



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 11 OF 2016

BETWEEN

COPANA LIMITEDPLAINTIFF

AND

OSIENALA (FRIENDS OF LAKE VICTORIA)1ST DEFENDANT

DR FELIX ONYANGO OBIERO ONG'ANG'A 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 21st October 2016, the plaintiff moved the court, *inter alia*, under **Order 2 rule 15(1),(b), (c) and (d)** for an order that the 1st and 2nd defendants' statement of defence dated and filed on 31st May 2016 be struck out and judgment entered for the plaintiff against the defendant as prayed in the plaint, or on such terms as the court may in its discretion direct.
2. In the grounds set out in the face of the application, the plaintiff averred that the statement of defence is frivolous, vexatious and an abuse of the process of court and is likely to delay or prejudice the fair and expeditious disposal of the matter.
3. The application is also supported by the affidavit of Johanes Akelo Omboto, a director of the plaintiff ("Copana"), sworn on 24th October 2016. He adopted the contents of the plaint and deponed that the defendants are owe Copana Kshs. 9,500,000/- being the balance of Kshs. 14,500,000/- due as refund of money paid to the defendants representing its proposed shareholding in a joint venture promoted by the defendants.
4. The facts giving rise to this suit are not disputed. According to the plaint, the 2nd defendant ("Dr Ong'ang'a"), the Executive Director of the 1st Defendant, a Non-Governmental Organisation ("Osienala") approached Copana in early 2014 with a proposal to establish a television station to be known as Lake Victoria Television ("LVTV") which was at the time registered as a business name under the **Registration of Business Names Act (Chapter 499 of the Laws of Kenya)**. LVTV was to be incorporated as a limited liability company to be known as Lake Victoria Television Limited ("LVTV Ltd") with an authorized share capital of Kshs. 40,000,000/- made up of Kshs. 20/- each. To effect the joint venture Copana and Osienala entered into Memorandum of Understanding dated 10th February 2014 under which Copana accepted to purchase 300,000 ordinary shares valued at Kshs. 6,000,000/- being 15% of the shared of LVTV Ltd (in formation). It was agreed that LVTV Ltd would be sooner incorporated and that Copana would be issued with a share certificate for the shares purchased and that it would be a director. Copana paid Kshs. 6,000,000/- on 5th February 2014 and further invested Kshs.

6,500,000/- and Kshs. 2,000,000/- on 2nd April 2014 and 5th August 2014 respectively bringing the total aggregate investment to Kshs. 14,500,000/.

5. Copana's case is that the investment did not materialize and because of the misrepresentation by the defendants, it decided to rescind the Memorandum of Understanding. By a letter dated 28th January 2015, it demanded the money it had paid to the Osienala with interest thereon. Osienala refunded Kshs. 3,000,000/- on 14th July 2015, Kshs. 1,000,000/- on 13th August 2015 and Kshs. 1,000,000/- on 16th September 2015 leaving a balance of Kshs. 9,500,000.00 which forms the basis of the claim together with interest and costs.

6. In their statement of defence dated 31st May 2013, the defendants admit the Memorandum of Understanding signed between Osienala and Copana but deny making any false representation to Copana about the viability of the investment. They also deny that LVTV Ltd would be incorporated within the stipulated period as the incorporation of the company was in the hands of a third-party lawyer which fact was well known to Copana which was represented on Board of Directors which discussed the matter.

7. The defendants further averred that the money paid by Copana was put towards operational costs of the proposed television station. They contended that operations at the television station were ground to a halt because equipment worth about Kshs. 4,000,000/- was stolen from its premises. They further contended that the policy environment occasioned by digital migration was uncertain making it difficult to start operations.

8. The defendants argued that the performance of the contract was frustrated and Copana, being a member of the Board of Directors of LVTV Ltd (in formation), acquiesced to the delay. The defendants submitted that the Memorandum of Understanding did not confer on Copana the power to unilaterally alter the agreement to claim interest.

9. It well established the power to strike out a defence is draconian and must be exercised with circumspection. This principle was outlined in ***DT Dobie & Company (Kenya)Ltd v Muchina [1982]KLR*** by Madan JA., who stated:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.

10. Where the statement of defence raises a bona fide triable issue, then the defendant must be allowed to defend the suit. In ***Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & another [2009] eKLR***, the Court of Appeal observed that, "***It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.***"

11. From the pleadings, the following matters are not in dispute;

- Osienala and Copana entered into a Memorandum of Understanding dated 10th February 2014.
- In consideration for shares in the proposed LVTV Ltd (in formation), Osienala received a sum of Kshs. 14,500,000/- from Copana.
- On or about 27th January 2015, Copana issued a notice to rescind the agreement.
- Osienala refunded Copana Kshs. 5,000,000/- it had paid for the purchase of shares.

12. From the undisputed facts, it is not difficult to conclude that Osienala's defence does not raise any triable issues. Although counsel for the defendants argued that the Memorandum of Understanding did not have a rescission clause, Clause 9 thereof states as follows:

9. That if OSIENALA shall for any lawful cause be unable to incorporate Lake Victoria Television

Limited then in such event it shall refund to the purchase on demand the sum hereby paid to it without interest.

13. Even if I were to accept, as the respondents argue, that the contract was frustrated, Osienala agreed to refund Copana leaving a balance of Kshs. 9,500,000/-. In other words, Osienala accepted that it was obliged to refund the Copana in terms of Clause 9 of the Memorandum of Understanding and it admitted as much by making part-payment. I therefore find that Osienala has no defence against the claim by Copana in respect of the principal sum.

14. The issue of interest is dealt with by Clause 9 of the Memorandum of Understanding which is clear that the sum due on refund is to be paid without interest. In light of the clear provision of the contract, whether the Copana is entitled to interest, “*on a reducing balance basis from 05.02.2014 until payment in full*” is a triable issue.

15. Finally, the Memorandum of Understanding between Osienala and Copana did not implicate Dr Ong’ang’a in his personal capacity. His liability can only be established if he is guilty of material misrepresentation as pleaded in the plaint. Since the Memorandum of Understanding is clear, such misrepresentation can only be established by testimony and other evidence. In other words, whether Dr Ong’ang’a is liable to refund the money to Copana is a triable issue.

16. Following the findings I have made above, the Notice of Motion dated 21st October 2016 is allowed on the following terms;

(a) The statement of defence is struck out only to the extent of the 1st defendant and judgment is entered for the plaintiff against the 1st defendant for the sum of Kshs. 9,500,000/- only.

(b) The cost of the application shall abide by the suit.

DATED and DELIVERED at KISUMU this 31st day of January 2017.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by Otieno Ragot & Company Advocates for the plaintiff/ applicant.

Mr Achura instructed by Amondi and Company Advocates for the defendant.