REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 513 OF 2012

A.Z SHAH T/A FASHION SPOT……..PLAINTIFF

VERSUS

JANMOHAMED INVESTMENTS LTD……....DEFENDANT

R U L I N G

The application for determination is the Notice of Motion dated 12th February 2013 seeking to strike out the defence dated 30th May 2013. The application is supported by the affidavit of Ashok Z. Shah dated on 17th January, 2013 on the ground that the defence is scandalous, frivolous, vexatious and meant to delay a fair trial of the suit. The applicant states that the claim is for a liquidated amount of Kshs.2,018,362.10. This is the amount of rent overpaid and Kshs.135,000/= the cost of proceedings before the Business Rent Tribunal. The applicant claims that the defendant in his defence admitted that it was paid Kshs.2,032,800/-. It states that the counterclaim is incompetent in law since there is no evidence of Kshs.500,000/= allegedly used for repairs.

The application is opposed through the replying affidavit sworn by Karim Janmohamed, a Director of the Respondent, dated 30th May, 2013. The Respondent stated that it had filed a suit before the Business Rent Tribunal being case number 12 of 1997 which was decided in their favour. The applicant together with other tenants were ordered to pay the Respondent a sum of Kshs.2,032,800/= in arrears of rent. In an appeal in the High court of Kenya HCCA No 328/99, 342/99, 6/2000 and 65/2000 all consolidated the Tribunal's decision above was reversed and the money paid to the Respondent by the Plaintiff was refunded in full and final settlement. The Respondent further claimed that the Plaintiff left the premises in a bad state and failed, neglected and refused to repair the premises which repairs the Respondent had to carry out to the tune of Kshs.500,000/=, remaining amount was paid in full and final settlement to the applicant. The Respondent contended therefore, that the defence is plausible and not an abuse of the court process or meant to delay the process of the court. That in the circumstances that it will be fair and just for the suit can be subjected to the rigours of trial and be determined on merit as it contains serious triable issues that require being investigated in a full hearing of the suit.

The applicant on the other hand, submitted that allegation of refund of the applicant money, must be demonstrated with documents to prove the same. That even if Kshs.500,000/- could have been spent on repairs, which was denied, on repair the balance of Kshs.1,653,362.10 must be accounted for the applicant cited the case **of Mugunga General Stores Vs Pepco Distributors Ltd (1987) KLR 150**

I have carefully considered the arguments from both sides.

The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort

and even then only in the clearest of cases. The power should only be exercised after the court has considered all facts and not the merit of the case. See **DT Dobie & Company (Kenya) Ltd Vs Muchina (1982) KLR.**

The substantive law on striking out pleadings is **Order 2 Rule 15 of the Civil Procedure Rules**. Sub-Rule 15 (1) of the aforementioned Order, it is provided that: -

> **"(1) 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."**

In the instant case the ground relied upon by the applicant to seek striking out, is that the defence is scandalous, frivolous, vexatious and meant to delay the fair trial. In **BULLEN AND LEAKE AND JACOB'S PRECEDENCE OF PLEADINGS, 12th Ed**., at page 144 and 145, scandalous pleading are described as follows:

> ***"For this purpose, allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any "unnecessary" or "immaterial" allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else. Again, if degrading charges are made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous. One of the two defendants may apply to strike out scandalous passages from the defence served on him by the other."***

Frivolous vexatious, pleading and actions are also defined as follows.

> ***"A pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasoned argument. Again a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good."***

In the same text at page 148, abuse of process is described as follows:

> ***" It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, although it should not be lightly done, yet it may often be required by the very essence of justice to be done."***

In the instant case the dispute relates to payment of rent on premises situated on land reference number 209/11612. The applicant assertion is that it paid the Respondent a total sum of Kshs.2,032,800/= being the rent arrears and rent at the new rates assessed by the Business Premises Rent tribunal in case number 12 of 1999. When the High Court overturned the Tribunal's ruling and set the rent at Kshs.69,757.50 from 22nd July, 1999, the Respondent became liable to refund to the applicant a sum of Kshs.2,018,362.10 being overpayment of rent arrears wrongly or mistakenly paid under the order of the Tribunal together with Tribunal Costs of Ksh.135,000/- and interests at court rates from 6th August, 1999 until payment which is the basis of Applicants suit herein.

I have carefully considered the pleadings forming the plaint and the defence and amended defence in relation to this application. The defence raises a set-off in relation to a sum amounting to Kshs.500,000/- allegedly used to carry out repairs after the Applicant quit the premises allegedly without returning same to its original state of repair. Whether such allegation is justified or not it raises an issue requiring investigation by a trial court.

On the other hand, the defences made mere denials as to the balance remaining from Kshs.2,018,362.10 less the sum of Kshs.500,000/- above stated i.e. Kshs.1,518,362.10. Indeed, no specific mention and/or denial of this sum is made in the Defence even after the Plaint specifically pleads the total sum of Ksh.2,018,362.10 and how it arose, thus tending to make the deep silence an acquiescence to the positive pleading in the plaint.

The Defendant further could have pleaded in the Amended Defence that the sum of Ksh.2,018,362.10 less Ksh.500,000/- was refunded to the Plaintiff and plead circumstances of such refund. The Defendant however, avoided to do so which this court considers to have been done deliberately especially since the defences were drawn by a qualified advocate.

In the above circumstances, the court considers the defences to the extent stated above, to be mere denials amounting to a sham. The court will accordingly strike out the defences to the extent of the sum of Kshs.1,518,362.10 in respect of which a judgment should and is hereby entered against the Defendant in favour of the Plaintiff with interests and costs as prayed in the Plaint.

The rest of the claim shall go to trial. Orders accordingly.

Dated and delivered at Nairobi this 16th day of June, 2015.

D A ONYANCHA

JUDGE