



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 747 OF 2009**

**MILENIUM CHUMA LIMITED .....PLAINTIFF**

**VERSUS**

**PLATINUM STEEL LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed this Notice of Motion Application dated 10<sup>th</sup> June 2016, seeking for Orders that, judgment be entered against the Defendant as prayed for in the Plaint, and the Court be pleased to grant such further Orders or directions as it may deem fit and just. The costs of the Application be borne by the Defendant/Respondent.

2. The Application is brought pursuant to Order 2 Rule 15(1) of the Civil Procedure Rules Section 1A, 1B, 3, and 3A of the Civil Procedure Act, and all the enabling provisions of the law. It is based on the grounds that, the claim is for a liquidated amount and agreed interest. That the defence filed is frivolous, vexatious, a bare denial, general traversal, and does not raise any triable issues to warrant a full trial and it is intended to delay the Plaintiff from realizing the dues, justly owed to it. The Defendant is truly indebted to the Plaintiff in the sum of Kshs. 7,614,049.74 and therefore the defence is an abuse of the Court process.

3. The Application was served upon the Defendant/Respondent but there was no response thereto. The Parties then agreed to dispose of the same by filing written submissions. The Plaintiff filed their submissions but the Defendant did not file any. The Plaintiff submitted that, the overriding objective of the Civil Procedure Act is intended to facilitate just and expeditious disposal of cases. That, the statement of defence herein dated 27<sup>th</sup> May 2010, consists of mere denials, and does not address the reason why the money claimed does not owe. That paragraph 2, 3, and 4 of the statement of the defence consists of generalized statements of traversal requiring strict proof of the Plaintiff's claim, as stated under paragraph 3, 4, and 5 of the plaint. Reliance was laid on the case of **George P.B. Ogendo Vs James Nandao & 4 others (2006) eKLR**, to submit that, the statement of defence herein is inconceivably vague, hopeless, unarguable and leaves the Plaintiff in ambivalence as to what defence is being pleaded by the Defendant.

4. The Applicant further submitted that, Defendant has not shown or even made an effort or attempt ***“to show why the sums, as contented by the Plaintiff do not owe”***. That an evasive and vague defence will normally be struck out for want of seriousness, as it tends to annoy. Reference was made to the case of **George B.P. Ogendo VS James Nandasa & 4 others (supra)** and also Orders 2, Rule 15 of the Civil Procedure Rules, 2010. The Court was invited to rely on the pleadings, to determine the Application, since Affidavit evidence is not required in such an Application.

5. I have considered the Application, the grounds thereto, the Affidavit in support and the submissions by the Applicant. I find that, the Application is premised on the provisions of Order 2, Rule 15(1) of the Civil Procedure Rules, 2010. For ease of reference I shall reproduce the same. It 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***

***(a) It discloses no reasonable cause of action or defence in law; or***

***(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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***

6. In this case the Applicant has cited Order 2, Rule 15 (1) of the Civil Procedure Rules, 2010, and has relied on it wholly. An Application for striking out pleadings brought under Order 2 Rule 15 (1) (a), does not require evidence be adduced. Order 2, Rule 15 (2) clearly states that:

***“No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made”***

7. In deed the Applicant was rife to this procedural requirements and submitted that:

***“Order 2, Rule 15 of the Civil Procedure Rules, 2010 does not allow the parties herein to produce any evidence in application such as this one. The court should therefore only proceed on the pleadings as filed to arrive at its determination. These include the plaint and the defence as filed”.***

8. To the contrary, Order 2, Rule 15 (1) (b), (c) and (d) requires evidence be offered. Thus, an Applicant cannot rely on Order 2, Rule 15 (1) (b) (c) (d) and succeed without offering evidence for the orders it seeks.

9. However, the Applicant has relied on grounds that fall under Order 2, Rule 15 (a), (b) (c) and (d) and which require evidence. He avers that:

***“The claim is for a liquidated amount and agreed interest. The defence filed is frivolous, vexatious, a bare denial, general traversal, and does not raise any triable issues to warrant a full trial. It intended to delay the plaintiff from realizing the dues, justly owed to it, yet the Defendant is truly indebted to the plaintiff in the sum of Kenya Shillings 7,614,049.74.00. It is therefore an abuse of the court process”.***

10. As held in the case of *Olympic Escort International Company Ltd & 2 others vs. Perminder Singh Sendhu & Another (2009) eKLR*, it is inappropriate to combine ***“two prayers one which requires evidence before the decision is made and one that does not.”*** The Court held that:

***“In my view, prejudice must be guarded, and it will be very difficult for the Court to consider other grounds based on the evidence produced then disabuse itself of that evidence when considering the grounds of disclosing no reasonable cause of action under Rule 15 (1) (a).”***

11. As the provisions of Order 2, Rule 15 (2) of Civil Procedure Rules, 2010 are capped in mandatory form, an Application that cites all grounds thereunder, some that require evidence and others which do not require evidence, is fatally defective and susceptible to striking out.

12. Although provisions of Article 159 of the Constitution of Kenya, 2010 requires that, the Court decide

matters without due regard to technicalities, the issue herein, is not a technical issue. It is a serious issue of procedural requirement of the law.

13. In that regard, I find that the Notice of Motion Application herein dated 10<sup>th</sup> June 2016 is fatally defective, incurable and therefore I strike it out with no costs. In that case, I shall not delve into the determination of the other issues raised therein, they shall await their day in Court.

14. Those then are the orders of the Court.

*Dated, signed and delivered this 23<sup>rd</sup> Day of March 2017 at Nairobi*

**G.L NZIOKA**

**JUDGE**

**Ruling Read in open Court in the presence of:**

Mr. Nganda for Plaintiff/Applicant

No Appearance for Defendant/Respondent

Teresia - Court Assistant