REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 108 OF 2006

1. HACO INDUSTRIES LTD

2. SOCIETE BIC……PLAINTIFFS

VERSUS

1. DOSHI IRON MONGERS LIMITED

2. KENYA BUREAU OF STANDARDS……....DEFENDANTS

R U L I N G

1. There is before court the Notice of Motion dated 7/4/2017 by the defendant counter claimant seeking orders that:-

i) The Reply to Defence and Counterclaim dated 3rd April 2017, be struck out and or dismissed;

ii) Judgment be entered for the 1st Defendant for prayers a), b), and c) plus interest and costs thereon as prayed in the Counterclaim dated 5th June, 2006 in respect of the liquidated sums.

iii) The 1st and 2nd Plaintiffs be ordered to pay costs of the suit and the Application.

2. The grounds upon which the said application is premised are that the Reply to defence and defence to the counterclaim was filed on 5/4/2017 some 11 years and 2 months out of time, without the leave of the court, thus abusive of the court process in that it was calculated to delay the hearing of the counter claim slated for the 12/4/2017. The Application was supported by the Affidavit of one ASHOK LABSHANKER DOSHI which essentialy reiterated the grounds of the application and added that the facts deponed thereto were based on advice from his counsel Mr. Khanna.

3. The application was opposed by the plaintiff by the Replying Affidavit sworn by Mr. N.K. Sitonik and grounds of opposition dated and filed on 11/4/2017.

4. The gist of the grounds of opposition was that by the 12/4/2018, the suit had not become ready for hearing as the defendant counterclaimant had not filed the documents to accompany it, had not taken directions under Order 11 and had inordinately delayed to set it down for hearing.

5. It was equally asserted that the Applicant/counter claimant ought to have requested for judgment on default to file a defence to the counter-claim and that the counsel had represented to the other that the matter would not be pursued in court but referred to arbitration and that there was no explanation for failure to comply with Order 11. It was additionally contended that Sections 1A, 1B & Article 159 dictated that the counter claim be heard on the merits.

6. The Replying Affidavit on its point reiterates such facts including the assertion that there had been a representation to go to arbitration and that the suit was never dismissed for court of prosecution but rather withdrawn on the 16/06/2015.

7. There is a second application by the plaintiff dated 3/5/2017 seeking that the counterclaim filed on 16/6/2006 be struck out for being an abuse of the process because it has not been accompanied by witness statement, list of witnesses and list of documents as well as copies of such documents contrary to Order 7, has not sought to have time extended to file the document and failed to set down the matter for pre-trial directions. For those reasons the plaintiff contend that there is not valid counterclaim on record but a document which is prejudicial to the plaintiff who does not know the case to face and that a delay of 7 years after the promulgation of the Civil Procedure Rules was equally

prejudicial and incapable of compensation by way of costs. The application was supported by the Affidavit of one Mr. Kariuki George which largely reiterates the grounds of the application.

8. In opposition to that Application the defendant/counter claimant filed grounds of opposition essentially asserting that Order 7 Rule 5 is not applicable to the counterclaim having been filed prior to the 2010 Rules and that there was no obligation to extend time to comply with Order 7 Rule 5 where there was no defence to the counterclaim since the counterclaim was undefended as much as there was no requirement to fix the matter for case conference where no defence was on record against the counterclaim.

9. When the parties attended court on the 7/2/2018 it was ordered by consent that the two applications be heard together and by way of written submissions to be highlighted. Pursuant to those directions, the Defendant/counter claimant filed submissions dated 22/5/2017 on its application dated 7/4/2017 and another set dated 7/3/2018 for the plaintiff application dated 3/5/2018 while the plantiff's submissions are dated 26/5/2017. It is those submissions counsel attended court on 22/5/2018 to highlight and the counsel essentially echoed the written submissions without much addition. The only addition I gather from Mr. Oluga's highlights are that a mere representation to refer matter to arbitration was not a good reason not to file defence because by dint of section 6 arbitration act, the plaintiff was expected and mandated to file an application for stay and reference within the time limited for filing a Reply and defence to counterclaim which itself is limited to 15 days after service. On the assertion that the plaintiff's suit was withdrawn rather than dismissal, counsel pointed out the record are clear that the request to withdraw was not accepted but the suit was dismissed for want of prosecution.

10. On the plaintiffs application to strike out the counter claim for failure to comply with the provisions of Order 7 Rule 5, the counsel urged and urged that the Rules came into operation in 2010 yet the document was filled in the year 2006. He inferred that to accused to the application would be to apply the Rules retrospectively.

11. For Mr. Sitonik, he stated by urging his clients application for striking out the counterclaim for failure to comply with Order 7 Rule 5 and relied on the submissions filed and the authority of ***CAPWELL INDUSTRIES LTD VS NATIONAL IRRIGATION BOARD [2015] eKLR*** for the proposition that whether a delay to prosecute a case is inordinate or not depends on the circumstances on case to case basis and that where the court considers that justice can be done it will disallow an application to dismiss suit for want of prosecution.

12. On the Application to strike out Reply to defence and defence to counterclaim Mr. Sitonik submitted that the question of arbitration was reserved by the defendant in its defence and that the fact of representation was put on oath and not controverted. Equally counsel submitted that the counter claimant had the option to request for judgment on default of a defence but did not do so and therefore there was no closure for them not to file a Reply and Defence to Counter-claim as they did.

13. On delay in filling the Reply to defence and defence to counterclaim the counsel submitted that a defence however irregularly brought to the attention of the court need to be considered and a court should be hesitant to lock out a party from the seat of justice. On that basis he sought that the Reply to defence and defence to counterclaim be deemed duly filed.

14. On the assertion that the firm ceased to be on record upon the dismissed of the suit, counsel termed that a fallacy because they were served by the defendants' counsel and even letters were written to them to acknowledge their being on record.

15. In closing submissions Mr. Oluga referred court to Order 11 Rule 2 which only mandated a party to seek pretrial directions once pleadings close.

Analysis and determination

16. Both applications seek the courts discretion to invite the very draconian remedy of striking out pleadings. However, both applications seek the remedy for different reasons. I propose to deal with the plaintiffs application first then proceed to consider that by the counter-claimant.

Should the counterclaim be struck out for failure to comply with both order 7 Rule 5 and Order 11

17. A counter claim is indeed a suit and cross action and therefore is subject to being struck out under Order 2 Rule 5 if the thresholds are met. Here the reason advanced is that the counter claim does not comply with Order 7 Rule 5. Whether that a sufficient reason do strike it out is the question here.

18. Striking out is a draconian remedy a court of law does not resort to lightly and in leisurely manner. It is only available where the pleading is so hopeless as to be incapable of injection with life by an amendment.

19. In this matter, I don't agree that failure to comply with the requirements. Under Order 7 Rule 5 is a ground enough to strike out the pleading.

20. While I totally agree that the Civil Procedure Rule 2010, became applicable to the counterclaim once the Rules came into force, I also find that the documents in support of the counter claim could be filed out anytime and failure to seek extension of time is not ground to strike out the counter-claim.

21. On whether Order 11 was applicable to the counter claim so that failure to set down the matter from pretrial direction can be seen as an action towards abuse of the court process, I do find that it does apply to the counter claim but that failure to move the court by a party should not by itself be the only reason a court refuses to hear the parties on the merits of their dispute. I decline to strike out the counter claim on the facts relied upon and Order that the application dated 3/5/2017 itself lacks merit and is therefore dismissed.

How about the Reply to defence and defence to counter claim filed on 5/4/2017? Should it be strike out for having been filed out of time

22. I have held that failure to comply with procedural requirement should not by itself be the reason for a court to drive out a party from the seat of justice. For a counter claim unlike a plaint, there is no procedure for requesting for judgment to in default of a defence. Where the plaintiff fails to file a defence to counterclaim, the remedy is for the defendant to fix the matter for formal proof and not request for judgment.

23. As there is no procedure for requesting for judgment and none having been requested and entered, I do find that nothing stood on the way of the plaintiff from filling his defence when it did. If a counter claim is a cross action then a defence can be filed at anytime, provided the counterclaimant counsel takes no step to towards formal proof. This however is an area that may encourage indolence and the Rules committee need to look at that lacuna and maybe provide what consequences would follow in the event that the plaintiff fails to file a defence to a counter claim within the period of 15 days.

24. That being my finding, I uphold that the reply to defence and defence to counter claim are property on record and the counter claim should now be progressed toward being heard on the merits. To achieve that purpose, I direct that the defendant files any witness statements and list of documents it may require to rely on at trial within 15 days from today for this matter to proceed for case conference on the 14/11/2018.

25. As both sides have succeeded and failed in equal measure, I order that the costs be in the cause.

Dated and delivered at Mombasa this 27th day of July 2018.

P.J.O. OTIENO

JUDGE