



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 11 OF 2017

ENDEBESS DEVELOPMENT COMPANY LIMITED....PLAINTIFF/APPLICANT

VERSUS

COAST DEVELOPMENT AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. The application herein dated 5th May, 2017 has been brought under the provisions of Order 2 rule 15, Order 7 rule 1, Order 10 rules 2, 4(1), (2), 9 and 10, Order 13 rule 2, Order 50 rule 4, Order 51 rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A, Section 25 (i), (ii) and 81 (2)(f) of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders:-

(i) That this Honourable court be pleased to strike out and or dismiss the Defendant's statement of defence dated 31st March, 2017 and filed on 31st March, 2017 for being filed out time and without leave of the court and interlocutory judgment be entered accordingly against the Defendant/ Respondent in favour of the plaintiff;

(ii) That this Honourable court be pleased to strike out and or dismiss the defendant's statement of defence dated 31st March, 2017 and filed on even date for failure to disclose any reasonable defence to be relied upon by the Defendant;

(iii) That this Honourable court be pleased to enter Judgment on admission as against the defendant for the sum of Kshs. 62,000,000/= plus interest at the rate of 10% per annum from 14th April, 2013 until payment together with costs of the suit; and

(iv) That the costs of this application be awarded to the Plaintiff/Applicant.

2. The application is supported by the affidavit of Mary Kihamba Advocate. Counsel for the applicant filed her written submissions on 16th October, 2017.

3. On the date scheduled for hearing, Mr. Mulali appeared for the plaintiff/applicant and Mr. Cheloti for the defendant/respondent. This court gave directions as to the hearing of the present application. Highlighting of submissions was slated for 19th October, 2017 in the presence of the 2 Advocates. Come the said date, there was no representation for the respondent.

4. This court could have outrightly granted the applicant the orders sought for failure on the part of the respondent to file a response to the application dated 5th May, 2017. I however opted to peruse not only the present application but the averments in the plaint and the statement of defence.

5. In arguing the application Mr. Mulali indicated that the plaint was filed on 7th February, 2017 and the respondent filed a statement of defence on 31st March, 2017 which was 21 days after entering appearance. Counsel submitted that the respondent did not seek leave of the court to file the statement of defence out of time, which is contrary to the provisions of Order 7 rule 1 of the Civil Procedure Rules. He urged the court to strike out the statement of defence. He relied on the case of **Prime Bank Limited vs Paul Otieno Nyamodi T/A V.A Nyamodi and Company Advocates** [2015] eKLR where the defence was struck out for being filed 7 days out of time.

6. It was argued that the respondent did not raise any triable issues in its statement of defence as provided under Order 2 rule 15 of the Civil Procedure Rules. He cited the case of **ERF Kenya Limited vs Bustrack Ltd and Another** [2005] eKLR to support the said assertion.

7. Counsel for the applicant referred to the annexure marked as MK-5 attached to the applicant's affidavit which is a letter from the respondent dated 16th August, 2016 in which it admits owing the applicant the money the subject of the suit. He made reference to paragraph 11 of the statement of defence where the respondent admits owing Kshs. 22,681,000/=. Counsel stated that the said amount was arrived at 3 years after the contract was entered into, and in his view, the said amount is an undervaluation of the amount owing. He cited the case of

Choitrum vs Nazari, quoted in Nairobi Civil Appeal No. 271 of 1996, **Agricultural Finance Corporation vs Kenya National Assurance Company Limited** (in receivership), [1997] eKLR where the court held that admissions can be express or implied either on the pleadings or otherwise. He indicated that the application was unopposed as no response had been filed by the respondent.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If judgment should be entered on admission; and
- (ii) If the statement of defence should be struck out and interlocutory judgment entered against the respondent.

8. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought entry of judgment on admission provides as follows:-

“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 application make such order, or give such judgment as the court may think just.”

9. In the **Choitram Vs Nazari (1984) KLR 327** the above provisions were captured under **Order XII rule 6. Madan JA** (as he then was) in the said decision stated thus:-

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. 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 that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court’s discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.” (emphasis added).

10. The applicant has made reference to paragraph 11 of the statement of defence and submitted that the averment therein amounts to an admission. The said paragraph states - *“The defendant denies the allegation contained in paragraphs 10 and 11 of the plaint in so far as the plaintiff is alleging that the defendant is trying to unilaterally alter the purchase price and has shown a lack of good faith in its dealing with the plaintiff. The defendant further responds that the letter on the 25th August 2016 from the Ministry of Transport and Infrastructure was a professional valuation report noting that the machines were of derelict condition with evidence of vandalism and cannibalization and collectively worth Kshs 22,681,000/-.”*

11. In my view, the above averments do not connote a respondent who is admitting the claim in issue but one who is challenging the condition and the quality of the contractual merchandise. This court is of the finding that the said averments do not amount to an admission.

12. In **Cassam vs Sachania [1982] KLR 191** the court held that:

“Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal... Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.” (emphasis added).

13. The applicant has also relied on the letter dated 16th August, 2016 marked as MKA-5 and attached to the applicant's affidavit to show that the defendant admitted the claim. This court notes that the said letter was written on a *“without prejudice”* basis. The contents thereof are therefore inadmissible in the circumstances of this case and cannot form the basis of a judgment being entered on admission against the respondent.

14. On the issue of the defence being struck out for failing to raise triable issues and for an interlocutory judgment to be entered against the defendant; Order 7 rule (1) of the Civil Procedure Rules provides as follows:-

“Where a defendant has been served with a summons to appear, he shall, unless some other or further order be made by the court, file his defence within 14 days after he has entered appearance in the suit and serve it on the Plaintiff within 14 days from the date of filing the defence and file an affidavit of service.”

15. A perusal of the file reveals that the statement of defence was filed on 31st March, 2017 which was 21 days after the required timeline provided under the Civil Procedure Rules had elapsed. No leave of the court was sought to have the same deemed as being filed on time. Should I then proceed to strike out the defence for being filed out of time and for not disclosing triable issues?

16. Order 2 rule 15 of the Civil Procedure Rules provides as follows:

15. (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; 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 or judgment to be entered accordingly, as the case may be.

17. The claim as stated in the plaint is for the sum of Kshs. 62,000,000/= for supply of various machinery pursuant to a contract entered between the parties herein. The applicant also prays for costs and interest. A perusal of the statement of defence in paragraph 4 states that a purchase agreement was entered into on 10th April, 2013 for Kshs. 62,000,000/=. In paragraph 4(j) of the said defence, the respondent states that the machines the subject of the contract were valued at Kshs. 22,681,000/= as per a valuation report from the Ministry of Transport and Infrastructure.

18. The Court of Appeal in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** stated thus:

“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.”

19. In **Wenlock vs Moloney [1965] 2 All E.R 871 at page 874**, the House of Lords considered a similar matter, **Danckwerts L.J** had the following to say:-

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”

20. The power to strike out pleadings due to infraction of the rules of procedure is discretionary. The court has to consider all the circumstances of the case. In my considered view, striking out of the statement of defence herein will be tantamount to sacrificing justice in the alter of technicalities and will run counter to the provisions of Article 159(2)(d) of the Constitution of Kenya which provides that justice shall be done without undue regard to technicalities.

21. Having perused the statement of defence on record, and more particularly the issue of the value of the goods that were supplied to the defendant as compared to the claim as per the plaint, I am satisfied that the statement of defence raises triable issues that should go to trial. In the interest of justice, I deem the statement of defence filed on 31st March, 2017 as being properly on record. I therefore decline to enter interlocutory judgment. I award costs of the application to the applicant due to the non-response of the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mulali for the plaintiff/applicant

Mr. Masila for Mr. Cheloti for the defendant/ respondent

Mr. Oliver Musundi - Court Assistant