is only supported by the grounds stated on its face as the applicant did not swear an affidavit in support thereof.

3. The application is opposed by grounds of opposition filed by the 1st and 4th respondents on 2nd April 2019 and a replying affidavit sworn by *Oscar Igaida*, the then Secretary General of the 6th respondent on behalf of the 2nd, 3rd, 5th and 6th respondents.

4. In order to understand the context in which the application was filed, it is important to briefly outline its background. The court record shows that the plaintiff/applicant filed suit against the respondents by way of a plaint dated 20th January 2015 in which it sought, *inter alia*, special damages in the total sum of USD 22,387,250, general damages for breach of contract as well as costs of the suit and interest.

5. The suit was premised on claims that the applicant and the officials of the 6th respondent, AFC Leopards Football Club who are named as the 1st to 5th defendants/respondents entered into an exclusive supplier agreement with the club (6th respondent) to the effect that the applicant was the only company that would manufacture and supply the club with various sports apparel, accessories, equipment and promotional materials for a period of seven years from the date of execution of the agreement which was 7th July 2011.

6. The applicant averred that the respondents subsequently breached the terms of the said agreement by *inter alia*, refusing to accept goods that had been manufactured and shipped to Kenya pursuant to an order placed by the 6th respondent and by using products manufactured by the applicant's competitor during the subsistence of the contract.

7. Upon being served with summons, the respondents failed to enter appearance and file their statements of defence within the time limited by the law and interlocutory judgment was entered against them. They filed applications seeking to set aside the said judgment which applications were allowed vide a ruling delivered by this court on 31st July 2018. In that ruling, the respondents were directed to file and serve their respective statements of defence within 14 days of that date.

8. The court record shows that the 2nd, 3rd, 5th and 6th respondents filed their joint statement of defence on 2nd August 2018 while the 1st and 4th respondents filed theirs on 14th September 2018.

It is the filing of these defences and their content that apparently provoked the filing of the instant application.

9. In the grounds supporting the motion, the applicant attacked the validity of the defences filed by the respondents mainly on grounds that they offended the mandatory provisions of *Order 7 Rule 5* of the *Civil Procedure Rules*; that they were a sham and consisted of mere denials which did not raise any reasonable cause of action or defence in law given the existence of the exclusive supplier agreement which was duly executed by the parties whose validity remained unchallenged and whose terms the respondents had breached. The applicant also contended that the 1st and 4th respondents' statement of defence was filed outside the time limited by the court in its order of 31st July 2018.

10. As stated earlier, the respondents contested the motion maintaining that their defences offered a solid and good defence to the applicant's claim and that no good reason existed to justify their striking out as sought.

11. On the date the motion was fixed for hearing, all the parties agreed to have it prosecuted by way of written submissions. The 1st and 4th respondents as well as the applicant duly filed their respective submissions but the 2nd, 3rd, 5th and 6th respondents failed to file their submissions despite being given sufficient time by the court to do so.

12. I have carefully considered the pleadings, the application, the replying affidavit filed by the 2nd, 3rd, 5th and 6th respondents and the affidavit in response thereto sworn on 1st August 2019 by *Isaac Nsejjere* on behalf of the applicant; the 1st and 4th respondents' grounds of opposition and the rival written submissions filed by the applicant and the 1st and 4th respondents. I have also read the entire court record.

13. Having done so, I find that the key issue that arises for my determination is whether the applicant has demonstrated sufficient cause to warrant striking out of the defences filed by the respondents herein as sought.

14. In support of the motion, the applicant relied on *Order 2 Rule 15* and *Order 7 Rule 5* of the *Civil Procedure Rules (the Rules)*. *Order 2 Rule 15* of the *Rules* gives the court discretion to strike out or amend any pleadings on grounds 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.

15. Though the applicant did not disclose the specific ground the motion was predicated upon, since no affidavit was sworn in support of the motion, it is safe to assume that it was based on *Order 2 Rule 15 (1) (a)* given the provisions of *Rule 15 (2)* which requires that an application seeking striking out of a pleading on grounds that it does not disclose a reasonable cause of action or defence should not be supported by any evidence but should state concisely the grounds on which it is made which is how the instant application was presented.

16. Proceeding on the above assumption, I have carefully scrutinized the pleadings in the plaint and the statements of defences filed by the respondents. I have noted that the respondents have specifically denied that the 6th respondent entered into an exclusive supplier agreement with the plaintiff as alleged and put the plaintiff to strict proof thereof. The respondents also specifically denied that the 6th respondent ordered any uniforms or sports products from the plaintiff or that the plaintiff shipped and delivered any product to the 6th respondent as alleged. In addition, the 2nd, 3rd, 5th and 6th respondents also denied that the 6th respondent had capacity to be sued.

17. When the averments in the respondents' respective statements of defence are juxtaposed with the applicant's pleadings and the reliefs sought in the plaint, it is clear to me that the respondent's statements of defence raise triable issues which would require adjudication in a trial.

18. It must be remembered that a triable issue is not one that must succeed at the trial. It is an issue which raises a *prima facie* defence which ought to go for trial for determination. See *Ternic Enterprises Limited V Waterfront Outlets Limited, [2018] eKLR.*

19. Having found as I have above, I am unable to agree with the applicant's submissions that the defences filed by the respondents are a mere sham; that they constitute mere denials and that they are frivolous and vexatious meant to deny the applicant the fruits of its labour. My finding is that the said defences raise triable issues and are a good defence to the applicant's claim in the plaint.

20. Turning now to the applicant's prayer that the defences be struck out for offending *Order 7 Rule 5* of the *Rules*, I agree with the applicant that indeed the defences were not filed together with a list of witnesses, written witness statements and copies of documents intended to be relied on at the trial as required by the aforesaid provision. But can this omission provide sufficient basis for striking out the defences?

21. At the outset, I wish to point out that the remedy of striking out pleadings though available in appropriate cases is a drastic remedy which ought to be used sparingly and only in clear cases which are obviously hopeless. This is because striking out pleadings has the effect of prematurely removing a party from the seat of judgement. As stated by the Court of Appeal in *Kivanga Estates Limited V National Bank of Kenya Limited, [2017] eKLR*:

"... Striking out a pleading is a draconian act, which may only be resorted to in plain cases... Whether or not a case is plain is a matter of fact... A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

22. In my opinion, failure to comply with the provisions of *Order 7 Rule 5* of the *Rules* cannot provide sufficient basis for taking the drastic action of striking out a defence which is otherwise a good defence to a plaintiff's claim for two main reasons.

First, the provision is meant to apply to defendants who in support of allegations made in their defence intend to call witnesses or adduce documentary evidence. However, it is common knowledge that not all defendants call evidence in the course of a trial in support of their defences.

23. Secondly, the proviso to *Rule 5* leaves no doubt that failure to file a list of witnesses or witness statements is not a fatal omission. It provides that the same can be filed at least 15 days prior to the date slated for pretrial conference. In any event, such statements or documents can always be filed before trial commences with leave of the court if no prejudice was likely to be occasioned to the opposite party.

24. Lastly, the applicant sought the striking out of the defence filed by the 1st and 4th respondents on grounds that it was filed outside the time prescribed by the court on 31st July 2018. As stated earlier, the respondents were granted leave to file their defences within 14 days of the date of the ruling. The 14 days must have elapsed on or about 15th August 2018. The 1st and 4th defendants filed their joint statement of defence on 14th September 2018. There is no indication in the court record that before filing their defence, they sought enlargement of the time limited by the court on 31st July 2018. In the premises, there is no doubt that the 1st and 4th respondents' statement of defence was filed out of time.

25. Having made that finding, the question that now begs an answer is whether the late filing of the aforesaid defence would justify its striking out as sought by the applicant.

To answer this question, I will start by observing that the aforesaid defence was filed outside the time fixed by this court after granting the defendants leave to defend the suit. It was not filed outside the statutory period of 15 days prescribed by the *Civil Procedure Act* without leave of the court.

Secondly, the applicant has not claimed that the late filing of the 1st and 4th respondents' defence is likely to occasion it any prejudice when preparing for the trial of its case. In my view, the late filing of the aforesaid defence amounts to a procedural irregularity which can be cured by having the late filing regularized by the court in the spirit of dispensing substantive justice.

All in all, I am convinced that the wider interests of justice would militate against striking out a pleading only for the reason that it was filed outside the time prescribed by a court.

26. Having taken into account all relevant factors, I have come to the conclusion that the statements of defence filed by all the respondents in this suit are not incompetent or incurably defective. The upshot is that the applicant's Notice of Motion lacks merit and it is hereby dismissed with costs to the respondents.

27. Considering the age of this case and in order to facilitate its expeditious disposal, Under *Sections 3A and 1A* of the *Civil Procedure Act*, I exercise my discretion and hereby deem the defence filed by the 1st and 4th respondents as properly filed with leave of the court and direct that the parties comply with the requirements of *Order 11* of the *Civil Procedure Rules* within the next 90 days. The parties to thereafter take a mention date before the Hon. Deputy Registrar on a priority basis to confirm compliance and further orders.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of October, 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Baraza for the plaintiff

Mr. Keyonzo for the 1st and 4th respondents

No appearance for the 2nd, 3rd, 5th and 6th respondents

Ms Ubah: Court Assistant