REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 294 OF 2016

WATER AFRICA SERVICES LIMITED.......................PLAINTIFF

VERSUS

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.......................................DEFENDANT

RULING

The plaintiff filed this suit against the defendant claiming a total sum of Kshs. 131,012,768.04 being the sum due and payable for loss of business and tender opportunities attributed to the defendant. The cause of action arose as a result of a request by the defendant to the plaintiff to sink various boreholes throughout the Republic as set out in paragraph 4 of the amended plaint.

The defendant is said to have issued various Local Purchase Orders to the plaintiff to facilitate the said projects. The plaintiff pleaded that it has expended some money set out in paragraph 5 of the amended plaint in the execution of the projects and lost business due to delayed payments and lost opportunities. A demand for payment was not met hence this suit. The defendant denied the plaintiff's claim.

There is now before me an application by way of Notice of Motion dated 8th September, 2017 under Order 2 Rule 15 (a) (b) (c) and (d), Order 36 Rule 1(a) of the Civil Procedure Rules and Sections 1 A, 1B and 3 A of the Civil Procedure Act, for orders that the defence be struck out and judgment entered in favour of the plaintiff in the sum of Kshs. 131,012,768.04. The application is supported by an affidavit sworn by K. N. Ashoka Reddy said to be one of the Directors of the plaintiff company, in addition to the grounds set out on the face of the application.

The application is opposed and there are grounds of opposition filed on behalf of the defendant. Both parties have filed submissions and cited some authorities which I have read. It is the plaintiff's case in this application that the defence filed is a sham and amounts to mere denial and does not raise any triable issues. It is further stated that the defence is scandalous, frivolous and or vexatious.

The plaintiff further states that its claim has been admitted and partial payment made, hence the defendant cannot deny this. On the other hand, the defendant states the application does not satisfy the well settled conditions for striking out pleadings as the defendant has raised various defences to the suit the main one being that the entire suit is bad in law and an abuse of the process of the court.

It is the defendant's further position that the defence does not contain mere denials as alleged in the application and the issues denied must be specifically proved by the plaintiff. Order 15 (1) states 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 –**
>
> **It discloses no reasonable cause of action or defence in law; or**
>
> **a) It is scandalous, frivolous or vexatious; or**
>
> **b) It may prejudice, embarrass or delay the fair trial of the action; or**
>
> **c) 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."**

In the defence filed on behalf of the defendant, it is pleaded that at no time was the plaintiff contracted to perform the contract forming the basis of the claim. If there was any contract which was denied, it was procured without following due process and therefore *void ab initio*. It

was also pleaded that the defendant never made any promises to the plaintiff because it was not indebted to it. No money is owed and the plaintiff has been called to strict proof thereof.

The subject of striking out pleadings has been addressed severally in decided cases. In the case of **D.T Dobie & Company (K) Limited vs. Muchina (1982) KLR 1** the court held as follows,

> **"1 The power to strike out should be exercised only 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 opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.**
>
> **2. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as the suit can be ejected with life by amendment it should not be struck out."**

See also **Yobesh Amollo vs. The Heritage Insurance Company Limited (227) e KLR and Saudi Arabian Airline Corporation vs. Caen Express Services Limited (2014) KLR.**

The striking out of pleadings has the effect of driving a party out of the judgment seat before a hearing. In judicial proceedings, it is a legitimate expectation that a party shall have his or her day in court. That expectation is founded on the belief that, any dispute lodged before the court should be subjected to judicial inquiry through evidence to be tested under cross-examination. Where a party raises an issue, it should be considered triable not necessarily because it will ultimately succeed, but an honest belief that it should be subjected to a trial. If that be the case, issues should be left to the province of a full trial.

My observation of the defence filed is that it contains triable issues which cannot by any standards be called a sham, scandalous, frivolous or vexatious. There will be no shortcuts in this matter; the plaintiff must present evidence to prove its case and leave it to the court to make a determination. The application is therefore dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 27th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE