REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 87 OF 2014

HON. GEORGE B. M. KARIUKI…...................................PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.......DEFENDANT

R U L I N G

By way of Notice of Motion dated 21st July 2014, the Plaintiff herein, Hon George B. M. Kariuki, is asking this court to strike out the statement defence dated 14th May 2014 and seeking that a judgment be entered against the Defendant as claimed in the plaint. The Plaintiff is also seeking in the alternative that the court do enter judgment on admission as against the Defendant.

The application is premised on the ground that the defence as filed does not raise any triable issues, it is frivolous, vexatious, an abuse of the court process and solely aimed at delaying the fair trial of the case. The Plaintiff also claims that the Defendant does not dispute the dishonoured cheques and that the same were unpaid and therefore according to the Plaintiff the Defendant has admitted liability as claimed against it in the plaint.

The application is supported by the affidavit of Patrick Kohange dated 21st July 2014 and was opposed through the grounds of opposition dated 5th December 2014 and the replying affidavit sworn by Faith Cheruiyot and was canvassed by way of written submissions and highlighted by counsel's on 5th March 2015. The Plaintiff argued that the dishonor of the cheques was detrimental to the Plaintiff as the Defendant had received in full the funds in respect of which it issued the cheques that were eventually returned unpaid. The Plaintiff claims that the Defendant acted in breach of the contract and trust between the parties to the detriment of the Plaintiff as a consequence of which the Plaintiffs' reputation has been

He further submitted that it is not disputed that the two bankers' Cheque were not honoured. That, there is no plausible defence and it is plain that the defence is a sham or cannot be sustained; it would be pointless to put parties through a trial that would inflate costs to the disadvantage of the Plaintiff and delay delivery of justice to the prejudice of the Plaintiff.

The Plaintiff also submitted that the defence is frivolous and vexatious. He stated that pleadings are vexatious if they lack bona fide or when they are hopeless, oppressive and tending to cause unnecessary expenses and anxiety on the party. A case can also be said to be frivolous if it has no substance and the party is trifling with the court. The Plaintiff argued that the defence herein is not capable of sustaining a reasonable defence argument in court and it should therefore be struck.

The Plaintiff submitted that by letter dated 10th March, 2014 Defendant admitted liability for the unpaid Cheques. The Plaintiff argued that the admission has been expressed or implied in the pleadings filed by the Defendants and are plain and obvious and clearly readable. The Plaintiff further submitted that the general rule is that letters written during a dispute between parties which are written for the purpose of settling a dispute between parties and which are expressed to have been made **"without prejudice"** cannot generally be admitted in evidence.

The Defendant on the other hand, submitted that having joined issue on the matter pleaded in the defence and having made specific allegations that the facts pleaded in the defence are false, the Plaintiff cannot be allowed to say that there is no reasonable defence or that there are no issues which need to go to hearing for the court to determine whether the facts which the Defendant has pleaded are true or false. The Defendant submitted that the reply to the Defence alone should result in the dismissal of the application.

The Defendant also argued that the two cheques issued were not issued to the Plaintiff and therefore the dishonor could not in fact or law constitute defamation of the Plaintiff or reflect on the integrity or probity of the Plaintiff. That the cheques were issued by the Defendant pursuant to a contractual relationship between the Plaintiff and the Defendant which contract was governed by the terms and conditions signed by the Plaintiff.

I have considered all the eminent points of view of all the parties' advocates,

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 (supra).** The power is also discretionary which should be exercised with a lot of caution. The court of Appeal in **Crescent Construction Co. Ltd Vs Delphis Bank Ltd Civil Appeal 146 of 2001 [2007] eKLR** observed that:

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter."***

The Plaintiff's application is premised on **Order 2 Rule 15 of the Civil Procedure Rules, 2010** which provides:-

> ***"(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.***
>
> *b.* ***Its scandalous, frivolous or vexatious; or***
>
> *c.* ***It may prejudice, embarrass or delay the fair trial of the action; or***
>
> *d.* ***It's otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be."***

As per the above provision, a court power to strike out pleadings is on the basis that it discloses no reasonable cause of action or defence in law, or that it is scandalous, frivolous or vexatious or It may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the Court process. At this preliminary stage no evidence is admissible and the court will only make a decision based on the Plaint and the Defence as filed.

Through the plaint dated 8th April 2014, the Plaintiff is seeking damages for breach of contract, loss of credit and reputation, exemplary and general damages. The Plaintiff's claim is that Defendant's action caused the dishonor of the cheques and exceedingly caused him embarrassment which resulted in the Plaintiff being unable to perform his part of the contract for the purchase of the motor vehicle from DT Dobie. The Plaintiff also complains that the Defendant action caused the Plaintiff to be portrayed as someone who is unable to manage his finances or pay his bills and who should be shunned by the members of the public. The Defendant pleads that there existed a contractual of banker and customer relationship whose terms and conditions are set in the contract accepted by the Plaintiff. The defence also states that the Plaintiff requested for two banker's Cheques expressed in Euros for Euros 12,822 and euro 44,142.62. The Defendant advised the Plaintiff that it could not issue bankers Cheques expressed in Euros payable locally and those, such bankers' cheques would only be drawn on the Defendant's correspondent bank in Germany. The Defendant recommended that payment should be made by RTGS which was faster and recommended method of transmitting such sums. The two cheques were unpaid on presentation for payment to the Standard Chartered Bank in Germany. The Defendant admitted that that the nonpayment was in breach of the parties' contract which falls within clause 21 of the general terms and condition.

In my view, the foregoing the defences raise what appears to be triable issues. It has been said time and again that even where a single issue is raised, the parties ought to go for trial to determine that one triable issue. In my understanding triable issues are those that are subject to judicial examination in a Court, for determination on their merits. The Defendant has denied liability and relied on the general terms and conditions of the contract which the Plaintiff accepted; this issue alone will require judicial examination to determine on merit whether the condition 21 relieved the Defendant from any liability in the circumstances of this matter. The other issue which can be discerned from the pleadings is whether the actions of the Defendant caused the Plaintiff to be embarrassed or defamed in any way. In my view the Defendant should be given the opportunity to defend its claim before the trial court.

On the second issue, it is the Plaintiff contention that the Defendant has admitted liability and therefore judgment should be entered against it as prayed in the plaint. The Plaintiff pointed out paragraph 20 of the plaint which states "*The Defendant admits that the non-payment of the two bankers cheques of the 4th October 2013 was in breach of the contract between the Plaintiff and the Defendant as stated in paragraph 16 of the plaint, but such breach falls within clause 21 of the general terms and conditions so that there is no liability on the Defendant, alternatively any damages are limited under clause 28 (a) of the General Terms and condition but the Plaintiff has not suffered or pleaded any damages that are recoverable in an action for breach of contract.*"

The principle applicable in judgment on admission, is that the admission must be very clear and unequivocal on a plain perusal of the alleged admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern.

In **<u>Choitram</u> v <u>Nazari</u> (1984) KLE 327** that;-

> ***"...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."***

Chesoni Ag. JA went on to add that:-

> ***"...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was''***

Applying the principles of law cited above to the facts of this case, I do not agree with the Plaintiff that the relevant paragraph contains an admission of the Plaintiffs claim. In my view the admission is not clear and unequivocal on a plain perusal of the admission. That is to say, the Defendant has denied liability using the general terms and condition of the contract. The Defendant has also denied that general and exemplary damages are applicable in an action for breach of contract.

The Plaintiff further heavily relies on the letter dated 10th March 2014 which he believes admits liability. The Plaintiff argues that the same is not privileged under "***without prejudice***" principle provided under the evidence Act since it was not marked as so. The question begs whether the said letter can be used as evidence to show admission. Furthermore, the interpretation of the letter's content is itself in dispute and would require investigation. It is important to first consider the communication and the entire circumstances in which it was made to determine whether it can infer admission on the part of the Defendant. In the same letter the Defendant denies that the Plaintiff's reputation was lowered in any way since he was not the drawer of the cheques. The Defendants make an offer of Kshs.2,000,000/- as a gesture of good will to the Plaintiff. In my view, the letter does not contain admission which is plain and clear in anyway and the platform to canvass whether the letter was a gesture of good customer care by the Defendant or otherwise, is required. The matter should be allowed to proceed to trial and is hereby ordered so, thus rejecting and dismissing this application.

Dated and delivered at Nairobi this 21st day of July, 2015.

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D A ONYANCHA

JUDGE