



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 128 OF 2014

TELKOM KENYA LIMITED.....PLAINTIFF

VERSUS

CHASE BANK LIMITED.....1ST DEFENDANT

VISION NETWORKS SOLUTIONS AFRICA LIMITED.....2ND DEFENDANT

RULING

1. The application before the court is the Plaintiff's Notice of Motion dated 19th June, 2015 which seeks to strike out the 1st Defendant's defence with costs and judgement be entered for the Plaintiff for Kshs. 10,000,000/= together with costs and interest. The Applicant also seeks for the costs of the application.
2. The application was based on the grounds that the 1st Defendant's defence discloses no reasonable cause of action or defence in law. The Applicant draws this conclusion from the contention that the 1st Defendant admits at Paragraph 4 of the Defence to having issued an irrevocable undertaking and guarantee to pay the Plaintiff any sum not exceeding Kshs. 10,000,000 in the event that the 2nd Defendant defaulted in its obligations. The guarantee in question is dated 24th October, 2012. The Plaintiff/applicant also alleged that the 1st Defendant admitted that it failed to pay the Plaintiff when the guarantee was called up; that further it did not pay the sums claimed under the guaranteed as it was served with a court order dated 1st August, 2013 restraining it from doing so.
3. Further to this, the Plaintiff stated that the said restraining orders had in fact lapsed and had emanated from Nairobi HCCC No. 328 of 2013 Vision Network Solutions –vs- Telkom Limited & Chase Bank Limited (herein after "HCCC No. 328 of 2013"), a fact that the 1st Defendant has not denied.
4. It was also the Plaintiff's case that the guarantee in question had not lapsed as alluded to by the 1st Defendant in paragraph 6 of its defence. The application was unsupported by an affidavit, but the supplementary affidavit of Purity Karabai Mbabu sworn on 13th July, 2015 was filed following the directions of the court on 8th July, 2015. I will analyze the same after the 1st Defendant's rebuttal.
5. The 1st Defendant filed the affidavit of Kevin Kimani, legal officer, sworn on 6th July, 2015. It was contended that the application herein was devoid of merit and that there were several triable issues that raise a reasonable defence by the 1st Defendant against the Plaintiff's claim. In line with this, it was the deponent's claim that though it issued an irrevocable undertaking and guarantee to the Plaintiff on behalf of the 2nd Defendant, the payment of the said guarantee was

- stopped through a court order obtained by the 2nd Defendant in High Court Civil Suit No. 328 of 2013.
6. That in that suit, all the parties in the instant suit are a party to the same and the matter is still pending for determination. In the circumstances, the 1st Defendant averred that it could not pay the said guarantee in breach of the court orders stopping the said payment. Further to this, the 1st Defendant added that the life and validity of the guarantee was 365 days and therefore the guarantee had lapsed on 24th October, 2013 during the subsistence of the said orders. That likewise, the said guarantee had also lapsed by the time the Plaintiff/ Applicant had called it up on 20th January, 2014. In sum, it was the 1st Defendant's argument that the issue of the validity of the guarantee and its expiry; including whether there was a court order barring the 1st Defendant from paying the Plaintiff under the guarantee was a bona fide issue for trial. The 1st Defendant therefore urged the court to dismiss the Plaintiff's application, and allow for the 1st Defendant ventilate its defence through trial.
 7. In response to the above dispositions, the Plaintiff filed the supplementary affidavit of Purity Karabai Mbabu sworn on 13th July, 2015. It was contended that both the 1st Defendant and the Plaintiff filed an application on 17th March, 2017 and 28th April, 2015 respectively, seeking to have the 2nd Defendant's suit in HCCC No. 328 of 2013 dismissed inter alia for want of service of summons. When the applications came up for hearing, the same were adjourned severally due to different reasons.
 8. However, it was deponed that a temporary injunction was issued by the court on 31st July, 2013 for 14 days, restraining the 1st Defendant from paying up on the guarantee. The same were also extended till 16th October, 2013 to allow the Plaintiff (who was the 1st Defendant in that case) to file a Replying Affidavit.
 9. The Plaintiff thereby purported that the said interim orders lapsed on 16th October, 2013 given that the court was not sitting then and no extension was granted. That further, the 1st Defendant failed to attach any court order in its affidavit in reply to prove that there was a subsisting order in HCCC No. 328 of 2013. As such the Plaintiff reiterated that there was no triable issue disclosed by the 1st Defendant's defence and urged the court to allow the application and strike out its defence.
 10. On 14th October, 2015 directions were granted to determine the motion by way of written submissions. The Plaintiff filed its submissions on 23rd October, 2015 while the 1st Defendant filed its submissions on 23rd November, 2015. I have considered the pleadings, depositions and rival submissions including the various cases cited. The issue for the court's determination is whether the 1st Defendant's Statement of Defence as filed raises no reasonable defence and is a sham to warrant the striking out as prayed by the Plaintiff.
 11. The instant Application is substantively under Order 2 Rule 15 (a) . Order 2 Rule 15 (1) donates the power to the court , in an appropriate case, to strike out any pleading on the grounds that it is "scandalous, frivolous or vexatious", or "it may prejudice, embarrass or delay the fair trial of the action", or "it is otherwise an abuse of the process of the court".
 12. Put differently, the court must be persuaded that the defence is "without substance and is fanciful", "lacking in bona fides and hopeless or offensive" and would "embarrass or delay a fair trial or misuse the court process". In the case of D.T. DOBIE & COMPANY V MUCHINA, (1982) KLR 1, Madan J.A (as he then was) eloquently expounded on the approach to be adopted in exercising the power to strike out pleadings, and I quote him at some length:

“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 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 as the court itself is not usually fully informed so as to deal with the merits [without discovery, without oral evidence tested by cross-examination in the ordinary way]. Sellers, JA [supra].

13. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.
14. If an action is explainable as a likely happening which is not plainly and obviously impossible, the

court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

15. 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 a case before it.
16. The same sentiments were expressed by Danckwerts L.J when the House of Lords considered a similar Rule in WENLOCK V MOLONEY, [1965] 2 All E.R 871 at page 874, as follows:

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action.

17. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.
18. Bearing the above in mind it is essential to note that in striking out of a pleading on the basis that it raises no reasonable cause of action or defence, no evidence is admissible. This court is therefore only mandated to make a decision based on the Plaintiff and the 1st Defendant’s defence as filed. The court has to critically analyze the nature of the Statement of Defence on record.
19. Paragraph 1, 2, and 9 are paragraphs commonly found in all statements of defence. This leaves me with Paragraph 3 to 8. The same are in response to the Plaintiff’s claim with regard to the irrevocable undertaking and guarantee to pay the Plaintiff any sum not exceeding Kshs. 10,000,000 in the event the 2nd Defendant defaulted in its obligations. The claim therefore by the Plaintiff, is in regard to the enforcement of the guarantee.
20. In paragraph 4, the 1st Defendant admits that there was the existence of a guarantee in favour of the Plaintiff, but asserted that the same was valid for only 365 days. Paragraph 5 also stated thus;

“The 1st Defendant admits the contents of paragraph 9 and 10 of the Plaintiff in as far as calling up the guarantee is concerned save to add that the sum demanded on the guarantee could not be paid as the 1st Defendant was served with a court order on 1st August 2013 restraining it from making the payments. The 1st Defendant therefore avers that it could not disobey a lawful court order”

21. Upon analysis of the above averments, it is clear that there were interim orders in force emanating from HCCC No. 328 of 2013. Both the 1st Defendant and the Plaintiff agree that the same barred the 1st Defendant from paying up the sum guaranteed to the Plaintiff. These orders were further extended by Mabeya J on 12th August, 2013 to allow Telkom Kenya Limited to file a Replying Affidavit with regard to the application by Chase Bank Limited seeking dismissal of Vision Network Solutions Africa Limited’s suit for want of prosecution.
22. The matter was set to be heard on 16th October 2013. I draw these conclusions from the attached court proceedings in Purity Karabai Mbabu’s Supplementary affidavit of 13th July 2015. The proceedings are marked as “PKM4”. However, it was the contention of the Plaintiff that on 16th October, 2013, when the matter was coming up for hearing, the said court was not sitting. Whether this is true or not, cannot be ascertained at this stage as the same would require the call of evidence.
23. I say so because the particular averments that the interim orders issued were not extended would require the production of evidence in terms of the court proceedings in HCCC No. 328 of 2013. In my view, therefore, I find that whether or not the aforesaid orders had lapsed is a subject of trial and this court should not go into the rigors of trying to establish whether the same holds any water.
24. In terms of the validity of the guarantee, the 1st Defendant pleaded as follows in paragraph 6 and

7 of its Defence;

“6. In reply to paragraph 11 of the Plaintiff, the 1st Defendant states and maintains that when the Plaintiff on 20th January, 2014 called up the guarantee, the same could not be honoured as the guarantee had already lapsed on 24th October, 2013.

7. In response to paragraph 12 and 13 of the Plaintiff, the 1st Defendant reiterates and maintains that it is not liable to any claim as it could not honour the guarantee whose life had ended by the time it was called up on 20th January, 2014 and in any event puts the Plaintiff to strict proof thereof”

25. From the foregoing averments, I find that the issue of the validity of the guarantee is triable and constitutes a prima facie defence. This is due to the fact that the 1st Defendant asserts that the said guarantee was for a period of 365 days and had already lapsed when it was called up on 20th January, 2014. I cannot dismiss this assertion by the 1st Defendant as frivolous. The same constitutes a reasonable defence and is therefore a bona fide issue for trial.

26. Whether it succeeds or not, is an issue for the trial court to determine. I therefore agree with the reasoning of the court in **OLYMPIC ESCORT INTERNATIONAL CO. LTD. & 2 others –Vs- PARMINDER SINGH SANDHU & another [2009] eKLR**, where the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”

27. In the foregoing my evaluation of the matter is that the defence on record is not without substance or fanciful. The same could only be vexatious if it was lacking in bona fides or is hopeless or offensive, but there is no firm basis laid for such conclusions. I also find that it would be an abuse of court process to deny a party to civil proceedings access to a fair ventilation of its case in accordance with the Rules. In my assessment the 1st Defendant ought to be given its day in court where it can ventilate its case in oral evidence and test the Plaintiff’s claim through cross examination before a final decision is made.

28. In the result, I order that the Plaintiff’s Notice of Motion dated 19th June, 2015 be dismissed with costs to the 1st Defendant. The matter should however be listed for hearing at the earliest date possible to expedite its conclusion.

Dated, signed and delivered in court at Nairobi this 26th day of February, 2016.

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C. KARIUKI

JUDGE