



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 292 OF 2014

BIDCO OIL REFINERIES LIMITED.....PLAINTIFF

VERSUS

AHMED ABDIKADIR AHMED

T/A SAKINA DISTIBUTORS1ST DEFENDANT

MUTURI KENNEDY MWANGI2ND DEFENDANT

NKABU PHARIS KIRIMI3RD DEFENDANT

RULING

On 14th March, 2019 this court delivered a ruling upon an application filed by the 3rd defendant herein which sought the dismissal of the plaintiff’s suit for want of prosecution. That application was dismissed with costs to the plaintiff because it was deemed premature.

There is now an application before me, this time by the plaintiff, dated 14th December, 2016 seeking orders that the 3rd defendant’s statement of defence dated 29th March, 2015 and filed on 2nd June, 2015 is struck out, and judgment be entered against the 3rd defendant as prayed in the plaint plus costs. This application is by way of Notice of Motion under Order 2 Rule 15 of the Civil Procedure Rules.

The reasons given by the plaintiff for seeking the said orders are that, the said statement of defence is a sham, consists of mere denials and discloses no reasonable defence to the plaintiff’s suit. Further, the said statement of defence is said to be frivolous and vexatious, and that it is likely to prejudice, embarrass and or delay the fair determination of the case. Finally, the said statement of defence is said to be an abuse of the court process.

There is a supporting affidavit sworn by Deepak Shah, a director of the plaintiff. The said application is opposed and there is a replying affidavit sworn by the 3rd defendant.

The plaintiff’s suit against the defendants seeks, among other things, special damages resulting from fraudulent actions attributed to the defendants. The 3rd defendant herein filed a statement of defence which I will revert to shortly herein below. The 3rd defendant was said to be a sales agent who is alleged to have colluded with the other defendants to defraud the plaintiff. Particulars of fraud have been set out, and so are the particulars of special damages.

In the statement of defence filed by the 3rd defendant, paragraphs 3, 4 and 6 stand out. These provide as follows,

“3. The 3rd defendant wishes to state that no any other time he handled any cash money on behalf of the plaintiff herein (sic).

4. The 3rd defendant denies paragraph 9 of the plaint and wishes to state that he is not aware of such kind of fraud caused to the plaintiff and puts the plaintiff strict proof thereof (sic).

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6. The 3rd defendant wishes to state that the plaintiff herein maliciously registered a claim against the 3rd defendant vide a criminal case no. 1693 of 2014 at Thika Law Courts pending hearing and has not been proved guilty and is not worth for the plaintiff to institute the civil suit against the 3rd defendant when proved not guilty (sic).”

I have related the plaint and the 3rd defendant's statement of defence, and in particular the extracts cited above to the provisions of Order 2 Rule 15 of the Civil Procedure Rules upon which the application is predicated. Notwithstanding what appears to be a poor construction of the above paragraphs of the 3rd defendant's statement of defence, it is clear some triable issues are identifiable which cannot be wished away by way of summary procedure.

The effect of striking out a pleading is that it denies a party the right to have their day in court without a hearing. Courts exist to dispense justice and, in adversarial judicial system, every party who comes before the court should not be driven from the seat of justice without a hearing. There exist contentious issues of fact, both in the plaint and the 3rd defendant's statement of defence which must be tested by way of evidence and cross-examination.

Without delving any deeper into this matter, I believe that a fair hearing as provided for under Article 50 of the Constitution militates against the orders sought by the plaintiff.

This application must therefore be dismissed with costs to the 3rd defendant.

Dated, signed and delivered at Nairobi this 23rd Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE