REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL SUIT NO 285 OF 2012

THE KENYA POWER & LIGHTING CO. LTD .....PLAINTIFF

VERSUS

ALLIANCE MEDIA KENYA LIMITED .....DEFENDANT

RULING

Striking out pleadings

[1] I have been called upon to decide on a Notice of Motion dated 22nd October, 2012 which is expressed to be brought under Sections IA, 1B, 3 and 3A of the Civil Procedure Act (hereafter the CPA) Order 2 Rule 15(1), (b), (c) and (d), and Order 36 Rule 1(a) of the Civil Procedure Rules (hereafter the CPR). The Applicant prays for orders:-

1. **That the Defendant's orders, statement of defence filed herein and dated 10th July, 2012 be struck out with costs.**
2. **That on prayer (1) hereinabove being granted in addition thereto, and/or in alternative to the above, summary judgment be entered in favour of the Plaintiff against the Defendant as prayed in the plaint.**
3. **That cost of the application be borne by the Defendant.**

[2] The Applicant considered a brief history of the matter would yield appreciation. It stated that on or about 20th November, 2012 at about 1800 hrs., along Think Road, Nairobi a billboard which was erected by and belonging to Messrs Alliance Media of P.O. Box 25503 – 00603, Nairobi collapsed and fell across Kenya Power and Lighting Company's (KPLC) 66KV power lines. As a result extensive damage was inflicted to the power line fittings involving breakage of support insulators poles and severing of high voltage conductors. Consequent, there was an immediate interruption of bulk power supply totalling approximately 65 megawatts in two primary substations i.e. Parklands and Westland's 66KV/11KV stations. Parklands substation is a source of power supply lines covering the whole of Parklands, Pangani, Ngara, Muthaiga, Aga Khan, Gertrude Hospital and environs including parts of the Nairobi City Centre. The Westlands substation is equally a power supply source to the whole of Westlands Centre, and suburb, Peponi, Raphta, Lower Kabete Roads, Waiyaki Way including MP Shah Hospital.

[3] All these areas experienced loss of electricity supply for a duration of 25 hours before final restoration of supply on 21st November, 2011 at around 1900 hrs.

PARTICULARS OF LOSS

In an effort to restore power supply to these areas, the Plaintiff Company mobilized resources to conduct patrols, safety insulations of the faulty sections and preparatory works to remedy the damage occasioned. The Plaintiff Company incurred transport costs amounting to Kshs. 31,655/- and labour valued at Kshs. 74,635/-. Further the Plaintiff Company incurred expenses amounting to Kshs. 450,000/0 for materials, transport and labour costs. The damage caused led to an estimated load loss of 65 megawatts during the interruption lasting 25 hours which is equivalent to 1625 megawatts which translate to a loss of Kshs. 25,463,700/- calculated at an average tariff of Kshs.14.67 per Kilowatt Hour (KWH). The total financial loss accrued by the Plaintiff Company due to the interruption was Kshs. 25,914,090/- and the same is well within the knowledge of the Defendant. That was pleaded in paragraph 6 of the plaint. It is trite law that one must specifically plead special damages in a claim. However, the same is not a blanket rule and is open to certain exception, i.e. where existence of such a claim is clearly ascertained from the pleadings. It quoted; **McGregor on Damages 15th Edition at page 1126 par.1765** which made reference to the finding of **SLADE J., IN HAYWARD V PULLINGER [1950] ALLER** 581 where the learned Judge stated:

> **"The function of pleadings is to make it clear to your opponent what case he has to meet and I cannot help feeling that anyone reading paragraph 8 and seeing the words …' and his said service agreement was terminated on November, 6, 1947' must have been aware that special damage was being claimed… where the statement of claim suggests the probability that a claim for special damages is intended, I think is a question of degree whether the statement of claim does not put forward a claim for special damages albeit without the particulars which the rules of pleading strictly require, or whether it is nebulous that the Defendant can treat it as not being a claim for special damages at all."**

[4] According to the Applicant, the Defendants defence filed on 10th of July 2012 is scandalous, frivolous and vexatious and amounts to mere denials of an obvious legal obligation. They seek to have it struck out under Order 2 Rule 15 of the Civil Procedure Rules, 2010 provides:-

> **"(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-**

a. **It discloses no reasonable cause of action or defence in law.**
b. **Its scandalous, frivolous or vexatious; or**
c. **It may prejudice, embarrass or delay the fair trial of the action; or**
d. **It's otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.**

[5] To support the argument that the court has power to strike out a pleadings, the Applicant cited the decision by Justice G. K. Kimondo in **HCCC 511/08 MOHAMMAD HASIM PONDOR & ANOTHER V. SUMMIT TRAVEL SERVICES LTD & 4 OTHERS [2011]** where the learned judge struck out the defence and entered judgment against the Defendant and stated the following:

> **"The Court has power to strike out a pleading under Order VI Rule 13(b) and (d) of the old Civil Procedure Rules the precursor to the present Order 2 Rule 15. The Applicant would then need to demonstrate the suit is scandalous, frivolous, and vexatious or an abuse of the Court process. A frivolous suit must be plainly so on its face. It is one so baseless as to have no legs to stand on…"**

[6] In further support of the Plaintiff's prayer that the defence herein be struck out, it cited yet another judicial decision in the case of **JOHN PATRICK MACHIRA T/A MACHIRA & CO.**

ADVOCATES V GRACE WAHU NJOROGE [2006] Eklr where the Court of Appeal held:

> **"The Court has an inherent power to prevent the abuse of legal machinery … undoubtedly, therefore, the Court has power to strike out a statement of claim; but the power of the court is not confined to that: it applies also to a statement of defence with is frivolous and vexatious and an abuse of the procedure … it appears to be that evidence may be received in a proper case of motion of this kind to show that a pleading is an abuse of the process of the Court…"**

[7] The Applicant urged it is apparent that the Plaintiff has indeed suffered considerable pecuniary loss and the Defendant in his defence has not raised any triable issue or defence and this defence should be struck out with costs.

[8] The Applicant also submitted on the request for Summary Judgment and relied on the decision by Hon. Justice Lessit in **SCANHOUSE PRESS LTD V. TIME NEW SERVICES LTD [2008] eKLR** which made reference to **GURBAKSH SINGH & SONS LTD V. NJIRIRI EMPORIUM LTD [1985] KLR 696** and held:

> "**Summary judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere fact of arithmetic."**

Other authorities were quoted; the case of **DIAMON TRUST BANK KENYA V PETER MUILANYI & ANOTHER [2006] eKLR** which cited with approval the decision of Newbold P in **ZOLA & ANOTHER V RALLI BROTHERS LTD & ANOTHER** and stated that:

> "**Order XXXV is entitled to enable the Plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the Defendant."**

[9] The Applicant was categorical that the sum due to the Plaintiff is indeed a mere fact of arithmetic as the same can be clearly ascertained. All the documents clearly ascertaining the sum due to the Plaintiff were provided to the Defendant. Thus, the statements by the defendant that the Plaintiff; has failed to give particulars of the damages that were incurred; and has no cause of action is a blatant attempt to mislead the Honourable Court. In any event, the Plaintiff has no cause action. See **Black's Law Dictionary, 2nd Edition** defines Cause of Action as:

> **"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person".**

[10] The Applicant took a swipe at the Defendant/Respondent's allegation that the defence of Act of God amounts to a triable issue hence the matter should proceed to full hearing. **Black Law's Dictionary** defines the terms "triable" as, **"subject or liable to judicial examination and trial."** It is trite law that matters must be specifically pleaded so that the same can be subject to judicial examination. Order 2 Rule 4 (1) of the Civil Procedure Rules Cap. 21 of Laws of Kenya provide that:

> **" A party shall in any pleading subsequent to a plaint plead specifically any matter for example, performance, release, payment, fraud, inevitable accident, Act of God, any relevant Statute of Limitation or any fact showing illegality:-**

a. **which he alleges makes any claim or defence of the other party not maintainable;**
b. **which, if not specifically pleaded might take the opposite party by surprise; or**
c. **which raises issues of fact not arising out of the preceding pleading".**

[11] The Defendant/Respondent failed to specifically plead ''Act of God'' as required by law

and rather resorted to ambiguous statements meant to hoodwink this Court into concluding that there exists a triable issue. Black's Law Dictionary defines "Acts of God" as;

> **" An overwhelming, unpreventable event caused by forces of nature such as an earthquake, flood or tornado… the effect of which could not be prevented or avoided by the exercise of due care of foresight."**

Michael A. Jones TEXTBOOK ON TORTS, 8th Edition at page 401 refers to Act of God as;

> **"…events caused by the forces of nature 'which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility '(Tennent v. Eaul of Glasgau (1864) 2M (HL) 22, 26 per Lord Westbury). Whether any particular natural phenomenon falls into this category will be treated as a question of fact, but it must have been impossible for human foresight to provide against it. It is not sufficient to demonstrate that the occurrence could not reasonably have been foreseen."**

[12] The Applicant stated that there has not been any evidence produced by the Defendants/Respondent to actually support its averments that indeed an act of God was the only cause of the said billboard falling on the power lines. It is trite law that foreseeable results of unforeseeable causes may still raise liability. It would have been prudent for the Defendant/Applicant to actually produce reports indicating that the rainfall on that day was extraordinary and explain/show what standard of care they had put in place to avoid such accidents. Instead, the Defendant/Applicant has made vague statements apparently in support of the said defence. Nothing extraordinary and /or beyond human foresight that took place on the subject day and rather the Defendant/Respondent is merely fishing for excuses with the sole intention of delaying the Plaintiff the fruits of litigation. In any case the defence is bare denials; and the Defendant having acknowledged that the Plaintiff Company deal with the supply of electrical power cannot in the same breath, question the ownership of the power lines. The defence does not also comply with Order 7 Rule 5 of the Civil Procedure Rules and none of the accompanying documents was filed. The rule states:

> **"The defence and counterclaim filed under Rule 1 and 2 shall be accompanied by:-**
>
> a. **An affidavit under Order 4 Rule 1(2) where there is a counterclaim.**
> b. **List of witness to be called at trial**
> c. **Written statements signed by the witnesses except expert witnesses and**
> d. **Copies to be relied upon at the trial."**

The overriding objective of the Civil Procedure Act is to "facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes…" but the defendant is militating against that.

[13] The Applicant relied on the following authorities:

1. **Civil Procedure Act Cap 21 of the Laws of Kenya.**
2. **Hccc 511/08 Mohamman Hasim Pondor & Another V Summit Travel Services Ltd & 4 Others [2011].**
3. **John Patrick Machira T/A Machira & Co. Advocates V Grace Wahu Njoroge [2006] Eklr.**
4. **Scanhouse Press Ltd V Times New Services Ltd [2008] Eklr.**
5. **Diamond Trust Bank Kenya V Peter Muilanyi & Another [2006] Eklr.**
6. **Michael A. Jones TEXTBOOK ON TORTS, 8TH edition.**

DEFENDANT'S WRITTEN SUBMISSION

[14] According to the Defendant, the Application dated 22.10.2012does not address what the plaintiff's cause of action really is, and that challenge has been raised in the Defence. It is impossible to tell from the Plaint or from the affidavit of Mr. Dianga, the legal body of legal

principles and/or doctrines upon which the plaintiff's claim is founded or the Defendant is liable to compensate it; is it based on contract or tort or restitution? The plaint does not establish: a cause of action; or a legally recognised right which has been wrongfully invaded or likely be invaded by the Defendant; or a legally recognised injury with respect to which relief is available.

[15] Quite apart from that, the Defence raises several traible issues which can only be properly addressed and conclusively resolved at the trial of this action, not by way of untested affidavit evidence. These include:

a. Whether the billboard that collapsed fell on the Plaintiff's power lines as alleged, causing extensive damage. There is simply no evidence before this Honourable Court to prove that the bill board in fact collapsed on the power lines as alleged. Paragraph 3 and 4 or Mr. Dianga's bare bones affidavit are mere assertions not backed up by any evidence at all.
b. Then there is the question whether the collapse was caused by an act of God i.e. an unexpected heavy down pour that was not and could not have been anticipated. This is an issue to be fully explored at trial.
c. The documents relied upon by the Plaintiff are with respect to paragraph 5 of Mr. Dianga's Affidavit which is produced so as to prove damage – Exhibit BN1. Yet, this is a self-generated document of limited use, if any, to the Court. It is an unsigned document, marked adv. Copy, entitled Power Supply Interruption and dated 20th November, 2011 and references OB No. 20/21/11/2011 (Muthaiga Police Station). Though dated 20th November, 2011 it refers to events that happened on 21st November, 2011 i.e. the restoration of power on 21st November, 2011 at 19.00hrs. This Honourable Court should not rely upon this document, which is inadmissible in any event.

[16] The foregoing discussion leads to yet another fundamental shortcoming in the Plaintiff's claim. The plaint claims an aggregate sum of Kshs. 25,914,090/- as damages with the statement that "further and better particulars whereof are well within the Defendant's Company Knowledge." On the Plaintiff's own admission no particulars for this claim, which is in the nature of special damages has been provided. The law is clear and well-settled and the authorities on this are legion-see for example **HAHN V SINGH [1985] KLR 717 AND JUVANJI V SANYO ELECTRICAL CO. LIMITED [2003] 1 EA 98**. Special damages must be pleaded with full particularity and strictly proved. Indeed, in the absence of particulars, no claim for special damages will be allowed to go to trial. Not only, has the Plaintiff failed to plead special damages with any particulars, but strict proof is also not forthcoming and the following issues are critical:

a. The documents relied on claim a loss of revenue of Kshs.25,463,759/-(a) which is worked at KWHrs 1,625,000/- and overall average tariff of Kshs.15.67. There is no evidence for the loss KWHrs at all. The actual monthly or yearly schedules for the affected installations on which the alleged averages are based, which should easily available, are simply not before the Court.
b. In any event, the law compensates, actual loss which in this case should have been proof of lost revenue (of which there is none) less the cost of production which yield the actual loss profit for which the Defendant would be liable (assuming this is a viable claim against it of which there is none). The costs of production are concealed from the Court.
c. The rest of the claim which is made up of material costs, transport and labour also fail for want of proof.

[16] The Defendant is convinced it has said enough to show that (i) Defendant's defence raises triable issues and probably, is could be the plaint which is frivolous, vexatious and devoid of merit.

COURT'S DECISION ON THE MATTER

[17] The court has taken time to consider the submissions by the parties which I have reproduced in *ex tenso,* and I think the only issues for determination are the ones listed below. I do not think there is any doubt that the court has power to strike out pleadings and enter judgment in

appropriate cases. What matters is the legal dimensions circumscribing the exercise of that power. Therefore, the issues I will engage are:

a) Whether the defence raises any triable issue or is a sham and should be struck out; and

b) Whether summary judgment should be entered in favour of the plaintiff.

[18] The two issues formulated, however, are inextricable and I propose to deal with them together. The subject of this application is not any novel; much has been written on it in scholarly work as well as judicial opinions. Accordingly, I do not wish to re-invent the wheel. The two matters; of triable issue and summary judgment were discussed by the Court of Appeal in numerous cases. This court also had occasion to assemble the said cases with an appraisal thereto in the case of **NBI HCCC NO 442 OF 2013.** I adopt the reasoning in that case which was rendered in the following manner;

[15] The legal dimensions governing entry of summary judgment are well settled that they cannot be called upon to justify themselves. Case law on the subject is legion which I need not multiply except I will refer to two cases; 1) ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR; and 2) SULTAN HARDWARES LIMITED v STEEL AFRICA LIMITED [2011] eKLR; where the Court of Appeal quoted its earlier decisions and also from its predecessor. That rendition by the Court of Appeal in the two cases is reproduced below, and it is in such subtle and absolute simplicity that I will not need further elaboration.

[16] In the case of ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR the Court of Appeal had the following to say:

> *In **MOI UNIVERSITY v VISHVA BUILDERS LIMITED** - Civil Appeal No. 296 of 2004 (unreported) this Court said:-*
>
> > ***"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed***

was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

And finally in Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 at p. 365 this Court said:-

"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this Court stated:

With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.

If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.

That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of Dhanjal Investments Limited vs. Shabana Investments Limited, Civil Appeal No. 1232 of 1997 (unreported) where it stated:

The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited [1952] 19 EA 77, and followed in the Court of Appeal for Eastern Africa in the case of Souza Fiqueredo & Co. vs. Moorings Hotel [1959] EA 425, that if the Defendant shows a bona fide triable issue he must be allowed to defend without conditions."

[17] In the case of ***SULTAN HARDWARES LIMITED v STEEL AFRICA LIMITED [2011] eKLR*** *the Court of Appeal stated the following:*

We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalji t/a Vakkep Building Contractors vs. Casousel Ltd. [1989] KLR. 386 the predecessors of this Court (Nyarangi, Platt, JJ.A. and Kwach, Ag. J.A.) held that:

"Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist".

See also – Kassam vs. Sachania [1982] KLR 191 and Zola v Ralli V Bros Ltd [1969] E.A. 591.

[19] Like in the case of **NBI HCCC NO 442 OF 2013 AAT HOLDINGS LIMITED v DIAMOND SHIELDS INTERNATIONAL LTD :**

I should only decipher the principles which should guide the exercise of discretion in determining an application for summary judgment to be:

1) That Summary judgment is a draconian measure and should be given in only the clearest of cases.

2) That a trial must be ordered if a bona fide triable issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean one that will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. See the opinion of Duffus P. and Sheridan, J, in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75.

3) But a trial should not be ordered in a case where the Court strongly feels it is justified in thinking that the defences raised are a sham.

[20] Is there any triable issue which the defence raises? I have perused the defence and it puts forward a number of defences or issues to wit; 1) a defence of Act of God described as ''unusual down pour''; 2) the need to prove damage to power supply lines; 3) need to prove loss of revenue; and 4) need to prove quantum of damages, if any etc. Given the circumstances of this case, there is merit to allow the defendant an opportunity to challenge the plaintiff's claim that the collapsed bill board caused damage to electric power lines; or that the plaintiff suffered damage and loss in revenue. These are real issues which constitute prima facie defences which deserve trial. At this point, I should also say something about the defence of Act of God; it is a question of fact to be proved by the defendant, and at this stage, I need only state that the description of the Act of God is a specific pleading in law that support the defendant's claim. In sum, I am not persuaded by the Applicant that the defence is a mere denial. The defence raises, triable issues and I should give the defendant a chance to be heard on merit. The success of these defences is not really what matters but that they are triable issues worthy of adjudication by the court. See what the Court of Appeal stated above that;

As we know even one triable issue would be sufficient – see H.D Hasmani . Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

[21] Having found the defence raises triable issues, needless to say that this is not a suitable case for entry of judgment as prayed for by the Applicant. But let me say that the kind of case by the plaintiff is not a clear case of liquidated demand to which summary procedure would apply. The plaint regrettably is terse and lacks the punch of a clear liquidated demand. I note the submissions in support of the application before me provided detailed particulars which are not discernible from the plaint. But, for purposes of the application herein, I will avoid determining

the arguments by the parties, especially those on the cause of action and the requirement in Order 7 rule 5 of the CPR, and just let them fall by the way side, for they do not affect the decision of the court and may simply invite adverse comments from the court; and that is not advisable particularly now that the case will proceed to hearing. I say so because I am well aware that parties still have the right to amend their pleadings to make them better; which is responsible for the course courts of law always are inclined to- sustain cases or pleadings if they could be saved by breathing life into them by way of amendment. I am also aware Order 7 rule 5 of the CPR entails a wide discretion to allow parties to file documents; but there is no counter-claim herein and, therefore, Order 4 rule 1(2) of the CPR does not apply-that may have been the fatal omission.

[22] The upshot is that the Application dated 22.10.2012 is dismissed with costs to the Respondent. I need not determine the other issues

Dated, signed and delivered in open court at Nairobi this 31st March, 2014

F. GIKONYO

JUDGE