



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC. NO. 218 OF 2014

CASSIA AFRICA LTD.....PLAINTIFF

VERSUS

MARTHA KHAYANGA TULINGE.....1ST DEFENDANT

SIMON MAUNCHO2ND DEFENDANT

RULING

[1] The Notice of Motion dated 25th October 2014.

The Notice of Motion by the Plaintiff seeks the following orders:-

1. THAT the Defendant/Respondent's statements of defence dated 2/7/14 be and is hereby struck out and judgment be entered for the Plaintiff against the Defendants/Respondents jointly and severally for the sum of Kshs. 2,139,955/=.
2. THAT the costs of this application be in the cause.

The application is based on the following grounds:-

- a) THAT the Plaintiff/Applicant filed the suit herein to recover the amount of Kshs. 2,139,995/= being the amount owed by the defendant together with interests and costs.
- b) THAT the defendants/Respondents statement of defence filed on 2/7/14 is full of mere denials lacks merit and is an abuse of the process of this Honourable Court.
- c) THAT the existence of a contract between the Plaintiff/Applicant and the defendant is unchangeable and therefore amounts to admission of the claim hence the court should re-enter judgment.
- d) THAT the defendant/respondents has declined, failed and/or neglected to pay.
- e) THAT it is in the interest of justice that judgment be entered as prayed in this application.

[2] The Notice of Motion is supported by Peter Okwiri, a director of the Plaintiff Company

Cassia Africa Ltd. His affidavit sworn on 21/7/14. The Applicant case is that on 13.8.2012 the Plaintiff and the Defendant No.1 entered into a money lending agreement where the Plaintiff agreed to advance Kshs. 700,000/= to the 1st Defendant at a interest rate of 20% per month and a further 5% interest on the outstanding amount daily for each day the money remains outstanding.

[3] The 2nd Defendant provided guarantee and indemnity with the respect to the said loan by way of a guarantee and indemnity executed by the 2nd Defendant annexed P.O2. The 2nd Defendant also pledged a security in form of log book for motor vehicle No. KAC 766C and L.R No.Kefindo/Keputiei/2466 vide PO3A and PO3B.

[4] The Applicant has been unable to dispose the aforesaid security to recover outstanding debt thus the instant suit. The defence filed is a mere denial and does not justify the failure to payment of the outstanding debt. The Defendants have denied the claim and have filed Replying Affidavit via the 1st Defendant's sworn on 14.10.2014 where it is averred that the first Defendant never entered into the alleged agreement for advance of Kshs.700,000/=.

[5] The first Defendant also averred that he is not aware of the executed guarantee or indemnity or security given in the transaction of advancing the Kshs.700, 000/=. The Applicant submit that the Defendant do not aver that the agreement and the guarantee and indemnity are forgeries. The original log book and title deeds are held by the Plaintiff.

[6] The Plaintiff has relied on the cases of **Ecobank Kenya Limited Vs Bobbin Limited & 2 others- High Court Civil Case No 606 of 2012 Nairobi eKLR** where you stated, among other things that :-

“I insist that courts are not a haven for defaulters who have no intention of paying their just debts. In this case, there is enough reason to strike out the defence which is a mere sham and a source of delay for the Plaintiff to reach the fruits of legitimate expectation in form of judgment. This is underpinned by the long standing legal adage “justice delayed is justice denied” which is never a worn out notion for overuse, for, it will always excite constitutional delight and has even found expression in Article 159 of the Constitution as a principle of justice. In the spirit of the said constitutional principle of justice, I accordingly strike out the defence herein and enter judgment in favour for in the plaint”.

- The applicant submit that ,the above authority appears to be all fours with the matter herein and where the court had to consider the brief background of the loan facility, loan agreement and the letter of credit.

[7] In the case of **Equitorial Commercial Bank Limited Vs Jodam Engineering Works Limited and 2 others in HCCC No 13 of 2012** the court held that :-

“The general principle is that if the Defence shows bona fide triable issue, the defendant should be allowed to defend. The substance of the Defendants’ defence in the instant case has already been discussed above. In my considered view, it does not raise bona fide triable issue. It consists of mere denials and general traverse. Without reasons why the money is not owing. It is lacking in merit and raises no reasonable defence. It is for striking out”.

[8] In the case of **Janaco International (K) Limited Vs Simba Metals Limited High Court Civil Case No. 217 of 2012 Nairobi ieKLR 2013** adopted the parameters set out in **DT Dobie & Co Vs Muchina & Another (1982) eKLR** that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption

and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it”

[9] Again in **Emerg Investment Limited Vs Laban Ruto & Nine Others High Court Civil Case No.21 of 2009 Kericho eKLR 2010**, the Honourable Justice GBM Kariuki as he then was, quoted a passage in **George P.B Ogendo Vs James Nandasa & 4 Others Civil Case No 91 of 2002 Kakamega** that:-

“Gone are the days when liberty existed to engage in too many expedients in pleadings to an extent that the pleadings do not show what line of defence is being pursued by a Defendant. R.E Megary in “ Miscellany-at-law, a diversion for lawyers and others” at page 40 demonstrates a typical example of what today would be a model defence lacking in seriousness and incapable of showing what defence is relied on. It is an example that takes too far the expedients of pleadings. The example concerns an action brought against a neighbour for damaging a borrowed pony-cart. The local sea lawyer advised the defendant thus “ that he had never borrowed the cart; and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged; and that he had borrowed the cart from some person other than the Plaintiff, and that the Plaintiff had never owned any cart, whether the pony or otherwise, and so on and so forth” This is a defence that would today be struck out without the slightest hesitation.”

He further added that:-

“The process of the court must be carried out properly, honestly and in good faith. This is what Rule 13(1) connotes. The court will not allow its function as a court of law to be abused. Where a pleading is found to be groundless, the court will not hesitate to strike out as being an abuse of the process of the court”.

[10] The Honourable Judge Lesiit in **Plantation Fertilizer Limited Vs Rioki Coffee(1971) Company Limited High Court Civil Case No 58 of 2006 at Nairobi** quoted **Muguga General Stores Vs Pepco Distributers Limited (1987) KLR 150** where the Honourable Justice Platt, Gachuhi and Apaloo JJA held thus:-

“It is not sufficient simply to deny liability without giving some reason. A mere denial was not sufficient defence in this type of case. The Defendant had to give a reason as to why he did not owe the money, such as the absence of contract or that payment and could be proved”.

[11] The Respondent No. 1 only puts the Applicant to strict proof without offering any explanation to the averments in the Plaint, deposed materials and the documents executed by the Defendant and signatures thereof. No mention of police being involved to investigate the signatures.

[12] On principles of striking out pleadings the respondent submit that same were laid down in the case of **D.T. Dobie & Co. (K) Ltd –vs- Michina [1982] KLR 1**. The focus is whether or not the facts pleaded in a Plaint or otherwise gives the complainant a cause of action. It was stated that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. Madan J. stated as follows:-

“The words “reasonable cause of action” in Order VI Rule 13 means an action with some chances of success, when the allegations in the plaint only are considered a cause of action will not be considered reasonable if it does not state such facts as to support the claim/prayer.

The words cause of action means an act on the part of the defendant which gives the plaintiff his cause of complaint.

As the power to strike out pleadings is exercised without the court being fully informed of the merits of the cause through discovery and oral evidence, it should be used sparingly and cautiously.

The power to strike out should be exercised only after the court has considered all facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

[13] The respondents submit that, what is true of a plaintiff is also conversely true of a defence. The denials of the defendants enjoin the plaintiff to prove its allegations of facts made in the plaintiff. The allegations of existence and execution of the Agreement and the guarantee and provision of security needs proof. They further submit that under above heading, the defence is not as unreasonable as the plaintiff purports; rather it raises serious issues of fact and law.

Allegations of scandalous, frivolous or vexatious under **Rule 15(1)(b) fair trial under (c) and abuse of process under (d)** require evidence.

The defendants cite the case of **Nyati (2002) Kenya Limited –vs- Kenya Revenue Authority [2009] e KLR** which defined the word scandalous as follows:-

“I can find no warrant for restricting the meaning of the term scandalous to only that which is indecent, offensive or improper,. Surely, if everybody knows a man including his parents, knows his names to be Tom Njuna Onyango, and when he is sued under those names, he leads “I deny that my names are Tom Njuna Onyango”. That kindly of denial part from being frivolous and vexatious can be properly described as scandalous.

[14] Also in the case of **Mpaka Road Development –vs- Kanan [2004] EA 161** where **Ringera J.** (as he then was) stated:-

“A matter would only be scandalous frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading ipso factor vexatious.

[15] In **Raphael Fredrick Kyle Kilonzo –vs- Investments & Mortgages Bank Ltd [2008] e KLR** the words frivolous and vexatious were defined as follows:-

A pleading or an action is frivolous when it is without substance or an arguable when:

- a) A party is ruffling with the court; or
- b) When to put it forward would be wasting the time of the court; or
- c) When it is not capable of reasoned argument; or

- d) **It is without foundation; or**
- e) **Where it cannot possibly succeed; or**
- f) **Where the action is brought or the defence is raised only for annoyance; or**
- g) **To gain some fanciful advantage; or**
- h) **When it can really lead to no possible good.**

[16] The defendants submit further that, in the defence, no positive assertions of fact have been made that can either be termed as scandalous, frivolous or vexatious. The question here is that what can possibly be untrue or scandalous about the defendants defence? It is up to the plaintiff to prove the defendant wrong, which can be done only at the trial. There is equally nothing convoluted, obnoxious or repetitive about the defence to render it vexatious or frivolous. Hence, there is no merit in the applications under Clauses (b) (c) and (d). Indeed, if the defendants had no defence, then it would not have been necessary for the plaintiff to bring out annexures PO-1, PO-2, PO-3A and PO-3B, which calls for proof. This in itself means that there are triable issues negating its allegation of lack of reasonable defence.

[17] In **Starline General Supplies LTD –vs- Discount Cash AND Carry Limited Nairobi Milimani Commercial Court, HCCC NO. 710 of 2005** held that;

“In order to establish whether or not there were any triable issues arising from any case, the court would ordinarily give due consideration to the contents of the plaint and the defence as well as other pleadings including affidavits.”

[18] The defendants submit further;

Issues are many in this case inter alia; whether or not the 1st defendant borrowed money or signed the Agreement, the Agreement exists, whether the 2nd defendant guaranteed, signed the guarantee, gave any security etc. The documents themselves raise several issues inter alia; want of payment of stamp duty that will render the alleged Agreement inadmissible in law. Section 19 of Stamp Duty provides as follows:-

“19 (1) Subject to the provisions of subsection (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever.”

[19] After going through the pleadings, Affidavit annexures and the parties submissions, I find the following issues emerging;

- a. **Whether the defence filed herein is mere denial, lacks merit and an abuse of the court process?**
- b. **What is the order as to costs and interest?**

[20] **Order 2 Rule 15(2) Civil Procedure Rule 2010** stipulates that, at any stage of the proceedings the court may order to be struck out or amend any pleadings on the grounds it discloses no reasonable defence, its frivolous, it is otherwise an abuse of the court process inter alia. In **MPAKA ROADS DEVELOPMENT Vs. KANAN (2004) EA 161** the court held inter alia;

‘a pleading is frivolous if it lacks seriousness.....’

[21] In the case of **EQUITORIAL COMMERCIAL BANK LTD Vs. DUDOM ENGINEERINGWORKS LTD & 2 OTHERS HCC 13/2012**. The court held inter alia that;

“The general principle is that if a defence shows bona fide triable issue, the defendant should be allowed to defend”.

In **MUGUGA GEN. STORES vs. PEPCO DIST LTD (1987) KLR 150** the CA held that;

“It is not sufficient to simply deny liability without giving some reason or mere denial is not sufficient defence....”

[22] In our instant case the Defendant deny the existence of a contract and owing of the money advanced yet they do not allege crime was committed in form of forgery. They do not deny nor explain the circumstances in which the securities went into applicant’s possession. The Defendant first advances a defence of denial and puts the Plaintiff into strict proof and prays for the matter to go for trial. The court agrees with the case of D.T. BOBIE authority holding that:

“No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action ...”

[23] However the form and shape plus the content of the Defence before the court, to say the least, discloses no reasonable defence. There is no intimation or application as to the amendment of the same to inject live in it. The courts do not do trial as a ritual for the sake of the trial. It is a luxury for the court to let the Plaintiff to just come to court and throw all the materials in proof of a claim where the defence appears to be skirting the liability and is just seeking to buy time and delay the day of the reckoning. A casual perusal of the Replying Affidavit by the 1st Defendant dated 14th October 2014 states that she did not borrow an amount of Kshs 700,000/=, neither did she execute the agreement. She however, did not state whether the documents exhibited by the Plaintiff “PO1”are fake or fraudulent. That she is not aware of guarantee and Indemnity executed by the 2nd Defendant. She has emphatically denied everything and avers that, she will prove during the hearing. She did not seek for the amendment of the defence to include a set off and or counterclaim.

[24] The 2nd Defendant proceeds on the same path as that of the 1st Defendant. He is relying on “strict proof” by the Plaintiff whatever that means and denies providing guarantee and Indemnity. The 2nd Defendant does not explain again the authenticity of the documents and the fact that the Plaintiff has custody of the Log Book of the m/v vehicle No KAC 766C and the title No. Kajiado/Kaputei-North/2466 and which were handed over to the Plaintiff by the 2nd Defendant as security for the loan.

[25] In absence of the explanation as to the comprehensive claim mounted plus the documents filed by the Plaintiff the court finds that the defence on record is sham, frivolous and an abuse of the court process. The court thus makes the following orders;

1. The Defence herein is struck out.
2. The judgment is entered as prayed plus costs and interest.

Dated, signed and delivered in court at Nairobi this 25th day of September, 2015.

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C. KARIUKI

JUDGE