



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 293 OF 2015

MILICONS LIMITED.....PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....DEFENDANT

RULING

1. By its application dated 28th November 2016 the defendant is asking the court to direct the plaintiff to amend the plaint, by deleting paragraph 15.
2. The basis for that application is that the paragraph in question was scandalous and sought to deliberately portray the defendant as a person who was acting in bad faith.
3. It is the view of the defendant that the said pleading was prejudicial to its reputation before the court.
4. Paragraph 15 reads as follows;

“In addition, the Project Architects, on the instructions of the Defendant, failed to execute the Final Accounts prepared by the Quantity Surveyor after completion of the construction project which would have allowed the plaintiff to hand over possession of the completed buildings to the Defendant”.

5. When canvassing the application, the defendant submitted that Order 2 Rule 15 of the Civil Procedure Rules contemplated the amendment of pleadings through an order for the striking out of pleadings which were scandalous, frivolous or vexatious. The said rule provides as follows;

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground.....”

6. Whilst it is correct to state that that rule empowers the court to strike out pleadings, it would not be right to make reference to the amendment of pleadings, through striking out. The rule expressly gives powers to the court to order that a pleading be struck out **OR** that a pleading be amended.
7. But the fate of this application is not hinged on the question of jurisdiction, as the court is clothed with the requisite mandate to determine whether or not to strike out the pleading in issue.
8. The defendant’s reason for seeking the striking out is that paragraph 15 of the Plaint was scandalous as

it portrayed the applicant as acting in bad faith, and is thus prejudicial to the reputation of the applicant.

9. The applicant submitted that the plaintiff did not have any control or oversight in the execution of the Final Accounts which were prepared by the Quantity Surveyor after the completion of the construction of the project.

10. Therefore, when the plaintiff alleges that the applicant had deliberately instructed the Project Architects to withhold the execution of the Final Accounts, with the intention of depriving the plaintiff the payment due to it, the applicant complains that that portrayed it in bad light.

11. The defendant's view was that the pleading in contention was deliberately worded so that it could malign the defendant's name. That is particularly so, when, as the defendant has pointed out, the Employer did not have any role in the execution of the Final Account.

12. As far as the defendant was concerned, there was a need for the Quantity Surveyor, the Contractor and the Architect to reach an agreement. And the defendant's further understanding was that the Project Architect had already discharged its obligation, when it provided the plaintiff with a "Draft Copy" of the Final Account.

13. The plaintiff had already filed its Bundle of Documents in court. The defendant pointed out that there was nothing contained in all the plaintiff's documents, or even in the Witness Statements which show that the defendant had influenced the Project Architect.

14. It was for that reason that the defendant asked the court to strike out the pleadings, because it served no other purpose apart from occasioning prejudice to the defendant.

15. In determining the application I find guidance from the following words of Madan J.A (*as he then was*), when he dealt with an application for the dismissal of a suit on the grounds that it did not disclose a reasonable cause of action or because it was otherwise an abuse of the process of the court;

"At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial...."

- In **D.T. DOBIE & COMPANY KENYA LTD Vs MUCHINA [1982] K L R 1.**

16. Although the application before is for the striking out of only one paragraph of the plaintiff, I hold the view that the words of Madan J.A (*above*) are fully applicable to it.

17. From the submissions of the defendant, the court is already being invited to delve into both the Witness Statements and the Bundle of Documents which will constitute the plaintiff's evidence at the trial.

18. The defendant says that once the court gives due consideration to the said evidence, it will be left with no alternative but to conclude that the averments in paragraph 15 of the plaintiff have no foundation.

19. Whilst it is possible that the plaintiff may ultimately fail to provide sufficient evidence to prove its assertions, that cannot be the basis for striking out the said assertions at this stage.

20. The onus of proof rests upon the party who has made any allegation in its pleadings.

21. Until the court makes a finding based on all the evidence provided, any assertion or allegation contained in the pleadings remain nothing more than that. Therefore, such assertions or allegations cannot prejudice the person against whom they have been made, if that person is a party to the suit.

22. It may be a whole new ball-game if the allegations were directed against a person who was not a party, and who may therefore never have an opportunity to respond.

23. In this case the defence has provided a written answer to the assertions in issue.

24. The applicant will have an opportunity, at the trial, to challenge the assertions further. And the plaintiff will have the opportunity to lead evidence to prove its assertions.

25. If, as the defendant says, there was no basis for those allegations, the court would so determine, after all the evidence tendered had been given due consideration.

26. Meanwhile, I find that the matters pleaded are neither indecent nor offensive, in themselves.

27. I also find that the pleading is relevant as it seeks to suggest the reason why the plaintiff considers the defendant liable.

28. Whether or not the plaintiff's said assertions will be proved will be determined when all the evidence which will have been produced, is analysed and assessed.

29. In conclusion, the application dated 28th November 2016 is unsuccessful. It is thus dismissed, with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mbugua for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.