**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 528 OF 2010**

**LESLIE J. MILLS.....PLAINTIFF**

**VERSUS**

**JAMES MURITU.....1ST DEFENDANT**

**J M MURITU CONSTRUCTION COMPANY LIMITED....2ND DEFENDANT**

**BY WAY OF COUNTER CLAIM**

**JAMES MURITU.....1ST PLAINTIFF**

**J M MURITU CONSTRUCTION COMPANY LIMITED.....2ND PLAINTIFF**

**VERSUS**

**LESLIE J. MILLS.....1ST DEFENDANT**

**REDWORTH LIMITED.....2ND DEFENDANT**

**HIGHTON REEDWORTH LIMITED.....3RD DEFENDANT**

**CHARLES KAMAU.....4TH DEFENDANT**

**R U L I N G**

By plaint dated 1st November, 2010 the Plaintiff Lesli J Mills sued James Muritu (1st defendant) and J M Construction Ltd (2nd Defendant) seeking: -

***"a) A declaration that the Plaintiff does not owe the Defendants any amount of money.***

***b) A return of the Plaintiff's cheque No. 000007 dated the 10th March, 2010."***

The prayers are premised on the claim that the Plaintiff was developing a project known as Doctors Plaza on L. R. No. 209/18/74 Nairobi along Ralpha Bauche Road and the Defendants desired to be appointed Contractor of the project. The Plaintiff through his company Reedworth Ltd and Highton Reedworth Limited received a sum of USD 25000 from 2nd Defendant being payment for completion of the Revised

Planning Agreement which payment was acknowledged on 20th April, 2009. The Defendants were not awarded the contract and lodged at Muthangari Police Station a complaint of obtaining money by false pretence by the Plaintiff. The Plaintiff was arrested and under duress forced to admit the debt and issued a cheque to the Defendant for the same. It is this arrest and incarceration at the police station that forms the basis of his claim and prayers.

The Defendant filed an amended statement of defence and counter claim against Leslie J Mills (1st Defendant), Reedworth Ltd (2nd Defendant), Highton Reedworth Limited (3rd Defendant) and Charles Kamau seeking judgment against the plaintiffs for an order to refund of USD 31500 (Kshs.2,583,000/-) and order for payment of USD 15000 (Kshs.1,230,000) being losses incurred and interest.

In the 4th Defendant's statement of defence to the counterclaim, the 4th Defendant Charles Kamau avers that he denies the contents of paragraph 11B of the counterclaim and in particular denies ever being an agent of the 1st Defendant and puts the 1st Plaintiff to strict proof. That Paragraph VIII B of the counterclaim is also denied. He further avers that save to what is admitted, he denies all the averments contained in the counterclaim and in particular denies having received any monies form any of the parties herein or being liable to any of them further that the counter claim discloses no reasonable cause of action and will apply that the same be struck out summarily.

This is the defence the precipiting the Notice of Motion dated 24th January, 2017 by the Applicant brought under order 2 Rule 15(1) (2) Civil Procedure Rules seeking orders that: -

> ***1) The Defence to counterclaim filed by the 4th Defendant to the Counterclaim be struck out for failing to disclose a reasonable defence.***
>
> ***2) In the result, judgment be entered for the 1st and 2nd Plaintiffs in the counterclaim against the 4th Defendant in the counterclaim as prayed in the counterclaim dated 14th November, 2012.***
>
> ***3) Costs of this application be borne by the 4th Defendant.***

The application is supported by the supporting affidavit of Kenneth Kirimi sworn on 1st November, 2016. He depones that the Applicants filed their counterclaim dated 14th November, 2012 on 15th November, 2012 and served upon the 4th Respondent. That the said defence amounts to mere denials as it raises no triable issue and is only calculated at delaying an expeditious determination of the counterclaim which is an abuse of the court process.

He further depones that the 4th Respondent jointly with others, owes the applicants sum of USD31500/- and the 4th Respondent defence should be struck out and judgment thereby entered against 4th Respondent as prayed in the counterclaim and that it is in the interests of fairness and justice that the defence is truck out and the orders sought herein are granted.

The application is opposed by the 4th Defendant Charles Kamau who filed a replying affidavit sworn on 10th day of November, 2016 in which he depones that his defence to counterclaim dated 27th July, 2016 clearly raises triable issues which issues can only be adjudicated at a full trial with the calling of and examination of named witnesses and production of documents if any in support of the counterclaim. That no documents or witness statements have been filed in support of the counterclaim and no prima facie case has been made out to warrant summary judgment as prayed for in the motion. That the burden of proof falls upon the Plaintiffs to the counterclaim to show in what ways he is indebted to them which burden has not been discharged and can only be adjudicated at a full hearing.

He depones further that as he had stated in his defence to counterclaim, he was never an agent of the Plaintiff nor did he never received any money on their behalf and indeed no evidence has been adduced in support of the counter claim. That striking out a plaint is a drastic measure which should only be done in

very plain and obvious cases as has been stated in the case law contained in his list of authorities.

By consent, the application was to be disposed of by way of written submissions. Both parties filed their respective submissions M/s Maina for the Applicant/Plaintiff in the counter-claim submitted that the 4th Defendant in the counterclaim defence is a general denial and raises no triable issues. Counsel submits that the Respondents replying affidavit only refers to triable issues having been raised without stating what they were. Counsel urged this court to be guided by the decision in **KCB Vs Suntra Investment Bank Ltd (2015) eKLR** and allow the application. Mr. Kabaru advocate for the Respondent relied on the replying affidavit and the salient averments which have been stated above.

The main averments in the counterclaim is that the Plaintiff in the counterclaim made a cash advance to 1st Defendant of USD 2500 (Ksh.2050000/-) to secure the contract. The 1st Defendant in the counter claim is Leslie J Mills. In respect of 4th Defendant the Plaintiff/Applicant in the counterclaim avers: -

> ***"VIII B. The Plaintiff further aver that on this background of events they requested all the Defendants for the recovery of their earlier advanced sum of USD31,500 (Ksh.2,583,000/-) and even managed to receive a sum of Ksh.500,000/-) from the Defendants through the 4th Defendant herein who was acting as an agent of the 1st Defendant."***

This is the claim that the 4th Defendant in the counterclaim is denying in his defence to the counterclaim and in particular paragraph 3 of the defence and counterclaim where he depones: -

> ***"The 4th Defendant denies the contents of paragraph 11B of the counter claim and in particular denies ever being an agent of 1st Defendant and puts the 1st Plaintiff to strict proof."***

The power of the court to strike out any pleading is donated by Order 2 Rule 15 of Civil Procedure Rules which provides: -

> ***"O. 2 Rule 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,***
>
> ***2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.***
>
> ***3. So far as applicable this rule shall apply to an originating summons and a petition."***

Order 2 Rule 15 has found expression in many decisions of the court and the guiding principles now well settled. In **Blue Shield Insurance Company Ltd Vs Joseph Mboya Oguttu eKLR** the court stated: -

> ***"The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan J. A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd Vs Muchina (1982) KLR 1 discussed the issue at length***

***and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -***

***'The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.'***

***We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L. J in the case of Cail Zeiss Stiftung Vs Ranjuer & Leeler Ltd and Others (No. 3) (1970) ChpD 506, where the Lord Justice said: -***

***'The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.'***

***We may add that like Madan J. A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."***

The constitution principles behind the requirement that this order of striking out should be used sparingly is that every party who is genuinely aggrieved should not be delayed by a process that the opponent is only using to delay the outcome of a suit. The second principle is that each party should as much as possible have his day in court and should not unnecessarily be shut out the seat of justice unless that his case is so hopeless that it does not warrant the courts time. This was expounded by the court in **Saudi Arabia Airlines Corporation Vs Premium Petroleum Company Limited** when the court stated: -

***"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every court of law should pay homage to its core duty of serving substantive justice in any judicial proceedings before it, which explains the reasoning of Madan J. A. in the famous DT Dobie case that the court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is draconian act comparable only to the proverbial drawing of the "Sword of the Damocles". Therefore, the power to strike out a suit or defence should be used sparingly and only to the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in Patel Vs E. A. CARGO HANDLING SERVICES LTD [1974] E. A. 75 AT PAGE 76 (Duffus P) that "… a triable issue …. Is an issue which raises a prima facie defence and which should go to trial for adjudication?" Therefore, on applying the test, a defence which is a sham should be struck out straight away."***

In this suit the applicant submits that the 4th Defendant/Respondent Charles Kamau acted as an agent of the 1st Defendant J Mills, in the transaction. This is denied by the 4th Defendant/Respondent in his defence. Agency is a fact which must be proved or in appropriate cases inferred. This in my view is an

issue that can be determined by evidence and is, therefore, a triable issue in respect of the 4th Defendant/Respondent. His defence cannot in my view be said to be a sham as to persuade this court to strike it out and enter judgment for the Plaintiff. In the premises, therefore, I do not find merit in this application and dismiss it with costs.

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

**…….**

**S N RIECHI**

**JUDGE**