REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.E044 OF 2019

SAICARE ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

MANA PHARMACY.....1ST DEFENDANT

OULULA WANGURA.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion application dated **22nd June 2020** by which **SAICARE ENTERPRISES LIMITED** (the Plaintiff/Applicant) seek the following orders:-

> **1. THAT this Honourable Court be pleased to strike out the Statement of Defence dated 16th April 2020 and enter Judgment for the Plaintiff/Applicant as prayed in the Plaint.**
>
> **2. THAT this Honourable Court be pleased to enter Judgment on admission as against the Defendant/Respondent for the sum of Kshs. 22,719,736.26 plus interest until payment in full with costs of the suit.**
>
> **3. THAT the costs of this application be provided for.**

(2) The application was premised upon **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act, Order 2 Rule 15, Order 13, Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules and Article 159** of the **Constitution of Kenya, 2010** and all other enabling provisions of the law. The application as supported by the affidavit of even date sworn by **MINAXI BHUPENDRA BHATIA** a Co-Director of the Plaintiff/Applicant Company.

(3) Neither **MANA PHARMACY** (the 1st Defendant/Respondent) nor **OULULA WANGURA** (the 2nd Defendant/Respondent) filed any Reply to the application. The application as canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions dated **16th July 2020** whilst the 1st and 2nd Defendant/Respondent field submissions dated **6th August 2020.**

BACKGROUND

(4) The Plaintiff instituted this suit through the Plaint dated **26th March 2019**, seeking Judgment against the Defendants for:-

> **(a) A mandatory Order directed against the Defendant(s) for the immediate payment to the Plaintiff in a sum of Kenya Shillings Twenty Two Million, Seven Hundred and Nineteen Thousand, Nine Hundred and Thirty Six and Twenty Six Cents (Kshs. 29,719,936.26).**
>
> **(b) Special damages being Kshs. Eighteen Thousand (Kshs. 18,000/-) as bank charges for the bounced cheques.**
>
> **(c) Interest on (a) and (b) above**
>
> **(d) Mesne Profits.**

(e) Costs of this suit.

(5) The 2nd Defendant field the Statement of Defence dated **13th June 2019** seeking that the suit be dismissed in its entirety with costs to the 2nd Defendant.

ANALYSIS AND DETERMINATION

(6) The Plaintiff/Applicant submits that its claim is made up of a very clear and specific liquidated claims, the result of having supplied medicines and other medical accessories to the Defendants between **February** to **March 2019**. It is submitted that in its Defence the 2nd Defendant admitted having taken delivery of the goods in question which were accordingly invoiced. That having admitted receipt of the subject goods the Defendants issued cheques in payment. However the Defendant only paid **Kshs. 6,000,000/-** and issued post-dated cheques for the balance of **Kshs. 23,484,958.16.** Out of the 24 post-dated cheques, 17 expired after the Defendant stalled their presentation and 6 of the post-dated cheques were dishonoured by the Bank. The Plaintiff/Applicant therefore claims this amount of **Kshs. 23,484,958.16** from the Defendant.

(7) The Plaintiff/Applicant filed a complaint at Embakasi Police Station against the 2nd Defendant and the 2nd Defendant filed in the High Court **NAIROBI MISC. CRIMINAL APPLICATION NO. 560 OF 2020** seeking anticipatory bail. The Plaintiff/Applicant contends that in that application, the 2nd Respondent admitted owing the debt to the Plaintiff and explained that the failure to pay was result of delays occasioned by Busia County Government. The Defendant suggested a payment plan to offset the amount due and indicated his intention to make payment in full. The Plaintiff/Applicant's position is that in light of the above admissions by the 2nd Defendant, the current defence is merely frivolous, scandalous, vexatious and an abuse of process. They urge the Court to strike out the Defence and to enter Judgment as prayed in the amount of **Kshs. 22,729,936.26.**

(8) The Defendant/Respondents urged the Court not to strike out their defence submitting that the same raised genuine and triable issues. **Order 2 Rule 15 of the Civil Procedure Rules, 2010** provides as follows:-

"(1) At any stage of the proceedings the court may order to be struck out or amend any pleadings on the ground that:-

(a) It discloses no reasonable cause of action or

defence in law

(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."

(9) In support of its claim that the Defence on record ought to be struck out the Applicant cited and relied on the case of **KENYA COMMERCIAL BANK –VS- SUNTRA INVESTMENT BANK LTD [2015]eKLR** in which the test set out in the case of **SAUDI ARABIA AIRLINES CORPORATION –VS- PREMIUM PETROLEUM COMPANY LIMITED** was stated as follows:-

> **"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. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding 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, is that 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''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a 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." [own emphasis]**

(10) I have considered the submissions made by the Applicant in support of this application. I have also perused the Statement of Defence dated **13th June 2019** and filed on **14th June, 2019**. It is trite law that striking out of a pleading is a discretion which the Courts should exercise very sparingly. In the case of **BLUE SHIELD INSURANCE COMPANY LTD –VS- JOSEPH MBOYA OGUTTU** it was held:-

> **"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-**

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable." [own emphasis]

(11) For a Defence to merit a hearing it is not necessary that said Defence be persuasive – what is required is that the Defence be genuine and one which raises even one triable issue. The Defendant has denied owing the amount being claimed by the Plaintiff. In **SANKALE OLE KANTAI T/A KANTAI & CO. ADVOCATES –VS- HOUSING FINANCE COMPANY OF KENYA**, the Court states:-

"While I commiserate with the plaintiff, the court must execute a delicate balancing act to ensure that both parties remain at equal arms length. In our adversarial system of justice, even the weak and vanquished must be granted a stay at the throne of justice. The plaintiff may strongly feel that the defence set up is a strategy to delay justice but on the face of it, it cannot be said to be frivolous, vexatious or an abuse of court process. The veracity of that defence can only be fully tested on evidence at the trial." [own emphasis]

(12) I am mindful of the constitutional exhortation that a litigant must be awarded an opportunity to be heard as provided by the **Constitution of Kenya, 2010**. This was stressed in **CRESCENT CONSTRUCTION CO. LTD –VS- DELPHIS BANK LTD [2007]eKLR** where it was held:-

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter."

(13) It is trite law that for a Court to enter judgment an admissions uch admission must be unequivocal and clear – where there are issues of law and fact to be argued then a Court ought not enter Judgment on admission. In **HARITSAETH T/A HARIT SAETH ADVOCATES – VS- SHAMASCHARANIA** the Court stated as follows:-

"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In Choitram v Nazari (1984) KLR 327, Madan JA (as he then was) stated as follows regarding admissions:

> ***'Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered.***

They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…" [own emphasis]

(14) I am not satisfied that the current case merits entry of Judgment on admission. The admission relied on by the Plaintiffs was allegedly tendered in a suit which is separate and distinct from the present one being **MISC. APPLICATION No. 560 OF 2020.** No admission of the debt has been made in respect to the instant suit.

(15) Based on the foregoing I find no merit in the present application. The same is hereby dismissed in its entirety. Costs are awarded to the Defendant/Respondent.

Dated in **Nairobi** this 18TH day of **DECEMBER, 2020**.

MAUREEN A. ODERO

JUDGE