REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 7 OF 2018

INCLUSIVE AGENCIES LTD.....PLAINTIFF

VERSUS

MAERSK KENYA LIMITED .....DEFENDANT

R U L I N G

1. I have for determination an application by way of Notice of Motion dated 16/2/2017 seeking that the plaintiff suit against the defendant be struck out with costs.

2. The grounds set out on the face of the Application are enumerated to be:-

a) Vide a Plaint filed on 15th October, 2015, the Plaintiff seeks Orders inter alia for damages for breach of contract and injunctive Orders restraining the Defendant from contracting a third party to render the services the subject of the that contract, pending the hearing and determination of the suit.

b) The injunctive Orders sought against the Defendant, if granted will be unenforceable, as the contract between the Plaintiff and Defendant has long since terminated by effluxion of time. There is therefore no sustainable cause of action as against the Defendant.

c) Further, the Plaintiff's other prayer for general damages is untenable in law as general damages cannot be claimed for breach of contract and the Plaintiff has not claimed any special damages.

d) It is the interest of justice to grant the reliefs as prayed.

3. The Application was supported by the Affidavit of Terry Ngare in which there is exhibited as an only annexture, the agreement between the parties. According to that Affidavit the defendant contends that the agreement having come to an end, by on own terms upon effluxion of time, on the 31.12.2015, was never renewed and therefore since 1st of January 2016 there was no contractual relationship between the parties a fact that has appreciated by the plaintiff when its advocate told court on the 20/9/2016 when an application for injunction was withdrawn on the basis that it had been overtaken by events.

4. On the basis of the terminated agreement and the fact that there are only two prayers in the suit; injunction and general damages for breach of contract, the defendant contends that there is no reasonably cause disclosed and the suit ought to be struck out.

5. The Application was opposed by the plaintiff by a Replying Affidavit sworn one John Otieno Ohanya on 10/10/2017. The gist of the opposition is that the matter having not been listed for pretrial and without judgment cannot be dismissed and on further grounds that the constitutional guarantees under articles 48 & 50 when put together with the dictates under article 159(2) e, for courts to seek substantial justice, the suit cannot be dismissed as sought by the defendant.

6. Parties filed respective submissions with regard to the Application. The plaintiff's submission are dated 8/12/2017 while those by the defendant are dated 14/11/2017.

7. I have consider the Application, the Replying Affidavit filed in opposition thereto together with the submissions citing decided cases. From that perusal the only issue that stands out for determination is whether the plaint filed herein need to be struck out for disclosing no cause of action.

8. The crystalised and trite principle of law on this area is that no suit should be summarily dismissed unless it be apparently hopeless to be

plainly and obviously devoid of any reasonable case of action and characteristically beyond redemption and incurable by an amendment [1]. Put the other way round, every suit, however implausible and however improbable its chances of success may appear, ought to be given a chance to be heard and that courts of law should strive to give parties the right to be heard rather than dismissing their claims in a summary manner[2]. So that court are seen to encourage access to justice and right to be heard on the merits.

9. However, that is not to say that every suit however incompetent, time barred or a mere conjecture must be heard by the courts. There is no magic in sustaining a suit that is obviously and plainly destined for failure for reasons that stare on the face of the court. Such examples include a suit barred by a statute or a suit filed in a court without jurisdiction[3].

10. The court has a duty to protect itself and resources, the public and litigants from being scandalized.

11. Being thus aware of the guiding principles, in this matter the defendant faults the plaint for disclosing no cause of action and the proceeds to exhibit the agreement between the parties as evidence to show that there is no suit. Under Order 2 Rule 15(2) where the only ground for striking out, is the non-disclosure of reasonable cause of action no evidence is admissible. That rule is expressed in no ambiguous terms. No evidence is admissible for the Defendant in this application and therefore the court cannot consider the Affidavit of Terry Ngure and its annexures[4].

12. Without considering that evidence there is nothing on the application to show that the remedies sought by the plaintiff are incapable of being granted.

13. That general damages is not awardable is a matter that ought not to determine at this level. It is a matter capable only of determination upon evidence.

14. While I do not wholly disagree with the principle of law enumerated in ***East Africa Breweries Ltd vs Aristide Brillain Nkoumondo [2015] eKLR***, I do not read the decision to say that general damages are never available for causes of action founded on breach of contract. I read the decision to say that no general damages are available for award where the loss is capable of qualification before had and claimed as special damages. In any event the Court of Appeal in a judgment dated 8/5/2015 did award damages in the sum of Kshs.500,000/=[5].

15. There is a line of authorities to support my finding that there has never been, in this County a blanket bar on award of general damages for breach of contract[6]. The principle the courts have adopted and followed is that enumerated by ***Alerson J in Hadley Baxendale 1885) 9 Ex. 341*** to the effect that:-

> **"We think its proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. in according to the usual course or thing from such breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, the probable result of the breach of it".**

16. I find that general damages can be awarded for breach of contract where the plaintiff by evidence does as the law of evidence dictate prove his case for award of such damages.

17. That being my finding on the matter, I now find and hold that the Application lacks merit and I thus dismiss it with costs to the plaintiff respondent.

Dated and delivered at **Mombasa** this **22nd** day of **June 2018.**

P.J.O. OTIENO

JUDGE

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[1] D.T. Dobie & Co. (K) Ltd vs Joseph M. Muchina [1980] eKLR

[2] Yaya Towers Ltd vs Trade Bank [2000] eKLR and Jones M. Musau vs Kenya Hospital Association & Another [2017] eKR

[3] Christie vs Christie [1873] LR 8 ch.499 cited in Bishop Ndoricimpa vs Standard Ltd [2001] eKLR

[4] D.T. Dobie [supra]

[5] Nyamongo & Nyamogo vs Barclays Bank of Kenya

[6]