



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HCCC NO 15 OF 2012**

**ACCORD AFRICAN VENTURE SAFARIS LIMITED.....PLAINTIFF**

**V E R S U S**

**SITE FORWARDERS LIMITED.....DEFENDANT**

**RULING**

The Plaintiff's claim is for payment of KShs. 3,253,800/00 being transport and freight charges incurred by the Plaintiff on behalf of the Defendant. Its case is that the parties entered into an agreement for transportation of the Defendant's goods from Mombasa to Nairobi between July 2011 and September 2011. That despite demand and notice of intention to sue the Defendant neglected to pay the sum. Particulars are contained in the plaint dated 13<sup>th</sup> December, 2011.

The Defendant filed a statement of defence dated 20<sup>th</sup> February, 2012. It denied each and every averment in the Plaint or that it owed the Plaintiff any amount of money for services rendered and put the Plaintiff to strict proof. It denied that it ever received any demand notice from the Plaintiff and prayed for dismissal of the suit.

The Plaintiff subsequently filed notice of motion dated 27<sup>th</sup> February 2012 in which it prayed for summary judgment. The Court (Odunga J.) in a considered ruling declined to grant the orders on the basis that summary judgment could not be entered when there was a defence already in place. It urged the Plaintiff to apply to have that defence struck out as it was the appropriate remedy to seek at that stage in the suit

Now the Plaintiff has filed Notice of Motion dated 6<sup>th</sup> May, 2015 seeking the main order that the defence dated 20<sup>th</sup> February, 2012 be struck out and judgement be entered for the Plaintiff. The application is brought under Order 2, rule 15(1) (c) & (d) and Order 51 rule 1 & 3 of the Civil Procedure Rules, 2010 (the Rules). There is a supporting affidavit sworn by the Managing Director of the Plaintiff, one David Mwangi Mburu, in which he asserts -

- i. That between the months of July 2011 and September 2011, the Defendant requested the Plaintiff to transport goods from Mombasa to Nairobi on its behalf.
- ii. The Plaintiff undertook the said transportation and delivered the containers to Nairobi and duly billed the Defendant for the same.
- iii. That the Defendant has since been making promises to pay and requesting to be allowed to pay by

- instalments and to date has not made good its word.
- iv. That the Defendant is truly and justly indebted to the Plaintiff and has not defence to the Plaintiff's claim.
  - v. That the defence filed is merely intended to delay the quick disposal of the suit and is an abuse of the process of the court.

The Defendant has opposed the application by replying affidavit filed on 22<sup>nd</sup> July 2015 by one James Gacucu, the Managing Director of the Defendant. Grounds of opposition emerging therefrom include –

(i) That the Defendant does not owe any money to the plaintiff and has never requested for any service or instructed any agent to act on his behalf in obtaining services from the Plaintiff.

(ii) That numerous issues for trial are disclosed by the pleadings and it should not be struck out.

(iii) That striking out defence is a summary procedure that should be only resorted to cautiously as it denies the Defendant a chance to state their case.

(iv) That the Plaintiff made a similar unsuccessful attempt to dismiss the defence 3 years ago and then lay in slumber until he made this bad faith attempt.

The parties filed written submissions which the Court has considered.

The guiding principle in applications to strike out pleadings is that the court ought to act cautiously and allow such application only in clear and obvious cases. The court should consider the facts of the case without embarking upon a trial of the same. It will not be concerned with the merits of the impugned pleading at this stage; that is a function of the trial court. The court must indeed refrain from expressing any opinions upon the merits of the facts pleaded as this may prejudice the fair trial of the action, should it go to trial. If only one triable issue is disclosed, that is enough to permit the suit to proceed to trial. See **D. T. Dobie & Company (K) Ltd –vs- Muchina [1982] KLR 1.**

Looking at the statement of defence filed, it is evident that it does not raise any triable issues at all. It is full of mere denials without any substance. Moreover, the Defendant has admitted its indebtedness to the Plaintiff. I am also satisfied that the defence as it is, is filed with the intention of delaying the quick disposal of the suit. To allow such defence to stand would in this case prejudice, embarrass and delay the conclusion of the action. It constitutes an abuse of the process of the court.

In the circumstances, the application is allowed. The defence is hereby struck out and judgment entered for the Plaintiff for the sum of KShs. 3,253,800/00 with costs and interest at court rates. It is so ordered.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of December, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**