



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL SUIT NO 723 OF 2001**

**LUKA KIPKORIR KIGEN.....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 3<sup>rd</sup> September 2013 and filed on 4<sup>th</sup> September 2013 was brought under the provisions of Order 2 Rule 15, Order 7 Rule 5 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act and all the enabling provisions of the law. It sought the following orders:-
  - a. **Spent.**
  - b. **THAT this Honourable Court be pleased to struck (sic) out the Defendant/Respondent (sic) pleading herein and summary judgment be entered against the Defendant/Respondent herein.**
  - c. **THAT the costs of the application be provided.**
2. The grounds on which the Plaintiff has relied on in support of the application were generally as shown hereunder:-
  - a. **THAT the Plaintiff filed this matter on 17<sup>th</sup> May 2001 but since then, the matter had not been heard.**
  - b. **THAT the Defendant had delayed the matter by promising to settle the same out of court and the Plaintiff had written to the Defendant but the same had been futile.**
  - c. **THAT the Defendant had filed the Defence and Counter-Claim but failed to serve the documents.**
  - d. **THAT the delay in prosecuting the suit was occasioned by the Defendant.**

## **AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION**

3. The Plaintiff filed an affidavit, sworn on 3<sup>rd</sup> September, 2013 to support his application. He reiterated the grounds on the face of his application and added that his advocates had fixed the matter herein severally but the same had not been heard. It was his contention that the delay in prosecuting this matter was occasioned by the Defendant's failure to file its List of Documents on time.
4. The Defendant's Grounds of Opposition dated 4<sup>th</sup> November 2013 and filed on 5<sup>th</sup> November 2013 were generally as follows:-
  - a. **The application was incompetent and could not lie under Order 7 Rule 5 of the Civil Procedure Rules.**
  - b. **The application lacked merit as the Plaintiff had not demonstrated that the Defence on record was frivolous, vexatious, scandalous, that it was an abuse of process of court or that it did not disclose any reasonable cause of action as envisaged under Order 2 Rule 15 of the Civil Procedure Rules.**
  - c. **The court record showed that the Defendant had applied to dismiss the suit for want of prosecution on 13<sup>th</sup> August 2010 because of the laxity of the Plaintiff.**
  - d. **The application was misconceived as it purported to rely on "without prejudice" communication to found a cause of action.**
  - e. **The application was a waste of judicial time as the Plaintiff had not yet filed a Witness Statement.**
5. In response thereto, the Plaintiff filed a Supplementary Affidavit sworn on 21<sup>st</sup> November 2013 in which he stated that the Grounds of Opposition had no basis as witness statements could be filed at least fifteen days prior to the trial conference. In addition, he stated that the Defendant's pleadings ought to be struck out for being an abuse of the process of the court and that it could not hide behind the provision of the law regarding "without prejudice" communication as there were exceptions to the rule. He termed the Defendant's Defence as a mere denial intended to drag the matter further.

## **LEGAL SUBMISSIONS BY THE PLAINTIFF**

6. In his written submissions dated and filed on 21<sup>st</sup> November 2013, the Plaintiff contended that the Defence and Counter- Claim did not raise serious grounds and that Order 2 Rule 15 and Order 7 Rule 5 of the Civil Procedure Rules, empowered the court to strike out pleadings. He referred the court to the case of **Peter Mwamba vs Bamburi Cement Ltd [2008] eKLR** where Lesiit J struck out a defence for lacking seriousness as it would unnecessarily delay the finalisation of the suit therein.
7. He submitted that the Defendant was obligated to file documents but that it had failed to do so. In this regard he referred the court to the case of **Caneland Limited vs Dolphin Holdings Limited & Another [1999] eKLR** where Mbaluto J struck out a defence for being scandalous, frivolous and an abuse of the court's process.
8. He concluded that the Defendant's Defence ought to be struck out for having failed to disclose a reasonable defence and relied on the case of **Ragbir Singh Chatte vs National Bank of Kenya Limited [1996] eKLR**.

## **LEGAL SUBMISSIONS BY THE DEFENDANT**

9. The Defendant's written submissions were dated and filed on 5<sup>th</sup> December 2013. It argued that the Plaintiff had not demonstrated the grounds set out in Order 2 Rule 15 of the Civil Procedure Rules. It placed reliance as had been held in the case of **Carton Manufacturers Limited vs Prudential Printers Limited [2013] eKLR** where the court held that a suit could not be struck out if it showed a semblance of a cause of action.
10. It also relied on the case of **Cabro East Africa Limited vs Rusoga Investments Limited [2013]**

**eKLR** where it was held that the power to strike out pleadings should be exercised cautiously as the court would be striking the same out without first hearing the merits of the case through discovery and oral evidence.

11. It submitted that its Defence was properly on record and that the matter should be set down for hearing and heard on merit as it had disclosed triable issues. It further contended that the application was a waste of judicial time as the Plaintiff had not complied with the provisions of Order 11 of the Civil Procedure Rules, 2010.
12. It asked the court to disregard the “without prejudice” documents annexed in the Plaintiff’s Supporting Affidavit as these were inadmissible under Section 23 of the Evidence Act Cap 80 (laws of Kenya). It referred the court to the case of **Anne Njeri Mangi vs Njomaita Investments Ltd [2012] eKLR** to argue that such documents ought not to be adduced so as to encourage parties to negotiate matters out of court.

### **LEGAL ANALYSIS**

13. The court has noted the parties’ submissions in respect of the “without prejudice” communication but finds the same not to have been at the heart of the application herein. The court ought to look at the substantive issues placed before it to avoid clouding the issues for determination.
14. The grounds under which a pleading can be struck out are enunciated in the Civil Procedure Rules, 2010. The issues of admissibility, relevance, weight and materiality are not grounds which would lead to a pleading being struck out.
15. It is for that reason that this court finds that it would be a waste of judicial time to analyse the submissions on the said issue for the reason that was before this court is whether or not, the Defendant’s Defence and Counter-Claim ought to be struck out.
16. It does appear to this court that the Plaintiff’s application for striking out the Defendant’s Defence was based on two grounds, to wit, under Order 2 Rule 15 and under Order 7 Rule 5 of the Civil Procedure Rules. The court will consider the said prayers separately to establish whether indeed the Plaintiff has been or has not been able to make out a case for the striking out of the Defendant’s Defence.
17. Order 2 Rule 15 of the Civil Procedure Rules, 2010 stipulates as follows:-

1. **At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-**
  - a. **it discloses no reasonable cause of action;**
  - b. **it is scandalous, frivolous or vexatious;**
  - c. **it may prejudice, embarrass or likely delay the fair trial of the action; or**
  - d. **it is otherwise an abuse of the process of the court...**
2. **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.**

18. The court is minded of the fact that it is mandated to determine matters before it without undue regard to procedural technicalities as provided for under Article 159 of the Constitution of Kenya, 2010 and that under Order 10 (1) and (2) of the Civil Procedure Rules. It is also very much aware of the fact that although the statutory provision under which an application has been brought has to be stated, no objection shall be made or application refused merely by reason to comply with the rule and further that an application will not be defeated on a technicality or want of form. However, failure to specify the provision relied upon could prove to be detrimental to a party where clarity is required.
19. The importance of stating the provision under which an application has been brought under Order 2 Rule 15 cannot be understated. There are several grounds under subrule (1) of the said Order making it necessary for an applicant to specify the subrule that it is relying upon for the striking of the pleading. Such a party must support its prayer with affidavit evidence under subrule (1)(b), (c) and (d) but state the grounds only where an application has been brought under subrule 1(a) of the said Order.

20. From the Plaintiff's application and Supporting Affidavit, his prayers appear to have been premised on the ground that the Defendant had caused delays in the determination of the suit herein as stipulated under Order 2 Rule 1(c) of the Civil Procedure Rules, 2010.
21. In his paragraph 10 of his Supplementary Affidavit, the Plaintiff introduced the ground of the Defendant's Defence being an abuse of the process of the court as envisaged under Order 2 Rule 15 (d) of the Civil Procedure Rules, 2010.
22. He alluded to the same argument in his written submissions and referred the court to cases to support his argument that the Defendant's Defence disclosed no reasonable defence and that the same was also scandalous and frivolous as contemplated under Order 2 Rule 15 (1)(a) and (b) of the Civil Procedure Rules, 2010 respectively.
23. The Plaintiff cannot purport to introduce new facts at the stage of the written submissions. He did not set out the grounds, in his application, under which he relied to show that the Defendant's Defence disclosed no reasonable defence as provided for under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules, 2010 and in any event, he ought not to have filed an affidavit if he was relying on that ground.
24. The Plaintiff did not also provide any affidavit evidence to support its prayers under Order 2 Rule 15 (b) and (d) of the Civil Procedure Rules, 2010 thus leaving him with the prayer for striking out the Defendant's Defence under Order 2 Rule 2 Rule 15 (c) of the Civil Procedure Rules, 2010.
25. In this regard, the court wholly concurs with the Defendant's submissions that the Plaintiff had failed to demonstrate that its Defence was frivolous, vexatious, and scandalous, that it did not disclose a reasonable cause of action or that it was an abuse of the process of the court.
26. Hence, turning to Order 2 Rule 15 (1) (c) of the Civil Procedure Rules, 2010, which this court deduced to have been the Plaintiff's case, the court was not satisfied that the purported negotiations of the matter out of court or the failure by the Defendant to file its List of Documents, if at all, were a cause of delay that would be contemplated under the said subrule. The Plaintiff filed suit in 2001 and the burden was on him to have driven the matter to its logical conclusion because it was his case.
27. Annexing copies of letters inviting the Defendant to fix a date for hearing of the matter and not proffering an explanation why the hearing of the case did not come to materialise or that the Defendant contributed in one way or the other to the matter not proceeding for hearing would not be sufficient to lead this court to find that the delays in prosecution of the Plaintiff's case were as a direct result of the Defendant. Indeed, to blame the Defendant for having caused the purported delays herein is merely a scapegoat by the Plaintiff for his own omissions for not doing what he ought to have done.
28. It is therefore the finding of this court that the Plaintiff did not satisfy it that the Defendant's Defence ought to be struck out on this ground.
29. As regards the striking out of the Defendant's Defence under Order 7 Rule 5 of the Civil Procedure Rules, 2010, the same provides as follows:-

**“The Defence and Counter-Claim filed under rule (1) and (2) shall be accompanied by-**

- a. **an affidavit under Order 4 Rule (1) and (2) where there is a counter-claim;**
- b. **a list of witnesses to be called at the trial;**
- c. **written statements signed by the witnesses except the expert witness; and**
- d. **copies of documents to be relied upon at the trial.**

**Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”**

30. Evidently, the said Order does not provide for striking out of the Defence for failure to comply with the said requirements. An action or defence can only be struck out under Order 11 Rule 3(2) (o) (i) of the Civil Procedure Rules, 2010. This is ideally after the court has given pre-trial directions and party (ies) fail to comply with the said directions. The court cannot create the law to find that it can strike out a pleading under Order 7 Rule 5 of the Civil Procedure Code as doing so would be usurping the role of Parliament particularly because the provisions for striking out of pleadings under the Civil Procedure Rules, 2010 are expressly set out.

31. For this reason, this court finds itself in agreement with the Defendant's submissions once again and upholds Ground of Opposition No 1 to the effect that the Plaintiff's application is grossly incompetent and cannot lie under Order 7 Rule 5 of the Civil Procedure Rules, 2010.
32. The Plaintiff has never listed this matter for pre-trial and in fact filed its Witness Statement dated 21<sup>st</sup> November 2013 on the same date which was about two (2) months that it had filed the present application. His contention that he could file his witness statement at least fifteen (15) days before the trial conference is incorrect and intended to mislead the court as the said period referred to hereinabove relates to statements by expert witnesses.
33. The Plaintiff is a witness of fact who is expected to have filed his witness statement at the time he filed suit or such other subsequent time that the court may order. His argument that he could file his statement at least fifteen (15) days before the pre-trial conference therefore falls flat on its face.
34. The responsibility lay solely with him to facilitate the preparation of his suit for trial and not for the Defendant to do so. It is not mandatory for a Defendant to call any evidence in which case, it was not necessary for the Plaintiff to await the Defendant to file its List of Documents.
35. It is trite law that a court should only strike out pleadings when a suitable case has been made out by a party applying for such striking out and not on the whims of a party who has been negligent and slow in prosecuting his case. As was rightly pointed out by the Defendant, the application herein was a waste of judicial time and ought not to have been filed at all. Indeed, it also took time for the court to decipher what exactly the Plaintiff wanted as his application was ambiguous and amorphous.
36. The Plaintiff ought to have fixed this matter for pre-trial and proceed for hearing. He did not do so but instead of filing the present application. The court finds that the delays herein are actually being caused by the Plaintiff.
37. This court is therefore persuaded by the Defendant's submissions that the Plaintiff's application was grossly incompetent and ought to be dismissed.

### **DIPOSITION**

38. In the circumstances foregoing, this court finds the Plaintiff's Notice of Motion application dated 3<sup>rd</sup> September 2013 and filed on 4<sup>th</sup> September 2013 to have been spurious, unmerited and an abuse of the process of the court. The same is hereby dismissed with costs to the Defendant.
39. In view of the age of the matter, this court hereby directs that the Defendant files its List of Witnesses, Witness Statements, List and Bundle of Documents within thirty (30) days from the date of this ruling.
40. It is also hereby directed that parties agree and file a Joint Statement of Agreed Issues within forty five (45) days from the date of this ruling and that in the event they are unable to agree on the same, each party shall be at liberty to file its separate version of Statement of Agreed Issues within sixty (60) days from the date of this ruling.
41. Matter to be listed for Pre-trial Conference on 19<sup>th</sup> September 2014 to confirm compliance and for further orders and/or directions by the court.
42. Either party is at liberty to apply for further orders and/or directions by the court.
43. It is so ordered.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of May 2014**

**J. KAMAU**

**JUDGE**

