



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL SUIT NO 123 OF 2013

ISAT AFRICA LIMITED FZC.....PLAINITFF

VERSUS

COMMCARRIER SATELLITE SERVICE LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 23rd September 2013 and filed on 25th September 2013 was brought under the provisions of Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-
 - a. **THAT the honourable Court be pleased to Strike out the Defence herein dated 8th May 2013.**
 - b. **THAT the Honourable Court be pleased to enter summary judgment in favour of the Plaintiff/Applicant herein for the sum of USD 59,276.25 plus interest.**
 - c. **THAT the Honourable court be pleased to award the costs of this application to the Plaintiff/Applicant.**

THE PLAINTIFFS' CASE

2. On 23rd September 2013, K. Ganapathy Sankar, the Plaintiff's Chief Finance Officer swore a Supporting Affidavit on behalf of the Plaintiff herein. The Plaintiff filed its written submission dated 24th September 2014 and filed on 25th September 2014. Its Further Supplementary written submissions dated 21st October 2014 and filed on 22nd October 2014.
3. The Plaintiff contended that the Defendant's Statement of Defence dated and filed 8th May 2013 was a sham and disclosed no defence in law and was a mere denial of facts whose sole purpose is to delay the fair trial of the suit thereby occasioning an abuse of this Honourable Court's process. This was because the Defendant had admitted that it entered into a contract with it for the provision of bandwidth satellite services but that the Defendant had failed to fulfil its obligations under the said contract.
4. It averred that this Honourable Court that it was in the interest of justice that judgment to be entered accordingly as it had the power to strike out a defence that disclosed no reasonable defence in law and order.

THE DEFENDANT'S CASE

5. In response to the said application, on 20th August 2014, the Defendant's Advocate filed a Notice

- of Preliminary Objection on behalf of the Defendant. The same was filed on 23rd September 2014. The Defendant's written submissions were dated 13th October 2014 and filed on the same date.
6. The Defendant's objection was that the Plaintiff's present application was incurably defective and should be dismissed forthwith for reason that no evidence was admissible on an application seeking to strike out a pleading on the ground that it disclosed no reasonable cause of action or defence in law.

LEGAL ANALYSIS

7. Order 2 Rule 15 1 (a), (b), (c) and (d) of the Civil Procedure Rules 2010 provides as follows:-
1. **At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-**
- It discloses no reasonable cause of action or defence in law; or**
 - It is scandalous, frivolous or vexatious; or**
 - It may prejudice, embarrass or delay the fair trial of the action; or**
 - It may be otherwise an abuse of the court process of the court,**

And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case may be.

8. The Plaintiff referred the court to several cases where the common thread was that mere denials did not constitute a valid defence to a claim. In the case of **Magunga General Stores vs Pepco Distributors Limited (1987) 2KAR 89** which it relied upon, Njagi J (as he then was) stated as follows:-

“... first of all a mere denial is not a sufficient Defence... it is not sufficient therefore simply to deny liability without some reason given.”

9. It also placed reliance of the case of **Equitorial Commercial Bank Limited vs Jodam Engineering Works Limited & 2 others (2014) eKLR** where Kasango J also stated as follows:-

“... Although in the above two cases there was admission by the defendants of the claim against them, either through correspondence or in the Defence, the ratio established is that mere, general denial without reason is not sufficient Defence.”

10. The Plaintiff also referred the court to the cases of **Abok James Odera T/A Odera & Associates and John Patrick Machira T/A Machira & Co. Advocates** referring to the case of **City Planning Works Kenya Limited vs Bacly KLR (1977) 85** and the case of **Nairobi Golf Hotels (Kenya) Limited Civil Appeal Number 5 of 1997** where the Court of Appeal observed that:-

“...it is now trite law that in Applications for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have had leave to defend the

suit. His duty is however limited to showing prima facie the existence of bona fide triable issues or that he has an arguable case. On the other hand it follows a plaintiff who is able to show that a Defence raised by a defendant in an action falling within the provision of Order XXXV is shallow or a sham is entitled to summary judgment.”

11. On the other hand, the Defendant contended that all the Plaintiff was required to do was only to state concisely the grounds on which it was relying upon as provided by Order 2 rule 15 (2) of the Civil Procedure Rules which stipulates that:-

“No evidence shall be admissible on an application under sub rule (1) (a) but the application shall

state concisely the grounds on which it is made.”

12. It argued that the Supporting affidavit sworn by one K. Ganapathy Sankar amounted to the Plaintiff adducing evidence through an affidavit hence making the application defective. The Defendant relied on the case of **Ari Credit Finance Company Limited vs Migingo Nairobi HC Case No 5916 of 1990** which had been cited with authority in the case of **Ajit Singh Viridi vs J. F McCloy [2014]** in this regard. Bosire J (as he then was) held that:-

“...no evidence is admissible under Order VI Rule 13 (1) (a), which is the current Order 2 Rule 15 of the Civil Procedure Rules, 2010. The rationale is that if a pleading is scandalous, frivolous and vexatious as alleged by the Plaintiff in the application, the same should be clear enough and can be so held without adducing evidence to support the said allegation...”

13. It contended that the said provision of the law had been couched in mandatory terms and as such, the action of a supporting affidavit being brought together with the application, rendered the application by the Plaintiff incompetent, incurably defective and should be dismissed with costs.

14. It also pointed out that striking out of pleadings is discretion of the court and urged the Court to consider the provisions of Article 159(2) (a) and (d) of the Constitution of Kenya, 2010 that provides that justice shall be done to all irrespective of status and that justice shall be administered without undue regard to technicalities. It was contended the pleadings herein had been drafted by the Defendant’s previous advocates on record who had been given all the information required by the Defendant but had failed to include all of it in the defence. As a result thereof, the Defendant ought not to be prejudiced by the actions of its previous advocates. They relied on the case of **Paul Asin t/a Asin Supermarket vs Peter Mukembi [2013] eKLR** cited with approval the case of **Philip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103** to buttress its point that a party ought not to be prejudiced by mistakes but his case ought to be heard on merit.

15. It averred that its Defence had raised various triable issues herein including the terms and alleged breach of the contract. It admitted having entered into a contractual relationship with the Plaintiff but denied owing any amount to the Plaintiff, stating that in the event that there were any sums owed by them to the Plaintiff, then the same were set off as against damages and income suffered by the Defendant.

16. It referred the court to the Paragraphs (4) and (5) of its Defence to persuade the court to find that there were indeed triable issues. The same stated as follows:-

4. **The Defendant states that if at all it owes the Plaintiff alleged sums, which is denied, then said sums were set off as against damages and income suffered by the Defendant a result of a breach of the terms of the Contract by the Plaintiff.** (emphasis Defendant). **Full details of the said breach are within the Plaintiff’s knowledge.**

5. **The Defendant admits that the Plaintiff has made demand for the sum claimed but states that the Plaintiff consistently refused to acknowledge losses incurred by the Defendant on account of the breach of the contract for satellite services by the Plaintiff.** (emphasis Defendant).

17. It placed reliance on the case of **Nazziwa vs Serwaniko & Another [1972] EA 246** where it was held as follows:-

“...where facts and issues have arisen which are in dispute, the defence cannot be struck out as the same if successfully (sic) will defeat the claim. The application dated 10th June 2013 by the Plaintiff should thus be dismissed with costs to the defendant. It is defective, misconceived and premature, we so submit...”

18. Contending that the Defendant’s Defence contained mere denials is not enough. The Plaintiff had to demonstrate how the same was a mere denial and how the Defendant’s Defence in law without relying on disclosed no defence the affidavit evidence as was rightly pointed out by the Defendant.

19. To strike out the suit on this ground required a higher standard of proof as the court was expected to take a very drastic step against a party without hearing its evidence in a full trial.

20. It was evident that Paragraphs (4) and (5) of the Defendant's Statement of Defence did raise triable issues. At any given time, the main aim by the court ought to be to sustain rather than to terminate a suit. Striking out a suit is a draconian step which must be used as a last resort. An act of striking out of pleadings by the court should therefore be exercised cautiously and with a lot of restraint.

21. This was a conclusion that was arrived at in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”

22. The holding in the case of **Mukisa Biscuit Manufacturing Co Limited vs West End Distributors Limited [1969] E.A 696** may have been applicable in the circumstances of the case herein as the Plaintiff was not required to file any affidavit evidence to demonstrate that the Defendant's Defence disclosed no reasonable defence in law. Law J.A had the following to say on this issue:-

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

23. However, although the application may have failed because there were no sufficient grounds that were advanced by the Plaintiff to strike out the Defendant's Statement and enter summary judgment without relying on the Affidavit of Ganapathy Sankar support its case, the Plaintiff had contended that the Defence only served the purpose of embarrassing the Plaintiff and delaying fair trial of the action and was nothing more than an abuse of court process.

24. In view of the fact that the court found that the Defendant's Defence raised triable issues, it found no evidence to show that the said Defence only served the purpose of embarrassing the trial or that it was an abuse of the court process as had been contended by the Plaintiff.

25. Accordingly, having considered the pleadings, the written submissions and the several cases in support of the respective parties' case, the court came to the conclusion that the Defendant had demonstrated that determination of the party that breached the contract was a triable issue and that it was only fair and just to have the matter proceed to trial for the determination of the same.

26. As an *obiter*, parties are urged to cite the provisions of the law that they are relying on. The Plaintiff only relied on Order 2 Rule 15 of the Civil Procedure Rules without indicating under which sub-rule the present application had been brought. Although what stood out was the striking out of the Defendant's Defence for the reason that the said Defence disclosed no defence in law, the court noted that ground (e) on the face of the application had also sought to have the Defendant's Defence struck out for embarrassing the fair trial of this case and for being an abuse of the court process. Parties must set out their cases clearly without leaving the court with the responsibility of discerning what the party's case was all about.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's ruling was that Plaintiff's Notice of Motion application dated 23rd September 2013 and filed on 25th September 2013 was not merited and the same is hereby dismissed with costs to the Defendant.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of January 2015

J. KAMAU

JUDGE