



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISC CASE NO. 597 OF 2014**

**NATIONAL CEREALS AND PRODUCE BOARD ..... PLAINTIFF**

**VERSUS**

**HON. GIDEON MWITI IREA ..... DEFENDANT**

**RULING**

1. There are two Notice of Motion Applications before the court. The 1<sup>st</sup> motion is by the Defendant and is dated 8<sup>th</sup> May 2015 and seeks to secure the following orders.

- a) That the honourable court do strike out the plaint filed dated 15<sup>th</sup> December 2015.**
- b) That the costs of this application be provided for.**

2. The application is supported by the Defendants affidavit sworn on 8<sup>th</sup> May 2015. It is also premised on the grounds set out in the application but principally on the alleged reason that the verifying affidavit is fatally defective and cannot be cured by amendment for no authority of the deponent, Mr. John Ngetich, to execute the affidavit, is exhibited.

3. The Plaintiff filed grounds of opposition dated 4<sup>th</sup> November 2015 to this application.

4. The 2<sup>nd</sup> motion is filed by the Plaintiff on 14<sup>th</sup> August 2015. The Plaintiff seeks to secure the following orders.

- (i) That the Defendant's Statement of Defence be struck out and Judgment be entered for the Plaintiff as prayed in the Plaint.**
- (ii) That the Defendant to pay the Plaintiff costs of the suit as well as those of this application.**

5. The application is premised on the ground set out therein and is supported by the affidavit of John Ngetich sworn on 12<sup>th</sup> August 2015. The main grounds for these prayers are that the Defendant is truly indebted to the Plaintiff and that the Statement of Defence is bare, scandalous, vexatious and is solely meant to prejudice, embarrass or delay the fair and quick disposal of the suit and that the statement of defence is an abuse of the process of this court.

6. The motion is opposed by the Defendant through Grounds of Opposition filed on 21 October 2015, which grounds are same urged by the defendant in supporting his 1<sup>st</sup> said application.

7. Parties, with the leave of court, agreed to have the two applications heard and determined simultaneously. Parties also filed submissions to the two applications. However the Defendant's submissions filed herein on 1<sup>st</sup> February 2016 does not address the issues raised in the 2<sup>nd</sup> application by the Plaintiff. The submissions only address themselves to the 1<sup>st</sup> application by the Defendant.

8. I have carefully considered the two applications and the opposing affidavits and submissions of the parties. With regard to the 1<sup>st</sup> application by the Defendant for striking out the Plaintiff, the Applicant submitted that Order 4 rule 1 (7) of the Civil Procedure Rules provides that a plaint be accompanied by a Verifying Affidavit, and that Order 4 rule 1 (4) further provides that where the Plaintiff is a corporation the Verifying Affidavit shall be sworn by an officer of the company duly authorised under seal of the company to do so. The Applicant alleges that the plaint herein is not verified as required by law, and that the Verifying Affidavit filed in court on 18<sup>th</sup> November 2014 by John Ngetich does not show the authority under seal pursuant to which Mr. Ngetich had the authority to verify the plaint.

9. The issue for determination in this application is therefore whether or not the suit herein is properly verified.

10. The Applicant cited the case of Nairobi HCCC No. 609 of 2004 e KLR without giving the name of the parties, in which case the applicant quoted M. G. Mugo J as having observed that the issue of authority and capacity to sue goes to the jurisdiction, and that a company can only sue in its own name with sanction of its board of directors or under a resolution in general or special meeting. I have no problem with that requirement. Indeed it is good law, which is aimed at protecting the corporations. That any suit brought in the name of a corporation must be sanctioned by a resolution by its board. The only issue is when that resolution may be made. A board of a corporation is comprised of human beings as officers. These officers may not be available on a short notice when a corporation may need to either file a suit or to file a counter-claim. The human frailties or demands of the board members, or their inability to meet at a specific time in order to resolve to sue or file a counter-claim shall not be a foundation for challenging the legality of a suit filed by a corporation or a counter-claim filed by a corporation provided always that there is provable intention of the board to file the suit and to clothe a particular officer with the authority to verify the suit. This means that it is not necessary to file such authority at the same time the suit or counter-claim is being filed. Such authority can be filed later. Indeed, a corporation is at liberty to ratify a suit or counter-claim which may have been filed initially without authority. In all this, it is the legitimate intention of the corporation that the law protects. The intendment of the corporation is what matters, and so, a corporation can also disown a suit filed without its authority if there was no such intention to file the suit in the first place.

11. In regard to this application, the Plaintiff has attached to the affidavit of John Ngetich the Authority to Act dated 10<sup>th</sup> December 2014 and marked as exhibit JK1. The said authority is under seal and authorised the said Mr. Ngetich to act on behalf of the plaintiff in all matters including this suit. In response to this authority the Defendant/ Applicant herein has stated that the said authority is an afterthought and should be disregarded by this court. That suggestion is not correct, in light of what I have said above, that the authority need not be filed at the same time with the suit. In this particular instance, the said authority pre-dates the suit. But even if it did not, it is still the position of this court that the Board of a corporation can still ratify an action of the corporation. The intention to file the suit or counter-claim originated with the corporation.

12. In light of the foregoing the 1<sup>st</sup> Application herein by the Defendant dated 8<sup>th</sup> May 2015 must fail with costs to the Plaintiff/Defendant.

13. Now to the 2<sup>nd</sup> Application by the Plaintiff, it is to be noted that the Defendant in his submissions did not respond to the issue raised in this application.

14. By its application dated 27<sup>th</sup> July, 2015, the Plaintiff seeks the striking out of the Statement of Defence on the basis that the same is bare, scandalous and vexatious and that it is principally meant to delay the fair and quick disposal of this case. Indeed, it is the Plaintiff's contention that the same is an abuse of Court process. The application is supported by the affidavit of John Ngetich, the Acting Board Secretary of the State Corporation. The affidavit annexes a duly stamped Deed of Guarantee executed by the Defendant committing himself to personally pay the debts owed to the Plaintiff together with other charges stated therein. Pursuant to the said guarantee, and as deponed to in paragraph 8 of the said Supporting Affidavit, the Defendant made payment by way of post-dated cheques amounting in total to Kshs.13,000,000/= as follows;

i) Value of maize - Kshs.11,806,250

ii) Auctioneers legal fee - Kshs. 898,936

iii) Administrative charges - Kshs. 294,814

Kshs.13,000,000

15. Upon the said guarantee, the Plaintiff released to the Defendant Discharge documents and the security in respect of all that piece or parcel of Land being Kajiado/Kaputiei North/2078. The Defendant used the Discharge to his advantage and therefore placed the security beyond the Plaintiff's reach. Then the cheques started bouncing and by his letter dated 3<sup>rd</sup> January, 2014, the Defendant asked for indulgence. The Defendant did not make good his promise despite the indulgence and all his cheques subsequently banked were returned unpaid.

16. The Court takes judicial notice that the Defendant is a Honourable Member of Parliament for Central Imenti Constituency and, for that matter, a person of great knowledge, very exposed and one of our lawmakers and a public officer whose integrity in public dealings should be beyond reproach as demanded by chapter 6 of the Constitution of Kenya. He now files a defence denying everything and particularly that there was no resolution to permit the Defendant to be personally liable for the debt. He also claims that he was under duress occasioned by the Plaintiff when he issued the cheques; the particulars of and what constitutes the duress are not explained. He has not returned to the Plaintiff the title and discharge to Land parcel number Kajiado/Kaputiei North/2078 with the Charge in tact in favour of the Plaintiff. The truth is, he has utilized the Discharge leaving the Plaintiff bare and without security only for him to renege by virtue of the bounced cheques. That is fraud. The Defence is not only bare but scandalous, a sham with no single triable issue at all.

17. Quoting the case of **Mugunga General Stores –vs- Pepco Distributors Limited [1957] KLR 150**, the Honourable Lady Justice Lessit held as follows in the case of *East Africa Portland Cement Company Limited –vs- Kom Stockist Limited [2008] eKLR*;

***“I am guided by this authority. It is not sufficient for the Defendant to merely deny the claim and put forward a defence without substantiation. There was need for the Defendant to explain why he denied owing the money. It also had to give details of alleged misrepresentation. Failure to do both rendered the defence a sham.”***

18. In this case, the Defendant executed a guarantee taking over the debt from Tana Trading Co. Limited. The Defendant issued cheques that have bounced on presentation. However, as seen at paragraph 12 of the supporting affidavit, (*the receipt is exhibited at page 34 of the Plaintiff's list and bundle of documents*), the Defendant paid Kshs.100,000/= towards part payment of the legal fee. The guarantee is therefore part performed. The Defendant is estopped from reneging on it. The defence raised is not reasonable. In the case of ***Equatorial Commercial Bank Limited –vs- Jodam Engineering Works Limited and 2 Others [2014] eKLR***, Justice Kasango held as follows;

***“A statement of Defence is said to raise reasonable defence if that Defence raises a prima facie triable issue. In the case of Olympic Escort International Co. Ltd & 2 Others –vs- Parminder***

***Singh Sandhu & Another [2009]eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide...***

The Judge proceeded to quote Black's Law Dictionary, 8<sup>th</sup> Edition on the meaning of "Bona fide" as 1. *Made in good faith; without fraud or deceit.* 2. *Sincere; genuine*

19. The Statement of Defence preferred by the Defendant cannot be said to be made in good faith. It is fraught with fraud and deceit on the very face of it. One cannot take advantage of a deal, allow one party to perform its part and then renege on his part. The Defendant's guarantee is unequivocal, the cheques are there for all to see. The Defendant cannot possibly have a defence. It will be a waste of precious judicial time if such Defence is allowed to proceed for hearing. In the case of *Barex Millers Limited –vs- Eagles Industries Limited* [2014] eKLR, the Court held that "*Valuable judicial time should not be expended investigating a bogus defence.*" There is completely no prima facie defence. In the Equatorial Commercial case cited above, the Judge proceeded and stated thus;

***"It cannot be gain said that the striking out of a pleading should be done sparingly. It is a procedure that a Defendant is entitled to have his defence proceed to trial. The Plaintiff is equally entitled to efficacious and speedy determination of his claim..."***

The above findings apply to the Defendant in this case. There is completely nothing to be investigated if the Defence were to be put to trial as desired by the Defendant. The Courts are not a haven for defaulters who have no intention of paying their just debts.

20. In all, and looking at the justice of the case, the overriding objective of our Civil Procedure Rules, this is a perfect case for striking out. It would be extremely injudicious to have the Plaintiff to wait for its payment from the Defendant any longer than it has.

21. Arising from the foregoing paragraphs of this ruling, the inescapable verdict of the court is that the Plaintiffs application dated 27<sup>th</sup> July 2015 if allowed as prayed.

22. The effect of the ruling is that;

**(i) The Defendants Notice of Motion Application dated 8<sup>th</sup> Many 2015 is dismissed with costs to the Plaintiff/Respondent.**

**(ii) The Plaintiff Notice of Motion Application dated 27<sup>th</sup> July 2015 and filed herein on 14<sup>th</sup> August 2015 is allowed as prayed.**

Orders Accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 15<sup>th</sup> DAY OF April, 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Nyawara for Plaintiff

No appearance for Defendant

Teresia – Court Clerk