



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 9 OF 2014**

**GEORGE MURAGE GITHU T/A**

**HOMELAND SUPPLIES SERVICE.....PLAINTIFF**

**VERSUS**

**SIMON MURIITHI NDUIRE.....DEFENDANT**

**RULING**

By a plaint dated 31<sup>st</sup> March, 2014, the plaintiff sued the defendant seeking judgment against the defendant for, *inter alia*, a declaration that the defendant is a trespasser and that his takeover of the plaintiff's business and/or plant and using the same is unconstitutional, illegal and unjustified. He also sought an order for accounts to be taken to ascertain the profits the defendant has received from the said business for the period he has been illegally operating it and also an injunction restraining the defendant from interfering with or trespassing on the premises on which the business is located.

According to the plaintiff's plaint, the plaintiff set up his business in the year 2011 on LR No 732 (Ruringu) and registered it in the name of Homeland Supplies Services. He ran the business till 10<sup>th</sup> November, 2013 when the defendant through "*dubious deals illegally entered into the said business claiming to have lent plaintiff a sum of Kshs Three Million Two Hundred and Seventy Five Hundred only whereof the defendant assumed illegal receivership of the said business*".

In response to the plaintiff's claim, the defendant filed a defence in which he denied the plaintiff's allegations. In particular, he contended that the plaintiff owed him **Kshs. 3,275,000/=** and which, by mutual agreement, was to be settled within a specific period failure of which the defendant was to take possession of the plaintiff's business. This arrangement was supported by a written agreement dated 10<sup>th</sup> October, 2013. The said agreement is one of the documents that the defendant is relying upon in opposition to the plaintiff's claim.

In reply to the defence the plaintiff denied owing the defendant the sum alleged; however, he did not deny executing the alleged agreement but has, as far as I can gather, questioned its validity.

Against the background of these pleadings, the plaintiff filed a motion dated 2<sup>nd</sup> May, 2014 in which it sought, in the main, for the order that the defendant's statement of defence be struck out because it discloses no or no reasonable defence and further that judgment be entered for the plaintiff as prayed in

the plaintiff. The motion is said to be grounded on sections 1A and 3A of the Civil Procedure Act, Order 2 rule 15 of the Civil Procedure Rules, sections 2, 15, 16 and 17 of the Chattels Transfer Act and sections 19 and 38 of the Stamp Duty Act.

On the face of these pleadings, it is apparent that one of the questions that cannot be resolved on the basis of affidavit evidence is whether the defendant lent the plaintiff any money and if so whether the two parties entered into any sort of arrangement on how the sum lent was to be repaid.

In his plaint the plaintiff has also asked for accounts to ascertain the profits that have accrued for the period that the defendant has been in charge of his business and how much of such profits should be paid to the plaintiff.

In my view these are questions that cannot be determined in an application such as the one before court.

Without pre-empting the outcome of the plaintiff's suit, it cannot be said that the defendant's defence is so hopeless that it plainly and obviously discloses no reasonable defence as the plaintiff has suggested.

In the case of **D.T. Dobbie Kenya Co. Ltd versus Muchina (1982) KLR 1**, it was held that the power of striking out pleadings as a summary procedure is invariably exercised without being fully informed on the merits of the case through such means as discovery or oral evidence and therefore it should be used sparingly.

While emphasising why the court should exercise restraint in exercising this power, Justice Madan said in that case:-

***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.***

Although the learned judge was making reference to a suit, the same principle applies to a defence filed in response to a suit; a suit and or a defence filed against it are weighed against the same standard of whether they disclose a reasonable cause of action or a reasonable defence, as the case may be.

It has also been held that the summary procedure is only appropriate to cases which are plain and obvious so that any judge can say at once that the statement of claim as it stands is insufficient if proved to entitle the plaintiff to what he asks. I would say the same of a statement of defence.

Having so said, I am inclined to conclude that I do not find any merit in the applicant's application dated 2<sup>nd</sup> May, 2014. I hereby dismiss it with costs.

**Signed, dated and delivered in open court this 14<sup>th</sup> day of December, 2015.**

Ngaah Jairus

**JUDGE**