



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 122 OF 2014

MAJANJA LUSENO & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

AND

SUSAN KINAKAI.....3RD PARTY

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 9th July 2014 was brought under the provisions of Sections 1A, 1B and 63 (e) of the Civil Procedure Act and Order 2 Rule 15 (d) of the Civil Procedure Rules and all enabling provisions of the law. It sought the following orders **THAT:-**

(i) **The Defence filed by the Defendant be struck out and judgment be entered for the Plaintiff as sought in the Plaintiff.**

(ii) **The costs of this application and the suit be borne by the Defendant.**

THE PLAINTIFF'S CASE

2. The application was supported by the Affidavit of Steve Luseno, Advocate that was sworn on the 9th July 2014. The Plaintiff's List of Authorities dated 19th September 2014 was filed on 22nd September 2014. Its Written Submissions dated 4th November 2014 and were filed on even date

3. At all material times, the Plaintiff was a customer of the Defendant having opened two (2) accounts. At the time of opening the accounts, the Plaintiff provided the Defendant with the account operating mandates. The Plaintiff stated that the Defendant breached its duty when it failed to observe the account operating mandates leading to the loss of the Plaintiff's monies from the said accounts. It was the Plaintiff's contention that the monies would not have been lost had the Defendant exercised due diligence.

4. The Plaintiff termed the Defendant's Statement of Defence as a mere denial of facts which

rendered the entire defence an abuse of the court process, an attempt by the Defendant to delay justice to it and a waste of judicial time and resources. The Plaintiff was categorical that all the issues raised by the Defendant were issues between the Defendant and the Third Party and did not concern it.

5. It therefore sought to have its application allowed as prayed.

THE DEFENDANT'S CASE

6. In opposition to the application herein, Henry Maina, the Defendant's Legal Services Manager swore a Replying Affidavit on 31st July 2014. The same was filed on 1st August 2014. The Defendant's List of Authorities was dated and filed on 19th September 2014 while its Written Submissions were dated 18th November 2014 and filed on 21th November 2014.
7. The Defendant stated that the Plaintiff operated two (2) accounts with it being account number CA2-1-200-002707 and account number CA2 1-200-002830 that were opened on 15th January 2008 and 19th February 2008 respectively. In the course of operating the two (2) accounts, the Plaintiff introduced one Susan Nyaruiru Kinakai, the Third Party herein as its duly authorised agent to make deposits, to present and cash cheques or collect statements in the ordinary course of such transactions.
8. The Defendant vehemently denied that the Third Party herein wrongfully withdrew from the said Bank accounts a sum of Kshs 24,731,969 without the Plaintiff's knowledge or consent and averred that the Plaintiff was the author of its own misfortune.
9. The Defendant denied having made any payment to the Third Party or to her account at Equity Bank Limited through "Special Authorisation" and contended that cheques were presented in the ordinary course of business. It was its case that if the Plaintiff had any claim, then it ought to have directed the same against the said Third Party.
10. The Defendant was emphatic that it had an arguable case as there were several triable issues herein and the matter could not therefore be determined by way of affidavit evidence. It thus prayed that the Plaintiff's application be dismissed with costs to it.

LEGAL ANALYSIS

11. Order 2 Rule 15 (1) (d) of the Civil Procedure Rules, 2010 under which the Plaintiff's application was brought provides that :-

"At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

(a) ...

(b) ...

(c) ...

(d) It is otherwise an abuse of the process of the court."

12. While the Plaintiff correctly submitted that a plaintiff is entitled to efficacious and speedy determination of his claim, a defendant is equally entitled to have the defense proceed to trial as could be discerned from the holdings in the cases of **Diamond Trust Bank (K) Ltd vs Martin Ngombo & 8 Others [2005] eKLR** and **DT Dobie vs Muchina [1982]KLR 1** that it referred the court to.

13. The rules of natural justice require that a court must not drive away any litigant from the seat of justice. The objective of a court of justice should always be aimed at sustaining a suit rather than terminating it by summary dismissal and that **“it is better to allow a weak case to go to trial than to invoke the guillotine process”** - **See Kisii Farmers Co-operative Union Limited vs Sanjay Natwarlalchaunhan t/a oriental Motors [2006] eKLR.**
14. In the cases of **Mpaka Road Development Limited vs Kana [2004] EA 160** and **DT Dobie vs Muchina** (Supra), it was held that a pleading should only be struck out if it is manifestly hopeless that it amounts to an abuse of the court process. Indeed, a pleading should only be struck out if it is so hopeless that no amount of amendment could sustain it to set out a case.
15. It was evident from the case law that was relied upon by both the Plaintiff and the Defendant that they were in agreement that striking out of pleadings is a draconian measure that should be exercised sparingly, as a last resort and only in plain and obvious cases.
16. Plain and obvious cases would fall within what a court would consider that a pleading is an abuse of the court process, it is a sham, it is vexatious or it is intended to cause delay of the hearing of the suit- **See Mpaka Road Development Limited vs Kama [2004] EA 160, DT Dobie vs Muchina [1982] KLR, Jackson Ngechu Kimotho vs Equity Bank (2013) eKLR.**
17. This was also an issue that was addressed in the case of **DT Dobie & Company (Kenya) Limited vs Muchina** (Supra) where the Court of Appeal made certain observations relating to the jurisdiction of a trial court regarding affidavit evidence. It stated thus:-
- “...If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face... The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the 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.”**
18. The case of **Captain Simon Siganga vs Standard Limited [2009] Eklr** that was relied upon by the Plaintiff in which the court therein was able to determine a question of liability between a plaintiff and the defendant in a case where there was a third party without going for trial by merely perusing the documents filed was distinguishable from the facts of the case herein.
19. While a bank should only act upon the mandate given to it by a customer and that the mandate forms the contract between a bank and its customer in relation to operating the accounts, making a determination of whether or not there was breach of duty by the Defendant through affidavit evidence would ideally be shutting out it from adducing evidence to show the Third Party's liability, if at all. It was the considered view of the court that the question of whether the Defendant breached the duty it owed the Plaintiff was an issue that could only be determined at trial.
20. Notably, the Plaintiff averred that the Defendant's Replying Affidavit did not answer any of the issues raised in its Application as its claim was wholly against the Defendant and not against the Third Party. However, court noted that the Defendant was also adamant that it had recourse to the Third Party and that it enjoined the Third Party herein as a party to this suit when the Plaintiff failed to do so.
21. Indeed, enjoining a third party cannot in any way be termed to be an abuse of the court process or an admission by a party as it is an avenue that is provided for in the Civil Procedure Rules, 2010. It does not also follow that a defendant who enjoins another party as a third party has admitted what a plaintiff has accused it of. The Defendant's admission that it paid the monies to the Third Party was not contradictory to the Defence. The mere fact that the Defendant sought contribution and indemnity from the Third Party did not therefore entitle the Plaintiff to judgment against the Defendant herein, on admission.

22. The court can only interrogate whether the Defendant acted outside the scope of the mandate, whether or not the cheques were forged, whether or not the Plaintiff had actually drawn the said cheques, whether the Third Party withdrew the monies without the Plaintiff's knowledge and consent or if the Defendant could sustain its defence of contributory negligence against the Plaintiff, in a full trial.

23. The said Third Party was said to have been the Plaintiff's duly authorised agent and could make deposits, present and cash cheques or collect statements in the ordinary course of such transactions. The question of apportionment of liability, if any and if the Defendant failed to detect an imitation of the Plaintiff's signatures in the cheques, a duty that was found to be upon a bank in the case of **Simba Commodities vs Citi Bank (2013) eKLR** relied upon by the Plaintiff were genuine triable issues.

24. The court did in fact note that the Defendant had identified the following triable issues for its determination:-

- a. **Whether the Plaintiff was guilty of contributory negligence.**
- b. **Whether the signatures in all the cheques listed in the Plaint totaling Kshs 24,731,969 were forged.**
- c. **Whether the withdrawal of the sum of Kshs 24,731,969 was done without the Plaintiff's knowledge or consent.**
- d. **Whether the cheques listed in the Plaint totalling Kshs 24,731,969 were presented to the Defendant in the normal manner or in circumstances that raised suspicion.**
- e. **Whether the cheques were signed by the Plaintiff's authorized signatories.**
- f. **Whether the said cheques were remitted to the Defendant by the Plaintiff's Agent the Third Party herein who had been introduced to the Defendant by the Plaintiff as a known or authorized agent.**
- g. **Whether the Defendant paid any monies to the Third Party on the strength of an alleged "Special authorization".**
- h. **Whether the Defendant acted as a prudent banker on the instructions of the Plaintiff.**
- i. **Whether the Defendant at all times acted within the written terms and conditions of operating accounts at the bank, the customary relationship of banker and customer as well as the banking regulations under the Banking Act.**
- j. **Whether the Defendant made payments to the Plaintiff or the Third Party against stale cheques presented by the Plaintiff or the Third Party.**
- k. **Whether the Plaintiff is guilty of fraud by permitting the said Third Party to present cheques to the Defendant for the sum of 24,731,969/= over the course of almost 4 years in the knowledge that the Third Party was perpetrating a fraud.**
- l. **Whether the Plaintiff is guilty of fraud by failing to notify or disclose to the Defendant that the Plaintiff had recovered a sum of Ksh 3,000,000/= from its Agent.**
- m. **Whether the Plaintiff colluded with the said Third Party to defraud the Defendant the sum of Kshs 24,731,969/=.**

n. Whether the Plaintiff is guilty of fraud by giving the said Third Party access to signed cheques, allowing her access to cheque books or passing her off as its duly authorized agent.

o. Who is liable for the alleged loss of Kshs 24,731,969/=?

25. The numerous issues raised by the Defendant were arguable and triable and could not be determined by way of affidavit evidence. As was rightly pointed out by the Plaintiff, a “**triable issue**” is an issue that must go for trial for determination even if it may not succeed. It did not matter that the Plaintiff strongly felt that the said issues were weak and could not be sustained at full trial.

26. Accordingly, having considered the pleadings, affidavit evidence, written submissions and the case law in support of the respective parties’ cases, the court was not satisfied that the Plaintiff had demonstrated that the Defendant’s Defence contained mere denials or that it was an abuse of the court process.

27. The instant case did not fall within what the court would consider an obvious or plain case that would warrant the striking out of the Defendant’s Statement of Defence that would have the effect of disentitling the Defendant a right to defend itself. On the other hand, failure to afford the Defendant its day in court would be tantamount to denying it an opportunity to fair hearing contrary to the provisions of Article 50 of the Constitution of Kenya.

28. The court was thus very hesitant to find that the enjoining of the Third Party herein was not serious and that it was a diversion from the real issues as had been contended by the Plaintiff.

DISPOSITION

29. For the foregoing reasons, the court found the Plaintiff’s Notice of Motion application dated and filed on 9th July 2014 not to have been merited and the same is hereby dismissed with costs to the Defendant.

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April 2015

J. KAMAU

JUDGE