REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.618 OF 2012

AJIT SINGH VIRDI……..PLAINTIFF/APPLICANT

VERSUS

J.F. McCLOY…….…… DEFENDANT/RESPONDENT

RULING

Application to strike out amended defence

[1] I have before me a Notice of Motion dated 10th June, 2013, in which the Plaintiff/Applicant is asking the court to strike out the Amended defence dated 6th June, 2013 for reasons, inter alia that; 1) it is scandalous, frivolous, vexatious; 2) it discloses no good defence; and 3) is an abuse of the court process.The application is expressed to be founded on Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.

[2] Parties filed written submissions and made oral submissions for and against the said motion.

The plaintiff submitted

[3] That the Defendant/Respondent has no good defence to the claim herein; the amended defence is simply a prevarication and an abuse of the court process. He gave his reasons. The Plaintiff and the Defendant Company entered into an Agreement dated 22nd May, 2012, which is exhibited as annexure **"ASV4".** The defendant undertook to pay the plaintiff a sum of $400,000/- for his shares in the company and final dues. Clause 4 of the Agreement of the said Agreement provided that the plaintiff will be paid the agreed sum of money in four equal instalments; the first instalment on execution of the Agreement, the second at the end of July, 2012, the third at the end of September, 2012 and the fourth at the end of November, 2012. The Defendant paid the first instalment on execution of the Agreement but defaulted on the others necessitating the filing of this suit.

[4] It was only upon filing the suit, when the Defendant paid an additional amount of $100,000/- on 22nd March 2012, which was a whole 8 months overdue as this payment was supposed to have been made at the end of July, 2012, in accordance with clause 4 (b) of the Agreement, being the 2nd instalment. Hence the Plaintiff is entitled **to interest for the late payment of the 2nd instalment for the 8 months** and the **amount of $ 200,000/-** owed by the Defendant to the Plaintiff, **which is unpaid representing the 3rd**

and 4th instalments and interest thereon.

[5] The plaintiff pressed that this is unequivocal Agreement dated 22nd May, 2012 appearing as annexure "ASV4" in the Plaintiff/Applicant supporting affidavit is the basis of the Plaintiff's suit against the Defendant as pleaded at **paragraph 10, 11, 12 & 13 of the Amended Plaint dated 24th May, 2013.** The Defendant/Respondent in its Amended Defence dated 6th June, 2013 does not deny this Agreement dated 22nd May, 2012 but in fact admits this Agreement to pay the Plaintiff/Applicant the sum of$400,000/- at **paragraph 6 & 7 of the Defence** and therefore has no good defence to the Plaintiff/Applicant's claim herein.

[6] According to the plaintiff, paragraph 7 of the Defence is scandalous,vexatious and frivolous as the Plaintiff/Applicant issued the Defendant/Respondent with receipt/acknowledgement letters dated 29th June, 2012 & 4th April, 2013 (whose copies appear as annexure 5 in the Plaintiff's supporting affidavit) for the payment of the first instalment of $100,000/- as the payment of $100,000/- on 22nd March, 2013. Further the Plaintiff has also confirmed having received the two payments at paragraph 11 & 12 of the Plaint and paragraph 8 & 12 of the Plaintiff/Applicant's supporting affidavit. The Defendant has not co0ntroverted this fact and in any event there was no default clause in the Agreement dated 22nd May, 2012 that further payments would be subject to issuance of receipt by the Plaintiff/Applicant. No written request by the Defendant for the receipt has been availed or shown and indeed the Defendant has failed to comply with the provision of Order 7 Rule 5 requiring it to file a list of documents to be relied on as well as witness statements, therefor there is no basis to support the allegations contained in the Defence.

[7] Further the Plaintiff/Applicant submitted that paragraph 3 & 14 of the Defence are scandalous, vexatious and frivolous as the suit herein is not Res Judicata as claimed and the Defendant/Applicant has not placed the pleadings of the suit that supports the plea of Res Judicata or even case number of the said suit. A plea of Res Judicata can only apply where there has been a suit involving the same parties with similar issues in dispute. In this case there has been no suit between Ajit Singh Virdi against J.F.McCloy Ltd pursuing payment under the Agreement dated 22nd May, 2012. The only other suit that Ajit Singh Virdi has filed was against Resham Singh Birdee and Armajeet Virdee for fraud and breach of trust against the Plaintiff, which clearly is not against the same parties or on the same issue. The Plaintiff submits that Nairobi HCC No. 164 of 2012 was between different parties over a different subject matter and Res Judicata does not apply.

[8] Further the paragraph 10 of the Amended Plaint was not controverted and/or denied by the Amended Defence or and replying affidavit by the Defendant/Respondent. In fact paragraph 7 of the supporting affidavit of the Plaintiff/Applicant has not challenged by the Defendant/Respondent. The Plaintiff submitted further that the contents paragraphs 9, 10, 11 & 12 of the Amended Defence are frivolous and vexatious. None of the issues therein addresses the voluntary Agreement dated 22nd May, 2012 and refer to allegations that were within the Defendant Company's knowledge through its directors when it voluntarily entered into the agreement. The said allegations are untruthful, scandalous and vexatious and the Defendant has not corroborated these allegations by any documentary prove and are merely an attempt to introduce some triable issue even through dishonesty. The Defendant in the said paragraphs has not demonstrated that it has paid the Plaintiff the full amount of $400,000/- it agreed to pay him and that is the only relevant issue in this suit, they submitted.

[9] On the law, the plaintiff submitted that the facts above clearly demonstrate that the Defendant/Respondent has no good defence to the Plaintiff/Applicant's claim herein and the Amended Defence dated 6th June, 2013 is a sham. It should be struck out for being an abuse of the court process as it is meant to delay the trial of the suit herein. Justice delayed is justice denied and the Plaintiff/Applicant will be prejudiced by the further delay in conclusion of the suit where the Defendant has clearly no defence nor raised any triable issue. In **KINYANJUI AND ANOTHER –VS- THANDE AND ANOTHER (1995 -98 2 E.A 159;** the Court of Appeal whilst allowing an application to strike out a defence stated as follows at page 165, " ….. ***it would not be wrong for us to say that defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."*** In **FREMAR**

CONSTRUCTION CO. LTD. -VS- MINAKSHI NAVIN SHAH CIVIL APPEAL NO. 85 OF 2002, the Court of Appeal whilst allowing an application to strike out a defence stated in relation to the court's powers to strike out that,

> ***"But the power is clearly donated in the rules and exists inherently, for the court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process. A defence which is a sham should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit."***

[11] The Plaintiff/Applicant submitted that the Amended Defence herein is scandalous and vexatious aimed at annoying. See paragraph 8 of the Amended Defence the Defendant/Applicant which claims that the suit is meant to extort and/or that the matter has been settled. That is contradictory and inconsistent with paragraph 6 of the Amended Defence which states that it is the Defendant/Respondent which opted to pay the Plaintiff the sum of $400,000/- and thereby bound itself by the Agreement dated 22nd May, 20122 and at paragraph 7 where the Defendant admits it did not make subsequent payments to the Plaintiff/Applicant after the first instalment.

[12] The Plaintiff further submitted that the Defendant has not raised any substantive response to the application to strike out the Amended Defence. In particular the Defendant's replying affidavit does not demonstrate in what manner the application herein is defective or lacks merit. The averments contained in paragraph 6 of the said replying affidavit are frivolous to the extreme in purporting that the Defendant's directors had no authority to enter the agreement dated 22nd May, 2012 as no such averment is contained in the Amended Defence. In any event it is trite law and in accordance with the "indoor management rule" or the "Rule in Turquand case that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not as held in **ROYAL BRITISH BANK V. TURQUAND(1856) 6 E&B 327**.

[13] It is therefore the Plaintiff/Applicant's humble submission that both on law and facts this is an appropriate matter for striking out the Amended Defence and for judgment to be entered as prayed in terms of the Plaintiff/Applicant's application herein. They urge this Honourable Court to allow the application as prayed and strike out the defence. The Defendant/Respondent has not denied entering into the Agreement dated 22nd May, 2012 for payment to the Plaintiff the sum of $400,000/- and no explanation that has been offered for the default to honour the terms of the Agreement to pay up the balance of $200,000/- which is now overdue. It is, therefore, unjust and an abuse of the court process to prolong the suit and there is no good defence. The Plaintiff/Applicant needs the fruits of judgment required for his and family's upkeep and medical attention as his only source of livelihood. Mr Thuo in reply submitted that none of the points submitted on by the defendant was in the Amended defence. He termed them as extraneous issues. He however, made a specific submission that a Company can buy shares see Section 211(2) of the Companies Act – Purchase of minority shareholders. He stated further that the defendant is taking advantage of technicalities under Order 2 Rule 15 against Article 159 of the Constitution.

DEFENDANT/RESPONDENT'S WRITTEN SUBMISSIONS

[14] The defendant also eminently submitted that application dated the 10th day of June, 2013 raises issues of facts contrary to Order 2 Rule 5(2) and as illustrated in **E.M.S. V. EMIRATES AIRLINES (2012) E KLR.** The following issues have been raised:

i. The validity of agreement dated 22nd May, 2012-. The pertinent questions are: whether a Company can hold shares; who were the shares sold; hence who is liable to pay for the said shares, if at all sold, is it the Company or shareholders? Is the agreement void ab initio and or enforceable under the Company Laws and other Laws of Kenya?
ii. Misappropriation of funds, sale of shares and fraud and the directors' Resham Singh Birdee and Amarjeet Singh Singh Virdee capacity and authorization as directors of the Company and or whether the matters herein are personal to the aforesaid directors Resham Singh Birdee and

Amarjeet Singh Virdee or do they involve the defendant Company at all?

[15] In the case of **ARI CREDIT FINANCE COMPANY LIMITED -VS- MIGINGO NAIROBI HC CASE NO. 5916 OF 1990,** Bosire J (as he then was) held that no evidence is admissible under Order VI Rule 13 (1) (a), which is the current Order 2 Rule 15 of the Civil Procedure Rules, 2010. The rationale is that if a pleading is scandalous, frivolous and vexatious as alleged by the plaintiff in the application, the same should be clear enough and can be so held without adducing evidence to support the said allegation. The plaintiff does not show this and the defendant prays for the application to be dismissed with costs.

[16] The defendant urged further that the plaintiff would have been entitled to assume that the internal company rules were complied with, even if they were not as per the **Rule in the Turquand Case if at all he was a third party but in the current circumstance the plaintiff had actual knowledge of them or there are suspicious circumstance putting him on inquiry** bearing in mind he was a previously shareholder of the defendant Company and the agreement dated 22nd May, 2012 emanated from sale of his shares in the defendant Company to the purported Resham Singh Birdee and Amarjeet Singh Virdee.

[17] The defendant pressed further that the amended defence raises at paragraph 3 and 14 therein that this matter is Res Judicata as the issues therein were covered by the proceedings in High Court Nairobi Civil Case Number 164 of 2012. The plaintiff in its application herein has elaborated in details the basis of the agreement dated 22nd May 2012 which was a resultant effect of all facts and issue which were dealt with in the proceedings of High Court Nairobi Civil Case Number 164 of 2012. The plaintiff has denied the suit herein is res judicata and hence it is upon this Honourable Court to evaluate Civil Case Number 164 of 2012 to deduce the validity of the defendant Companies claim herein. In the case of **PATEL -VS- E.A. CARGO HANDLING SERVICES LTD. [1974] EA 75** the court held that the discretion of the court is not limited in applications to strike out pleadings and that a defence on merit does not mean a defence that must succeed, it means a triable issue; that is an issue which raises prima facie defence and which should go for trial for adjudication. The issue of res-judicata is one that goes to the root cause of the matter itself; a party may not institute fresh proceedings with full knowledge that there was another suit filed as between then or over the same matter and the same has been finalized. This is an issue raised in the amended defence that the Honourable Court should adjudicate on and decide at the trial and not summarily as sought by the plaintiff. It was further held in the Trivedi and **TRIVEDI -VS- NJAU NGIRU CIVIL APPEAL NO. 129 OF 1984** that pleadings should only be struck out in clear cases. The present case is not a clear case. See also the persuasive authority of the High Court of Uganda, **NAZZIWA -VS- SERWANIKO & ANOTHER [1972] EA 246** the court pointed out that where facts and issue have arisen which are in dispute, the defence cannot be struck out as the same if successfully will defeat the claim. The application dated 10th June, 2013 by the plaintiff should thus be dismissed with costs to the defendant. It is defective, misconceived and premature, we so submit.

COURT'S RENDITION

[18] The application before me is an Omni-bus kind of application, for it is grounded on all the grounds provided under Order 2 rule 15 of the CPR. Trouble is, however, found where the applicant, like here, emphasizes that the defence discloses no defence; the court will not avoid applying the appropriate threshold provided in law. I need not state that the principles applicable to each ground are different. Such application must, therefore, be subjected to restriction placed by the law in Order 2 rule 15(2) of the CPR that...

No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

To surmount the restriction, the pleading must be undeniably a sham, a demurrer; the deficiency must be easily ascertainable without reference to or probing for any evidence. I do not consider that requirement to be a simple procedural requirement which is diminished by Article 159(2) (d) of the Constitution. It is a major companion in administration of substantive justice as it shall become clear later. At this point I should recite what the court stated in **BGM HC JR NO 107 OF 2010 ELECTINA WANG'ONA AND MATUNGU LAND DISPUTES TRIBUNAL [2013] eKLR** on procedural law

visa-viz sustentative law, that:

> ***[36] It bears restating, without doubt, procedural law is necessary in the administration of justice. It is through the laid down procedures that the substantive law is put into motion, its objects and essentials are realized. It is through the laid down procedures that an orderly, regular and smooth running of the legal machinery and operation of due process is ensured. It is also through procedural law that fair trial is achieved. A great deal could be said about the invaluable benefits of procedural law.....***

And Article 159 of the Constitution the court continued that:

> ***[39] ... the utter misconception that must be avoided is to think that all procedural requirements have been rendered obsolete. In spite of the constitutional admonitions against placing undue regard to technicalities, there is nothing pernicious in observing procedural rectitude provided it is kept under proper constitutional control, and relates to a technicality of a nature that is the Centre piece of administration of justice.***

[19] The restriction in subrule (2) of order 2 rule 15 of the CPR serves the interest of substantive justice required under Article 159 of the Constitution. It ensures that those cases which raise triable issues are heard on merit through a trial; it wades off summary rejection of a party's claim arbitrarily, for such is draconian act of driving a party away from the seat of judgment; it reinforces the benevolent attitude of the court to sustain rather than to dismiss cases summarily. Doubtless, the said subrule entrenches the constitutional desire of serving substantive justice and, therefore, the insistence by the law that an application which is based on Order 2 rule 15(1) (a) should be made in the clearest of cases makes sense. I admit it is a discretion which should be exercised sparingly and cautiously. Up to this point, I believe a case is made why an omnibus application which includes the ground that the impugned pleading discloses no reasonable cause of action and defence should be resisted or adopted only upon careful consideration of the entire case.

[20] I have set the legal dimensions. Applying the above test; is the amended defence a sham or a demurrer which is not worth of a trial? In essence, a court should never allow a defence which is a sham to go for trial for two reasons; 1) it will be an outright prejudice to the plaintiff; and 2) it will cause prejudice to the administration of justice. Prejudice to the plaintiff entails delayed benefits of the law and unnecessary costs being occasioned on the plaintiff. Prejudice to the administration of justice entails wasting of court's precious time and impediment to the court's ability to deliver on the overriding objective; i.e. a fair, just, affordable, proportionate and expeditious resolution of disputes. For better elucidation on these issues, see the case of **KINYANJUI AND ANOTHER –VS- THANDE AND ANOTHER (1995 -98 2 E.A 159;** where the Court of Appeal stated at page 165 that:

> ***" ……. it would not be wrong for us to say that defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."***

See also the case of **FREMAR CONSTRUCTION CO. LTD. -VS- MINAKSHI NAVIN SHAH CIVIL APPEAL NO 85 OF 2002,** the Court of Appeal stated in relation to the court's powers to strike out that:

> ***"....the power is clearly donated in the rules and exists inherently, for the court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process. A defence which is a sham should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit."***

[21] When I look at the amended plaint and the amended defence, I am persuaded that the defence raises many salient issues which are triable. Those issues will need full scale trial to be proved. See the case of **PATEL -VS- E.A. CARGO HANDLING SERVICES LTD. [1974] EA 75** that a defence with merit does not mean a defence that must succeed, it means a triable issue; that is an issue which raises prima facie defence and which should go for trial for adjudication. There is no dispute that the parties entered

into an agreement on 22nd May, 2012, but the defence has pleaded meritorious defence of res judicata and possible settlement of the agreement in kind only to mention but a few. These are substantial issues and are triable in law. Paragraphs 8, 9, 10, 11, and 12 of the amended defence raise triable issues which merit a plenary trial within the substantive judicial adjudication rather than being rejected in a summary manner. I will, therefore, decline to strike out the defence and order that it be sustained for trial.

[22] The other grounds saddle upon the ground that the defence discloses no defence. But for completeness of record I should state that, following my decision, the amended defence is not; 1) an abuse of the process of the court; or 2) a prejudice to the plaintiff; or 3) scandalous, vexatious and frivolous. Except, however, I order the phraseology ‘’extorting monies’’ appearing in paragraph 8 of the amended defence to be expunged for it imputes a charge on the plaintiff without justification. Other appropriate words or phrases which would best describe, in modest and civil manner, the acts complained of in paragraphs 7, 8, 9, 10, 11 and 12 could be substituted thereof.

[23] The upshot is that the application dated 10th June, 2013 is dismissed. Costs will be in the cause.

Dated, signed and delivered in open court at Nairobi this 20th March 2014

F. GIKONYO

JUDGE