



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 215 OF 2015

PENINAH MBITHE MBITHI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 25th May 2017 and filed on 26th May 2017 was brought pursuant to the provisions of Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It sought the following orders:-

- 1. THAT the Defendant's defence filed herein be struck out with costs.**
- 2. THAT thereafter this suit be listed for hearing for assessment of damages payable to the Plaintiff by the Defendant.**
- 3. THAT the Defendant be condemned to pay the costs of this suit.**
- 4. THAT other appropriate orders be made.**

2. The Plaintiff's Written Submissions were dated 29th May 2018 and filed on 30th May 2018 while those of the Defendant were dated and filed on 27th June 2018.

3. When the matter came before the court on 25th September 2018, the parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's case was that a Ruling that was delivered on 29th September 2015 made findings against all facets of the Defendant's Defence and consequently, no contestations remained to be determined.

5. She pointed out that the said findings were based on the Defendant's own admissions and concessions and that the Defence herein only sought to delay and embarrass the speedy conclusion of the same herein.

6. She therefore urged this court to strike out the Defendant's Defence and list the matter for assessment of damages payable to her by the Defendant.

THE DEFENDANT'S CASE

7. On In response to the sad application, the Defendant's Chief Legal Officer Litigation & Prosecution, Jude Ochieng, swore a Replying Affidavit on 4th July 2017. The same was filed on 5th July 2017. He also swore a Supplementary Affidavit on 18th July 2017 that was filed on even date.

8. It pointed out that it had obtained the complete set of pleadings in **Machakos ELC No 28 of 2015 Winnie Nyambura & Others vs**

Peninah Mbuti & Another where ownership of LR No Mavoko Town Block 3/6091 (Originally LR 438 Lukenya Ranching Co-operative Society) (hereinafter referred to as “the subject property”) was pending determination in the Environment and Land Court Machakos.

9. It was its case that in view of the contestations by third parties, ownership of the subject property was a seriously contested triable issue which could only be determined through evidence.

10. It therefore urged this court to dismiss the present application.

LEGAL ANALYSIS

11. The Plaintiff submitted that since the Defendant made concessions and admissions which were captured by Onyancha J (as he then was) in his Ruling of 29th May 2015, there was nothing that was left for determination by the court save for assessment of damages payable to her by the Defendant.

12. She relied on the several cases including **Kenya Commercial Bank Ltd vs Suntra Investment Bank Ltd [2015] eKLR** and **Patel vs East Africa Cargo Handling Ltd [1974-76]** where the common thread was that a defence would be struck out if it was a mere denial, a sham and raised no triable issues.

13. On its part, the Defendant contended that Onyancha J (as he then was) delivered his Ruling despite it having intimated to him that **Machakos ELC No 28 of 2015 Winnie Nyambura & Others vs Peninah Mbuti & Another** was pending hearing and determination.

14. It argued that before a court could strike out a suit, it had to be satisfied that the defence and Replying Affidavit had not raised any triable issues. It relied on the case of **Civil Appeal No 193 of 1999 Kenya Trade Combine Ltd vs Shah** (eKLR citation not given) where it was held that a “**defence that raises triable issues does not mean that a defence must succeed**”.

15. It also referred to the Black’s Law Dictionary 9th Edition and **Gupta vs Continetal Builders Ltd [1976-80] 1 KLR 809** and **Lalji t/a Vakkep Building Contractors vs Casousel Ltd [1989] KLR** where the common theme was that a triable issue is one that is arguable in a trial.

16. In her application, the Plaintiff had sought to have the Defendant’s Defence struck out under Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules. The said Order states as follows:-

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

a. ...

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.

17. This court concluded that the Plaintiff had not proven that the Defendant’s Defence was scandalous, frivolous, vexatious or that it may prejudice, embarrass the fair trial of her action or that it was otherwise an abuse of the court process. Indeed, it was not persuaded that there was good reason to strike out the Defendant’s Defence for the reason that there appeared to be another suit that was pending at Machakos Environment and Land Court for the determination of the question of ownership of the subject property.

18. Going further, the Defendant was categorical that no party should be denied an opportunity a fair hearing as was enshrined in Article 50 of Constitution of Kenya), 2010. Article 50 of the Constitution of Kenya provides as follows:-

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

19. This means that every person has a right to be heard in a fair trial no matter how hopeless his case may be or appear to be to the opposing party. Indeed, striking out of pleadings is a draconian step and should be exercised cautiously and as a last resort.

20. This position was reiterated in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption”.

21. Accordingly, having considered the parties Written Submissions, the case law they each relied upon, this court came to the firm conclusion that this was not a suitable case where it should strike out the Defendant’s case as there was clearly a triable issue. It was best that the hearing herein proceed on merit.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that Plaintiff's Notice of Motion application dated 25th May 2017 and filed on 26th May 2017 was not merited and the is hereby dismissed with costs to the Defendant.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of November 2018

J. KAMAU

JUDGE