



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 184 OF 2014**

**EAST AFRICAN BREWERIES LIMITED.....PLAINTIFF**

**VERSUS**

**ARISTIDE BRILLANT NKOUMONDO.....DEFENDANT**

**RULING**

1. East African Breweries Ltd, the plaintiff herein sued Aristide Brillant Nkoumondo, the defendant herein, in which it sought for judgement in the following terms vide the amended plaint dated 23<sup>rd</sup> June 2014

*a. An equitable account and/or equitable compensation*

*b. Damage and/or equitable compensation arising out of his breaches of fiduciary duty to the plaintiff.*

*c. Damages for fraudulent misrepresentation, fraud and deceit including damages in the sum of US\$2,861,700*

*d. Interest*

*e. Costs*

*f. Any other or further orders and/or reliefs as this Honourable court might deem just*

The defendant filed a defence to deny the plaintiff's claim.

2. The defendant has now taken out the motion dated 29.4.2015 in which he sought for the plaintiff's Amended plaint dated 24<sup>th</sup> February 2015 to be struck out. The motion sets out the grounds it is based. When served the plaintiff filed the replying affidavit of Wambui Kosgei to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the oral submissions and the material placed before this court. This court has been beseeched to grant the order striking out the plaint on basis that the suit does not disclose any reasonable cause of action. It is also argued that the action is an abuse of the court process as it only serves to prejudice and or embarrass the defendant. On the face of the motion, the defendant avers that it is not indebted to the plaintiff for the sum claimed or any other sum at all. The defendant further argued that the defendant is a separate entity from RBS East Ltd which

company is alleged to have received payment in the sum of USD1,432,000/= from Frigorex EA Ltd in pursuance of the purported sale of fridges. It is the submission of the defendant that the plaintiff's claim lies as against Frigorex East Africa Ltd and not the defendant. It was also pointed out that the defendant that he has no legal capacity to effect a sale of the plaintiff's assets including the alleged fridges. In any case, it was argued, that the refrigerators alleged to have been sold by the defendant are still in the plaintiff's ownership records and possession hence the allegation that they have been sold appear to be superfluous.

3. The plaintiff on the other hand is of the view that the amended plaint discloses a reasonable cause of action hence the motion should be dismissed. The plaintiff beseeched this court to find that several triable issues have arisen from the pleadings. First, is whether or not the defendant being the plaintiff's head of procurement, he owed the plaintiff the fiduciary duties to act honestly and to avoid a conflict of interest. The second issue which the plaintiff argues is whether or not the defendant amended the S.L.A before it was executed.

4. The plaintiff argued that payments were made by Frigorex into the bank account opened and operated by the defendant who is alleged to have fraudulently and in breach of his fiduciary duties proceeded to utilize these sums for his own personal benefit. The third issue which the plaintiff argued exists, is whether or not the defendant opened and operated bank accounts in the name of RBS (EA) and thereafter used the funds deposited for his own benefit. The plaintiff countered the argument that the defendant is distinct and separate from RBS (EA) Ltd by arguing that the plaintiff's claim is founded on a claim for breach of fiduciary duties which is a personal claim.

5. The defendant has argued that the plaintiff's replying affidavit should be struck out because under Order 2 rule 15 (1) (a) of the Civil Procedure Rules, no affidavit evidence was required. The plaintiff countered this argument by stating that since the defendant is also seeking to have the plaint to be struck out for being an abuse of the court process under Order 2 rule 15(1) (d) of the Civil Procedure Rules, the provision of affidavit evidence is required. With respect, I think I agree with the submissions of Mr. Malik, learned advocate on this issue, hence I decline to strike out the replying affidavit.

6. Having set out in brief the argument put forward by both sides, let me now revisit the aforesaid issues for determination. On the question as to whether or not the action discloses a reasonable cause of action, I have carefully considered the pleadings and the grounds stated in support and against the motion. It must be appreciated from the outset that this ground does not require the backing of any form of evidence under Order 2 rule 15 (1) (a) of the Civil Procedure Rules. The court is required to simply consider the pleadings and the grounds the application is based. The principles to be considered in determining applications for striking out pleadings are well settled. In **Waters vs Sunday Pictorial newspapers Ltd (1961) 2 ALL ER 758 at 761**, it was stated in part as follows:

***"... it is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. For the purposes of this appeal, we are not in anyway concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine."***

7. In **D. T. Dobie & Co. (K) Ltd vs Joseph Mbaria Muchina (1982) K.L.R 1**, Madan J A restated the principles as follows:

***"..... it is relevant to consider all averments and prayers when assessing under O. 6 rule 13 whether a pleading discloses a reasonable cause of action .....The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case of not disclosing a reasonable cause of action .... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by***

***amendment.”***

8. The plaintiff's claim is plainly stated in the amended plaintiff and can be summarised as follows. That the defendant who was employed by the plaintiff as the incharge of its procurement is alleged to have entered into two agreements i.e the Master Lease Agreement (M.L.A) and Secondary Lease Agreement (S.L.A) with a third party called Frigorex East Africa Ltd on behalf of the plaintiff to lease commercial fridges from Frigorex, the exclusive owner of those fridges. The plaintiff further avers that it was to buy those fridges at the expiry of the M.L.A less the depreciated value. It is alleged that the defendant changed two sub-clauses of the draft agreement before it was signed so that the money the plaintiff was to borrow i.e US 1,429,500 to buy the fridges could be diverted to RBS East Africa Ltd. instead of the plaintiff. It is further alleged by the plaintiff that the defendant is a director of RBS (EA) Ltd and is even a signatory to an account held by RBS (EA) Ltd at Chase bank where Frigorex paid the said USD 1,429,500. The plaintiff claimed that Frigorex should have paid the aforesaid amount to the plaintiff to enable the plaintiff purchase the fridges or defray the cost of maintenance or hire in the event that it did not exercise the option to purchase. The plaintiff further argued that the defendant could not separate himself from Frigorex as the court can lift the corporate veil. The plaintiff also alleged that the defendant attempted to sell 2,500 fridges belonging to the plaintiff to Frigorex but was unsuccessful as the same are still owned by the plaintiff and are still under the plaintiff's control.

9. It would appear from paragraphs 15, 16, 17 and 18 of the amended plaintiff that the plaintiff is saying that Frigorex paid USD1,429,500 to RBS E.A Ltd instead of paying the plaintiff to enable it purchase the fridges from Frigorex. This argument does not make sense unless the plaintiff confused itself in the process of drafting its pleadings. When the motion came up for interpartes hearing, the plaintiff was ably represented by an advocate whom I expected to clarify the issue. Prima facie, from the pleadings, it would appear the fridges belong to Frigorex (EA) Ltd. I have already pointed out that the plaintiff filed a replying affidavit to answer the defendant's motion. I have critically examined the aforesaid replying affidavit and it is clear from the averments therein that the plaintiff has failed to demonstrate that it had executed an agreement with Frigorex where Frigorex agreed to sell fridges to the plaintiff and the conditions attached thereto. In the circumstances what has emerged is that there exists a business relationship between Frigorex E.A Ltd and RBS (EA) Ltd. The plaintiff has attacked the close relationship between the defendant and RBS EA Ltd. The defendant has argued that the plaintiff should appreciate that he is separate and distinct person from the corporate entity known as RBS (EA) Ltd. There is a serious allegation by the plaintiff that the defendant attempted to sell 2,500 of its fridges. This allegation flies on the face in that the plaintiff admits in paragraph 21 of the amended plaintiff that title still remains with the plaintiff. The plaintiff has also claimed that Frigorex has already made payments to RBS for the fridges. If this is correct then the proper party to lodge a claim is Frigorex having paid for non-existent goods.

10. Let me revisit the issue that connects the defendant and RBS E.A. Ltd. The plaintiff has clearly stated that the defendant was in breach of fiduciary duties, which is a personal claim. I find this submission unconvincing because the transactions undertaken by RBS (EA) Ltd are regarded as those of the company. There is no attempt to lift the corporate veil. In any case it would appear the plaintiff has no intention of bringing RBS (E.A) Ltd on board as a party to these proceedings yet it is the party which is allegedly to have been paid.

11. After a critical consideration of the pleadings, I am convinced the issues raised by the plaintiff are resemblance of triable issues and were meant to sustain a suit which in my view plainly has no foundation to lean on.

12. I am convinced the suit discloses no reasonable cause of action.

13. Consequently, I find the motion dated 29.4.2015 to be well founded. It is allowed as prayed with costs.

Dated and delivered in open court this 23<sup>rd</sup> day of October, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant