

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 552 OF 2010

MEKAN (EA) LIMITEDPLAINTIFF

VERSUS

ASKASHARP HOLDINGS LIMITEDDEFENDANT

RULING

The defendant filed an application by way of Notice of Motion under Order 40 Rule 7, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act for orders that the plaintiff's suit be dismissed for being scandalous, frivolous, vexatious and an abuse of court process. If that order is denied then the defendant be granted leave to amend its defence and raise a counterclaim against the plaintiff and enjoin the plaintiff's directors as co-defendants in the counterclaim. That the plaintiff be compelled to deposit into court the outstanding and owing rental arrears of Kshs. 16,580,976/=.

The defendant has also sought an order that the court do vary discharge or set aside the order made on 21st May, 2013. The application is supported by an affidavit sworn by Ramji Shamji Patel a director of the defendant alongside the grounds set out on the face of the application. The application is opposed and there is a replying affidavit sworn by Andrew Mbaya a director of the plaintiff company.

Following that replying affidavit a supplementary affidavit sworn by Ramji Shamji Patel was filed with leave of the court. Both parties have filed written submissions addressing the said application.

I have gone through all the material before me. The application comes after the court (Dulu J and Musinga J, as he then was) granted injunction orders in favour of the plaintiff. The court unequivocally found that the plaintiff had established a *prima facie* case with a probability of success and that if an injunction was denied irreparable loss would follow.

Against that background, I see no basis whatsoever in declaring the plaintiff's suit scandalous, frivolous, vexatious and an abuse of the court process as alleged by the defendant. That prayer must therefore fail. As to the amendment of the defence, the court would generally grant leave if no prejudice or injustice will be occasioned to the other party. There are two limbs to the orders sought by the defendant. One is to raise a counterclaim against the plaintiff and two, enjoin the plaintiff's co-directors as co defendants in the counter claim.

I shall not deny the defendants leave to file a counterclaim provided that it is within the provisions of The Limitation of Actions Act Cap 22 Laws of Kenya. However, if that counter claim is going to be alleged against the plaintiff's directors in person for the same cause of action, this can only be done as and when the defendant has obtained an order to raise the veil of incorporation. I have not seen any order to that effect and therefore the plaintiff's directors cannot be made co-defendants in the counterclaim. In the event the defendant elects to file the counter claim against the plaintiff's company, this should be done within fourteen days of the date of this ruling.

With respect to the deposit into court of the rental arrears said to be owed, the material before me points to the fact that this is a contentious issue which has to be determined during the trial.

It follows therefore, other than the leave to amend the defence the application must fail. The defendant

shall pay the plaintiff's costs occasioned by this application.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE