



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CASE NO. 103 OF 2018**

**FARAM E.A LIMITED.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE PRINCIPAL SECRETARY MINISTRY OF HEALTH.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **FARAM EAST AFRICA LIMITED**, the Plaintiff, filed this case against **THE ATTORNEY GENERAL**, the 1<sup>st</sup> defendant, and **THE PRINCIPAL SECRETARY MINISTRY OF HEALTH**, the 2<sup>nd</sup> defendant.

2. The plaintiff’s claim is for judgment for Ksh 14,840,000/= with interest at 21% per annum (commercial rate). That amount is claimed in respect to the plaintiff’s supply of two sterished 50 low heat thermal infectious waste treatment unit for sterilizing and shredding medical waste. The two units were supplied at the request of the 2<sup>nd</sup> defendant.

3. The defendants filed their defence to the plaintiff’s claim. The defendants by that defence vehemently deny requesting for and being supplied by the plaintiff with the said two units. The defendants denied issuing the plaintiff with local purchase order and denied accepting delivery of those alleged goods. The defendant thereafter pleaded as follows:

*“In the alternative and without prejudice to the foregoing denials in Paragraphs 3 &4 of the statement, the defendants aver that if at all there was a contract between themselves and the plaintiff and/or goods delivered to them as alleged, which is vehemently denied, then the Defendants paid the plaintiff the amounts due and owing to him. The defendants invite strict proof to any averments to the contrary.”*

4. The plaintiff has by the Notice of Motion application dated 9<sup>th</sup> April 2019 sought the defendants’ defence be struck out and judgment be entered as prayed in the plaint. The application is brought under order 2 (a) and (b)Rule 15 of the Civil Procedure Rules which provides:

*“(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;”*

**ANALYSIS**

Since what the court is requested to do is strikeout defendant’s pleading it is necessary to examine the general principles governing pleadings. Let me refer to a persuasive Canadian case, namely **Rare Charitable Research Reserve v. Chaplin, 2009 CanLII 49639 (ON SC)** where the court stated:

*“General principles governing pleadings*

[17] As has oft been said, pleadings in a civil proceeding perform several functions: (i) they define with clarity and precision the question in controversy between the parties and, in so doing, set the “foul lines” for the determination of issues of relevance; (ii) they give fair notice of the precise case to be met and the remedies sought, in order to prevent “trial by ambush”; and (iii) they assist the court in its investigation of the truth and the allegations made: *National Trust v. Furbacher*, [1994] O.J. No. 2385 (Gen. Div.), para. 9; *Senchal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (S.C.J.), paras. 50 to 52. In civil cases the pleadings often are the only source of knowledge about a case available to the trial judge prior to the commencement of the trial.”

5. The question is, does the defendants’ defence define with clarity and precision the question in controversy; does it give a fair notice of the precise case the plaintiff is to meet; and does it assist the court to investigate the truth of the allegations.

6. Having considered the defendants’ defence, I find that it falls short of the above. The defendants begin by pleading in denial of the contract, alleged by the plaintiff. They deny requesting and receiving delivery of the sterilizing units from the plaintiff. The defendants’ pleading thereafter swings to the opposite where the defendant’s state if they received those units the plaintiff was fully paid for them.

7. It has often been said that striking out pleading should be approach with caution. This is what was stated in two cases I shall rely upon. The first is **Equitorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 others [2014] eKLR** where the court stated:

“In the case of **BLUE SKY EPZ LIMITED –Vs- NATALIA POLYAKOVA & ANOTHER [2007] eKLR** the court held that:

**“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.”** (underlining mine)

The second case is *Diamond Trust Bank (K) Ltd v* **DIAMOND TRUST BANK (K) LTD v MARTIN NGOMBO & 8 OTHERS [2005] eKLR** viz:

“This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence.

It is, however, a procedure which is to be resorted to in very clear and plain cases.

In *D.T.Dobie & Co. (K) Ltd. V. Muchina* (1982) KLR 1 at Page 9 Madan JA (as he then was) delivered himself thus on this point in respect of summary procedure provided for by order 6 rule 13 of the Civil Procedure Rules:

**“The Court ought to act very 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. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way”**

At this stage the Court is only required to satisfy itself that the defence raises prima facie triable issues and that is not a mere sham.”

8. In my view the defendants’ defence discloses no reasonable cause of action. The ground of opposition raised by the defendants in response to the application before court do not answer the issues raised in the application. To answer those grounds, I would say that the defendants’ defence does not “disclose serious triable issues.”

## **CONCLUSION**

9. In the end I find there is merit in the plaintiffs’ application. I accordingly will grant the prayers sought. I ought to also state that the plaintiff has proved its entitlement to commercial interest rate. It borrowed from a commercial bank the money it used to purchase the two sterilization units, which were delivered to the defendants and for which no payment has been made to date.

10. Accordingly the following are the orders of the court :

- a. The defendants’ defence filed on 14<sup>th</sup> May 2018 is hereby struck out.
- b. Judgment is hereby entered for the plaintiff as prayed in the plaint.
- c. The plaintiff is awarded costs of the Notice of Motion dated 9<sup>th</sup> April 2019.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read in Open Court in the presence of:**

Sophie.....**COURT ASSISTANT**

.....**FOR THE PLAINTIFF**

.....**FOR THE 1<sup>ST</sup> DEFENDANT**

.....**FOR THE 2<sup>ND</sup> DEFENDANT**