



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 32 OF 2013**

**MERCATURA KENYA LTD.....PLAINTIFF**

**VERSUS**

**1. OCEANIC OIL LIMITED**

**2. STANDARD CHARTERED BANK KENYA LTD.....DEFENDANTS**

**RULING**

1. The plaintiff/applicant through an application dated 14<sup>th</sup> July, 2014 seeks the following orders:-
  - (i) That the statements of defence and counterclaim filed herein by the 1st and 2<sup>nd</sup> defendants be struck out for being an abuse of the process of the court;
  - (ii) That the 1<sup>st</sup> and 2<sup>nd</sup> defendants be ordered to pay costs of the suit;
  - (iii) That this honourable Court be pleased to make any other or such further orders as it may deem fit and just to grant; and
  - (iv) That costs of the Application be provided for.
2. The application has been brought under order 2 rule 15(1)(d) of the Civil procedure Rules 2010 and all enabling provisions of the law. The application is supported by the grounds on the face of it and the supporting affidavit of Jenereiver K. Sikola dated 14<sup>th</sup> July, 2014.
3. On 30<sup>th</sup> July, 2014, the Counsel for the 2nd defendant filed his grounds of opposition to the effect that:-
  - (i) The application herein is a gross abuse of the court process;
  - (ii) The application is premature and seeks to short circuit the due process;
  - (iii) The application offends one of the cardinal rules of natural justice that no party shall be condemned unheard; and
  - (iv) That the suit's subtrata were fulfilled and thereby there is no dispute to be determined by this application.

4. The 2<sup>nd</sup> defendant also filed an affidavit on 13<sup>th</sup> August, 2014 in response to the said application. The 1<sup>st</sup> defendant did not file any response to the application. At the time of highlighting of submissions, Counsel for the plaintiff was not present in court. This court allowed Mr. Wafula Learned Counsel for the 2<sup>nd</sup> defendant to highlight his submissions upon being satisfied that he had duly served the plaintiff and the 1<sup>st</sup> defendant with a hearing notice. This court confirmed that an affidavit of service had been duly filed.

5. Mr. Wafula submitted that the suit filed herein seeks orders for specific performance for Kshs. 11,000,000/= in respect to two trucks sold to the 1<sup>st</sup> defendant that were financed by the 2<sup>nd</sup> defendant. He stated that the plaintiffs' submissions indicate that a sum of Kshs. 11,085,903/= was paid to the plaintiff thus leaving a balance of Kshs. 14,097/= which was paid on 27<sup>th</sup> July, 2013. He contended that there was no subsisting claim and the only outstanding issue is that of costs. He submitted that the application to strike out the defence is misplaced and is an abuse of the court process. In his view, due to the admissions made by the plaintiff the court should *suo motu* strike out the plaint under section 1A of the Civil Procedure Act. He stated that if the suit is sustained it should be transferred to the Resident Magistrate's Court. He prayed that the application be dismissed and that Counsel for the plaintiff personally meets their costs for engaging their law firm with the present application.

6. After Mr. Wafula wound up his submissions, Learned Counsel Mr. Omollo, informed the court that he was holding brief for Mr. Mokaya who had requested that he be allowed to submit in the matter the following day. On the subsequent day, Mr. Maosa held brief for Mr. Mokaya and submitted that the application sought orders for striking out of the pleadings because the 2<sup>nd</sup> defendant failed to remit monies to the plaintiff as soon as the suit was filed. Although the 2<sup>nd</sup> defendant made a part payment of the agreed purchase price, it remained with a balance. The defendants were therefore at fault. He added that the suit had been compromised but not settled. He informed the court that the payment for one motor vehicle was due on 21<sup>st</sup> March, 2013 but part payment was made on 10<sup>th</sup> April, 2013. As at that time the plaintiff had filed suit. The balance of Kshs. 14,097 was paid in July, 2013. He added that there was a counterclaim filed by one of the parties and as such the court will have to make orders based on the pleadings. In response to the foregoing.

7. In response to the foregoing, Mr. Wafula submitted that the counterclaim was for release of a motor vehicle. He cited the Uganda Court of Appeal case of **Uganda Corporation Creameries Ltd. and Another vs Reamator Limited**, Case No. 11 of 1990, where it was held that it is a well known principle of law that courts adjudicate on issues which actually exist between litigants and not academic ones. He added that the court cannot deal with an issue that has been overtaken by events. Counsel submitted that his client was wrongfully sued as he not privy to the contract between the plaintiff and the 1<sup>st</sup> defendant. His client can therefore not pay costs.

## **DETERMINATION**

The issue for determination is if the 1<sup>st</sup> defendant's defence and counterclaim and the 2<sup>nd</sup> defendant's defence should be struck out.

8. The plaint in this case was filed on 8<sup>th</sup> April, 2013 seeking specific performance of the sum of Kshs. 11,100,000/= being the agreed purchase price of two prime movers. The 1<sup>st</sup> defendant filed a defence and counterclaim on 25<sup>th</sup> June, 2013. In the said defence, the 1<sup>st</sup> defendant avers that there was no default on its part as payment was supposed to be paid by the 2<sup>nd</sup> defendant which payment was made on 10<sup>th</sup> April, 2013 to the tune of Kshs. 11,085,903.85. The counterclaim by the 1<sup>st</sup> defendant was due to failure of the plaintiff to release motor vehicle Registration No. KBV 0551N.

9. The 2<sup>nd</sup> defendant filed a defence on 2<sup>nd</sup> May, 2013, in which it averred that there was an arrangement between it and the 1<sup>st</sup> defendant (customer) in which a loan was to be advanced upon the customer fulfilling the requisite advance/loan formalities culminating into the registration of a chattels mortgage over motor vehicle registration Nos. **KBU 016N** and **KBU 015N**. Due to logistical issues the customer

did not fulfil some of the conditions in time and compounded by public holidays on 29<sup>th</sup> – 31<sup>st</sup> March, 2013 (Easter Weekend) and 9<sup>th</sup> April, 2013, (Office Assumption day) the bank lost 4 working days. It is further averred that the customer gave authority that the plaintiff's account could be credited on 10<sup>th</sup> April, 2013 after all formalities had been complied with. The 2<sup>nd</sup> defendant in paragraph 7 avers that by the time the plaintiff obtained the court order dated 10<sup>th</sup> April, 2013 and served on the bank on 11<sup>th</sup> April, 2013 the sum of Kshs. 11,085,903.85 was in the plaintiff's account and the plaintiff has no cause of action against it.

10. Order 2 rule 15(1) of the Civil Procedure rules provides that:-

***“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.”***

11. In Nairobi HCC No. 79 of 2013, **Saudi Arabia Airlines Corporation vs Premium Petroleum Company Limited**, the court held thus:-

***“I need not reinvent the wheel on the subject of striking out a defence. A great number of 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 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 proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counterclaim. Secondly, and directly related to the foregoing Constitutional principle and policies courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such a party away from the Judgment seat; which is a draconian act comparable only to the proverbial drawing of the ‘sword of Damocles’. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable even by 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 which passes the Sheridan J test in Patel vs E.A Cargo Handling Services Ltd. [1974] EA 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.”***

12. From the excerpts I have drawn from the 1<sup>st</sup> defendant's defence and counterclaim and the 2<sup>nd</sup> defendant's defence, it is my finding that the said pleadings are not a sham. They raise triable issues. This court however notes that the dispute that brought about the filing of the plaint has since been sorted out by the defendants herein. There is therefore no subsisting claim save for the issue of costs of the suit. In the circumstances, I find that the application dated 14<sup>th</sup> July, 2014 is without merit and is hereby

dismissed with costs to the 2<sup>nd</sup> defendant. In view of this court's finding that all that is outstanding is the issue of costs, the plaintiff will take action as a matter of priority to have the said issue determined.

**DELIVERED, DATED and SIGNED at MOMBASA on this 29th day of September, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Omollo holding brief for Mr. Mokaya for the plaintiff

No appearance for the 1<sup>st</sup> defendant

Mr. Wafula for the 2<sup>nd</sup> defendant

Mr. Oliver Musundi Court Assistant