REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 300 OF 2013

PARKER HOUSE RADIO LIMITED.....PLAINTIFF

VERSUS

SONY CORPORATION JAPAN.....1ST DEFENDANT

SONY GULF FZE-DUBAI.....2ND DEFENDANT

SONY GULF FZE-NAIROBI.....3RD DEFENDANT

RULING

1. The application before the court is the 2nd and 3rd Defendant's Notice of Motion dated 21st July, 2014 which seeks to strike out paragraphs 13,35,36,37,38, 39,40,41,42,45,46,47,48 and 49 of the witness statement filed by Ahmed Mukhtar on 9th April, 2014 . The Applicants also seeks for the costs of the application.

2. The application was based on the grounds contained therein and supported by the affidavit of MunaswamyDinakaran sworn on 21st July, 2014. It was deponed that that the aforementioned paragraphs of the witness statement are inconsistent with the Amended Plaint filed by the Plaintiff and were meant to subvert the Court's attention from the real issues between the parties. It was also the contention of the Applicant's that the paragraphs contained therein make reference to matters not pleaded in the Plaint and that parties are bound by their pleadings and the Plaintiff cannot therefore introduce issues that have not been pleaded through the witness statements. As a result, it was the Applicant's contention that the witness statement as crafted was vexatious and an abuse of the court process and the court should therefore grant the prayers as sought.

3. In reply to the application, the Plaintiff filed grounds of opposition dated 15th September, 2014. The Plaintiff under the Grounds of Opposition contended that the application is untenable in law and is an attempt to usurp the powers of the Court on its powers to admit evidence, in breach of the provisions of section 42 of the Evidence Act as read with section 170 of the Evidence Act, Cap 80 of the Laws of Kenya.

4. The motion was dispensed by way of written submissions. The Plaintiff filed its submissions on 25th May, 2013 while the 2nd and 3rd Defendants filed their submissions and rejoinder to the Plaintiff's

submissions on 21st April, 2015 and27th July, 2015 respectively. I have considered the pleadings, depositions and rival submissions including the various cases cited.The issue for the court's determination is whether the 1stDefendant's Statement of Defence as filed raises no reasonable defence and is a sham to warrant the striking out as prayed by the Plaintiff.

5. The application is substantively brought 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". 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. The learned Judge stated thus :

> ***"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]. 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.***
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> ***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.***
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> ***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."***

6. The same sentiments were echoed 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. 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."***

7. Bearing the above in mind it is essential to note that in striking out of a pleading the Court is only mandated to make a decision based on the pleadings filed.However, it is of note that the matter at hand regards a witness statement filed by Ahmed Mukhtar Parkar dated 4th April, 2014. The primary purpose of a witness statement is to provide written evidence in support a party's case that will, if necessary, be used as evidence in court. The objective of witness statements has been expressed as "to improve the efficiency of trials". In an adversarial system there are carefully formulated rules for pleading and discovery to ensure that by the time of trial each party is fully prepared and no party is taken by surprise. There is an obligation upon each party to come to trial with cards upon the table. In modern parlance, there is a duty of disclosure that requires each party to articulate its case clearly and precisely and to

provide access to the materials in its possession that are relevant to the case of each party (even if they do not assist the party giving access). That is in essence, the main objective of Order 11 of the Civil Procedures Rules 2010.

8. Furthermore, in addition to the above it is my opinion that contents of a witness statement flow directly from the claims as pleaded. Put differently, a witness statement provides details and particulars of the pleaded claim. Thus, it is my finding that where a witness statement fails meet this particular function, the tenents of striking out a pleading should be applied.

9. The Applicants in this particular case contend that the subject witness statement contains matters that have not been pleaded and are thus irrelevant to the Plaintiff's claim. That a party cannot raise new claims in evidence which were not made in the Pleadings. The Plaintiff on the other hand submitted that the Applicants' application was misconceived as it was brought prematurely, given that the evidence contained therein was yet to be tested through cross examination of the witness. That further, under section 170 (1) and 42 of the Evidence Act, allows the court to determine the relevance and/admissibility of statements and/or evidence made by a party to a suit. I am however of a different opinion. The court has the discretion to strike out a statement that is all commentary and contains no real evidence that would support a claim. See the case of **JD Wetherspoon PLC v Jason Harris [2013] EWHC 1088 (Ch).**

10. To this end, the court has criticallyanalyzed the alleged offending paragraphs of the witness statement as outlined in the application. With regard to paragraph 13 the nature of the Statement of Defence on record. Paragraph 13, I see nothing wrong with this particular claim, whereby it is alleged that at the request of the 2nd Defendant, the Plaintiff opened a subsidiary in Jabel Ali- Dubai, to improve the logistics of supplying its products to Kenya. The statement is not a new claim, but merely provides particulars of the pleaded clam. However, I have examined paragraphs 35 to 49. The same contain claims to the effect that the Defendants' are involved in criminal and unethical activities, more so with regard to the importation procedures of various goods in the country. I have looked at the Amended Plaint on record and I would have to agree with the Defendants, that the same do not form part of the claim of the Plaintiff.in the case of In the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, the Court of Appeal agreed with the holding of the Nigerian case of **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002**, where **Judge Pius Aderemi J.S.C**. expressed himself, and we would readily agree, as follows;

> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

11. I am also of the above persuasion. Parties are bound by their pleadings and any evidence produced to the contrary cannot stand. In any case the allegations contained in paragraph 35 to 49 of the statement should not be ventilated in this particular case since the same are quasi criminal in nature.

12. To this end it is my finding that the evidentiary material in the aforestated paragraphs is irrelevant to the Plaintiff's claim. As such I shall partially grant prayer number 1 of the application and strike out paragraph 35 to 49 of the witness statement of Ahmed Mukhtar filed on 9th April, 2014. The cost of this application shall be in the cause.

13. It is so ordered.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE