



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 260 OF 2015
SUBATI FLOWERS LIMITED.....PLAINTIFF
VERSUS
SUNNY DHANJAL.....DEFENDANT
RULING

[1] The Notice of Motion that is the subject of this ruling is dated **18 September 2015**. That application was filed by the Plaintiff, **Subati Flowers Limited**, pursuant to **Sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 2 Rule 15(1)(b), (c) and (d), Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that the Defendant's Defence filed on **20 July 2015** be struck out and judgment be entered for the Plaintiff as prayed for in the Plaintiff; and that the Defendant be ordered to bear the costs of the application as well as the suit.

[2] The application was predicated on the grounds that the Defence is a sham and a bare denial, and that it is otherwise frivolous and vexatious, since the Defendant had, by his actions admitted his indebtedness to the Plaintiff; and that the continued existence of the Defence herein is an abuse of the court process, and will unnecessarily delay the fair trial of the Plaintiff's action. The application was supported by the affidavit annexed thereto, sworn by **Ravi Patel**, the Director of the Plaintiff company. The Plaintiff's contention, basically, is that by an agreement dated **6 November 2013**, it advanced to the Defendant upon his request, a friendly loan in the sum of **Kshs. 12,000,000/=** through the account of **Spraymaster Limited**; which loan was to be repaid within 3 months together with interest of **Kshs. 450,000**, failing which the unpaid sum would attract interest at the rate of 20% per annum.

[3] It was further the contention of the Plaintiff that in a bid to pay the loan together with the accrued interest, the Defendant issued to the Plaintiff **Cheques Numbers 000597-00601**, all dated **29 October, 2014** and **Cheques Numbers 000602-000612** all dated **31 October, 2014** drawn on **Account Number [particulars withheld]** held at the Yaya Centre Branch of the **Standard Chartered Bank (Kenya) Limited**. It was averred that the aforesaid cheques were accompanied by a note on the letterhead of **Spraymaster Limited** dated **25 October 2014** addressed to the deponent, in which the Defendant admitted liability and signed the same in his own name as **M.S. Dhanjal**. However, the cheques were all returned unpaid upon presentation with the remarks "**insufficient funds - Refer to drawer**" thereby causing the Plaintiff to incur charges of **Kshs. 4,325/=** on account of the dishonour. In the foregoing circumstances, it was the contention of the Plaintiff that the Defendant's Defence is not good enough as it does not raise any triable issues.

[4] In the written submissions filed herein on behalf of the Plaintiff, the Court was urged to take note that the Defendant had not denied having issued the cheques to the Plaintiff, or his connection with **Spraymaster Limited**; or even that the proceeds of the friendly loan was requested for by the Defendant and granted to him through the bank account of **Spraymaster Limited**. Counsel for the Plaintiff relied on the case of **Choitram vs Nazari [1984] KLR 328** for the proposition that admissions need not be in the pleadings; and that they may be oral, or in correspondence or even in documents which are admitted.

[5] In respect of the dishonoured cheques, the Plaintiff relied on the case of **Equitorial Commercial Bank vs. Wilfred Nyasim Oroko [2015] eKLR** to support the argument that the Defendant having failed to demonstrate why the Plaintiff is not entitled to judgment upon the dishonoured cheques, the Defence cannot be anything but a sham and therefore ought to be struck out with costs. It was further sought that, in the alternative, judgment be entered for the Plaintiff as prayed for in the Plaint on the basis of the express admission by the Defendant as per the chit dated **25 October 2014**.

[6] The Defendant opposed the application vide the Replying Affidavit of **Dhanjal Manjeet Singh**, sworn on **22 March 2016**, contending that the Defence raises fundamental questions of law in respect of the legality of the contract that is the subject of this suit. Thus, some of the issues flagged up in the Defence for the Court's determination are:

[a] The validity of the contract; and whether it was signed by the Directors of **Spraymaster Limited** under seal of the Plaintiff company;

[b] Whether there was authorization by the Board of **Spraymaster Limited** to incur the liability,

[c] Whether or not the contract is unconscionable.

[7] Counsel for the Defendant amplified the foregoing averments in the written submissions filed herein on **13 March 2017** and urged the Court to rely on the principles set out in the case of **Saudi Arabian Airlines Corporation vs. Sean Express Services Limited [2014] eKLR**, namely: that the Court should aim at sustaining rather than terminating a suit; that to strike out a pleading should be the last resort as it would be tantamount to driving a party away from the judgment seat; and that even one triable issue would be sufficient to proceed to hearing for. The case of **Kenya Commercial Bank Limited vs Blue Shield Freighters Limited [2014] eKLR** was also relied on by the Plaintiff in support of the foregoing arguments. It was further the contention of the Defendant that the document sought to be relied upon as proof of admission of debt, is disputed, and in respect thereof, the Defendant pleads the doctrine of *Non est Factum*. The Court was accordingly urged to dismiss the Plaintiff's application dated **18 September 2015** with costs.

[8] **Order 2 Rule 15(1) of the Civil Procedure Rules**, pursuant to which the application has been brought provides that:

At any stage of the proceedings the Court may order to be struck out or amended any pleadings 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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[9] And in the case of **D.T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR 1**, the principle enunciated thereby to guide the Courts in the exercise of discretion in similar situations is this:

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being 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 as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way."

[10] Accordingly, the key issue for my determination is whether, on the basis of the evidence availed herein, it can be said that the Defence is scandalous, frivolous or vexatious; or merely intended to prejudice, embarrass or delay the finalization of the suit; or simply put, whether the Defence discloses any triable issues, granted that the claim is for a liquidated sum on the foot of dishonoured cheques.

[11] In the case of **Trust Bank Limited vs Amin Company Ltd & Another [2000] KLR 164**, it was held that;

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense... A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action."

[12] The Plaintiff, in addition to exhibiting the Agreement aforementioned, exhibited images of the dishonoured cheques and a bank statement confirming that on **6 November** a sum of **Kshs. 12,000,000** was transferred from the account of the Plaintiff **No. 1122857047** at Sarit Centre to the account of **Spraymaster Limited** at the instance of the Defendant. The note dated **25 October 2014** further shows that the Defendant, with the complements of **Spraymaster Limited**, forwarded the aforesaid cheques in repayment, thanked the Plaintiff for the financial assistance and apologized for the delay in repayment. The said cheques were drawn against the Defendant's own account at **Standard Chartered Bank, Yaya Centere Branch, Nairobi** and images thereof and the account statements presented herein clearly show that the same were returned unpaid due to insufficient funds; and that the Plaintiff was penalized for the dishonour by its bankers.

[13] In his Defence to the claim, the Defendant averred thus in paragraph 3 thereof:

"...the Defendant denies having entered into any contract with the Plaintiff. In the ALTERNATIVE and WITHOUT PREJUDICE to the foregoing, the Defendant avers that if any contract was entered into, which is not admitted, then such contract was resultant of an UNCONSCIONABLE dealing and/or conduct by the Plaintiff wherefore the terms of the alleged contract were extremely unjust, or overwhelmingly one-sided in favour of the Plaintiff."

The same style is reflected in paragraph 4 of the Defence, and it is for good measure that in **George P.B. Ogendo vs James Nandasa & 4 Others [2006] eKLR**, the viewpoint was expressed that:

"...an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded will normally be struck out on the grounds that it is wanting in seriousness and tends to annoy."

[14] The Defence filed herein is so replete with such vague and evasive averments that a conclusion that it is a vexatious pleading is unavoidable. Attempts were also made by the Defendant to obfuscate the issues by bringing in the entity, **Spraymaster Limited** to buttress the contention that authorization by the Board of Directors of the said company was a pre-requisite for the valid execution by the Defendant of the said contract. It is however manifest from the Plaintiff and the documents filed in support thereof that this was a contract between the Plaintiff and the Defendant, **Sunny Dhanjal**, in his personal capacity for

which the Defendant issued his own personal cheques in repayment; which cheques were subsequently dishonoured on presentation. Copies of the cheques as well as images thereof after the same were dishonoured have been exhibited herein. The cheques had been accompanied with a note dated **25 October 2014** from the Defendant to the following effect:

"Dear Naren/Ravi

Enclosed kindly find payment as per my telephone conversation yesterday. Once again thank you for your assistance when I needed. My apologies for the delay.

Regards

M.S. DHANJAL

[15] Whereas it is noted that the name on the cheques is slightly different from the name in the Agreement and the suit herein, the Plaintiff averred in the supporting affidavit that "Sunny" is the nickname of **Mr. Dhanjal Manjit Singh**, as admitted in paragraph 2 of the Defence and by necessary implication, in the Replying Affidavit. That being the case, it is presumed, by dint of **Section 30** of the **Bills of Exchange Act, Chapter 27** of the **Laws of Kenya**, that the cheques were issued for value. That provision reads:

"(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course..."

[16] Accordingly, it is not sufficient for the Defendant to evasively deny liability, a point well explicated in **Mugunga General Stores vs. Pepco Distributors Ltd [1986-89] EA 334**, thus:

"First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

[17] And in **Hassanah Issa & Co –vs-Jeraj Produce Store [1967]EA 55**, the Court of Appeal for Eastern Africa while dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is the equivalent of our Section 30 of the Bills of Exchange Act, observed that:

"...in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque...The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled."

[18] In the light of the foregoing, it is my considered finding that the Defence filed herein is frivolous and vexatious and is merely intended to delay the finalization of this matter. Accordingly, the same is hereby struck out as prayed in Notice of Motion dated **18 September 2015** and judgment is hereby entered in the Plaintiff's favour as prayed for in the Plaint for:

[a] The sum of Kshs. 14,494,235/=.

[b] Interest at 20% per annum from 11 February 2015 until payment in full.

[c] Costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE