REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 28 'B' OF 2013

MICHAEL DEE ROBINSON…….…….....1ST PLAINTIFF

MICHELE ALICE ROBINSON……..……..…2ND PLAINTIFF

VERSUS

PTALLAH BUTAKI……..……...…….……..DEFENDANT

RULING

1. The defendant prays that the set of accounts he filed be *"deemed to be final and conclusive"*. In the event, he prays that the plaintiffs' suit be struck out with costs. Without prejudice to the two prayers, the defendant craves an order directing the plaintiffs to appear in court to *"clearly state their claim against the [defendant for] the court to decide whether the plaintiffs' claim is valid."*
2. The defendant has presented a notice of motion dated 14th August 2014. The background to the motion is material. The plaintiffs' suit in the main is for an order of account for the sum of Kshs 7, 788,850. The plaintiffs allege that they paid the money to the defendant to purchase land; and, to construct a house on the property known as Kitale Municipality Block 15/Kaitogos/2299. On 5th April 2012 the court ordered that the defendant do render an account. The defendant did so on 2nd October 2013. The plaintiffs did not contest the accounts or seek any directions from the court. That is why the applicant maintains that the accounts are unquestionable and conclusive.
3. In a synopsis, the defendant avers that the suit is frivolous and founded on falsehoods. He contends that in the absence of any challenge to the accounts, there is no reason to warrant continuity of the suit. He states that the claim by the plaintiffs has been overtaken by events; and, that the suit property has been transferred to third parties. The defendant avers that he continues to suffer prejudice from the litigation; and, that unless the orders are granted; the ends of justice will be defeated. Those matters are buttressed by a deposition sworn by Ptallah Butaki.
4. The motion is contested. There is a replying affidavit sworn on 24th October 2014. The plaintiffs referred to an order of court made on 5th April 2012. The court had issued a preliminary decree relating to the books of accounts. The plaintiffs aver that the defendant subsequently filed an appeal being Eldoret Civil Appeal 17 of 2012. The plaintiffs state that the defendant has not acted upon the decree or prosecuted the appeal for over one year.
5. The plaintiffs' case is that the present motion is a maneuver to defeat the plaintiffs' application to make the preliminary decree absolute. They aver that the defendant acknowledged receipt of the monies from the plaintiffs to purchase land; and, and to construct a house on the property Kitale Municipality Block 15/Kaitogos/2299. The plaintiffs thus contend that their claim is well founded.

They also challenge the validity of accounts furnished by the defendant on the grounds that they were not made by a professional accountant or auditor; and, for want of receipts or other proof of expenditure. They say the applicant has only annexed a bill of quantities. I was implored to dismiss the application.

6. Both parties have filed comprehensive submissions. Those by the defendant were filed on 19th November 2015; those by the plaintiffs on 15th January 2016. The plaintiffs had earlier filed a list of authorities on 28th September 2015. On 20th January 2016, learned counsels made brief oral submissions. I have considered the rival arguments and precedents. I have also paid heed to the notice of motion, the pleadings, and depositions.
7. There is no contest that a preliminary decree was issued pursuant to the order of 5th April 2012; and, that it was extracted and served upon the defendant. The plaintiffs then filed an application dated 9th September 2013 seeking to make the preliminary decree absolute. On 3rd October 2013, the defendant filed a replying affidavit containing a statement of accounts. On 4th June 2014, the court granted leave to the plaintiffs to file a supplementary affidavit in response to the statement of accounts. Before they could do so, the defendant lodged the present motion. Granted those circumstances, I agree that the motion is a stratagem contrived to defeat the plaintiffs' earlier application. The latter application was withdrawn on 9th July 2015.
8. The key question for determination in this motion is whether the filing of the accounts; or, failure to challenge them compromised the suit. Paraphrased, should the court accept the accounts as the *final* answer to the claims by the plaintiffs? I accept that the defendant filed a statement of accounts on 2nd October 2013. There is attached a *bill of quantities* prepared by Design Scope. From their stamp impression, they describe themselves as *architects, designers and planners*. Although the plaintiffs contend that a professional *quantity surveyor's* statement is missing, the plaintiffs have *not* filed anything to controvert the filed accounts. The plaintiffs continue to assert that a sum of Kshs 3,808,000 has not been accounted for. For reasons that will become self-evident, I cannot make a firm finding at this stage.
9. What I can say is that the filing of accounts is not in *all* cases a *final* determination of indebtedness or otherwise of a party. The court was never meant to take over the functions of a professional accountant. That is why the court has powers to issue special directions on taking of accounts under Order 20 Rules 1 and 4 of the Civil Procedure Rules 2010. See *National Bank of Kenya Limited v. Pipeplastic Samkolit (K) ltd & another* [2001] KLR 112, *Christopher Mutuku & another v CFC Stanbic Bank Limited* Nairobi, High Court Commercial case 74 of 2011 [2014] eKLR.
10. I am fortified in that finding by the nature of the order of 5th April 2012. The court ordered that the defendant do render an account for the sum of Kshs 7,788, 850; that he pays the plaintiffs the sums found due to them; that a preliminary decree do issue; that the books of accounts in which the accounts have been taken be deemed as *prima facie* evidence of the truth of the matter; and, that the plaintiffs be allowed to take objections on the accounts so rendered. Clearly, the filing of the accounts by the defendant was *subject* to objections by the plaintiffs. True, the plaintiffs slept on their rights to take such objections within a reasonable time. But it would be to turn logic onto its head to say that the filing of the contested accounts determined the entire suit.
11. It is not lost on me either that prayer (c) in the plaint sought additional reliefs for the sum of Kshs 212,500 for furniture allegedly removed from the house. There is also a pending appeal against the ruling and order of 5th April 2012. I agree with the defendant that the filing of the appeal is not a stay of the present proceedings. The appeal may also have been affected by the withdrawal of the plaintiffs' motion dated 9th September 2013. But it remains a muddled situation that could embarrass one of the courts. For reasons I mentioned earlier, I am also unable to hold that merely by filing the accounts; or, the plaintiffs having failed to challenge them, the plaintiffs' suit *ipso facto* was determined or rendered otiose.
12. The defendant prays in the alternative that the suit be struck out for being scandalous, frivolous and vexatious or an abuse of court process. Striking out a pleading or a suit is a *draconian* measure to be employed sparingly. See *Wambua v Wathome* [1968] E.A 40, *Coast Projects Ltd v M.R. Shah Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates v Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 (unreported), *Francis Ngira Batware v Ashimosi Shatabansi t/a Ashimosi Shatabansi &*

Associates Advocates and 2 others Nairobi High Court case 476 of 2009 [2013] e KLR.

13. Ideally, cases should be determined on tested evidence at a full hearing. The words of Fletcher Moulton L.J. in *Dyson v Attorney General* [1911] 1 KB 410 at 418 ring true-

> "*To my mind, it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"*

14. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited v Muchina* [1982] KLR 1 is an all-time classic. He said at page 9-

> *"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".*

15. This court is also enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do *substantial justice* to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.
16. Applying those principles here, I find that striking out the suit will defeat the ends of justice. *Prima facie*, there seems to have been a contractual relationship between the plaintiffs and an entity known as *Fruited Plains*. It is pleaded at paragraph 6 of the plaint that the defendant was one of the signatories to the accounts of *Fruited Plains*. The plaintiffs claim they paid the defendant a sum of Kshs 7, 788,850. The defendant was to purchase land; and, to construct a house on the property known as Kitale Municipality Block 15/Kaitogos/2299. When the plaintiffs visited the Republic, they were not satisfied with the utilization of the money. Like I stated, the plaintiffs still contend that a sum of Kshs 3,808,000 has not been accounted for.
17. Those are mere allegations. I blame the plaintiffs for not moving with alacrity to challenge the accounts presented by the defendant. True, there was no specific time frame set by the court. But it remained the primary obligation of the plaintiffs to prosecute the suit. However, I do not see *serious* prejudice to the defendant if the question of accounts is determined fairly. I agree that the pendency of the suit prejudices the defendant. Litigation has obvious attendant costs. But it can be remedied. And I am prepared to grant the defendant thrown away costs.
18. In the result, the defendant's notice of motion dated 14th August 2014 is without merit. It is hereby dismissed. For the reasons I aforementioned, I grant the *defendant* thrown away costs of Kshs 10,000 to be met by the *plaintiffs* within *thirty days* of today's date. Purely in the interests of justice; and, *suo moto*, I grant the plaintiffs leave to file and serve any *objection* to the accounts within *seven days* of today's date. In default, the accounts filed by the defendant shall be deemed to be conclusive and final. The parties shall appear before the court for mention for compliance on a date I shall now give. On that date, the court will grant *final* directions on the *sufficiency* of the accounts or hearing of the remainder of the suit.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of February 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Ms. Odwa for Mr. Nyairo the defendant/applicant instructed by Nyairo & Company Advocates.

No appearance for the plaintiffs/respondents.

Mr. J. Kemboi, Court clerk.