



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 311 OF 2013**

**DEV SURINDER KUMAR BIJ ..... PLAINTIFF**

**VERSUS**

**AGILITY LOGISTICS LIMITED ..... DEFENDANT**

**RULING**

1. For the determination of the Court is the Defendant's application dated 18<sup>th</sup> September, 2013 brought pursuant to the provisions of **Order 2 Rule 15(1)(a), (b), (c) and (d)** of the *Civil Procedure Rules*. The Defendant prays the following orders, *inter alia*:

**“1. THAT this Honourable Court be pleased to strike out the amended Plaintiff filed herein, dismiss the suit against the Defendant, and enter judgment against the Plaintiff accordingly.**

**2. THAT the costs occasioned herein be provided for”.**

2. The application is predicated upon the grounds that the Amended Plaintiff discloses no reasonable cause of action as against the Defendant, is vexatious, frivolous and an abuse of the process of the Court. It is further averred that the claim against the Defendant is premature, in that the Plaintiff, as the Director and Shareholder of the Defendant Company, has failed to exhaust the internal remedies available to him in the circumstances so as to address the issues relating to the matter at hand.
3. The application is supported by the Affidavit of **Saibaba Kola**, the Applicant Company's Chief Executive Officer, sworn on even date. It is contended that the claim against the Defendant is defective as it has no basis and violates the provisions of the Law of Contract Act. Further, that the payment as demanded by the Plaintiff would go against the company's fiduciary duty to its shareholders. The Plaintiff, in any event, is not entitled to any of the relief sought as the Applicant was not party to the shareholder's agreement and hence its terms may not be enforced against the Defendant. Further, the deponent deposes to the fact that the claim is premature, unsustainable and untenable, is an abuse of the process of the Court and otherwise frivolous and vexatious in the least, as there was no agreement between the parties for payment upon demand by the Plaintiff and such further violates the provisions of the Law of Contract Act.
4. The application is opposed. In the Relying Affidavit of the Plaintiff sworn on 14<sup>th</sup> November, 2013, it is contended that the Plaintiff's employment was terminated on 29<sup>th</sup> August, 2012 after working in the employment of the Defendant from sometime in January, 2009. After the termination, the Plaintiff avers that he effected notice upon the Defendant on 5<sup>th</sup> November, 2012

in order to exercise his rights under **Section 6.1** of *Article VI* of the Shareholder's Agreement, for the purchase of his shares effective from 19<sup>th</sup> November, 2012. It is further averred that pursuant to the termination, the Plaintiff ceased to be a Director of the Applicant Company and was therefore ineligible to exercise his rights under the Shareholder's Agreement dated 26<sup>th</sup> June, 2008.

5. In the Grounds of Opposition dated 14<sup>th</sup> November, 2013, the Plaintiff avers that the claim is not predicated upon the Shareholder's Agreement but for the recovery of loans advanced to the Defendant, which loans have been admitted. It is further contended that there was no date fixed for the recovery of the loans and thus the same were repayable on demand.
6. The provisions of **Order 2 Rule 15(1)** of the *Civil Procedure Rules* provide thus:

**“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; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

**and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.**

Under the aforementioned provision, the Court has the discretion to either dismiss, stay or enter judgment as it may deem fit for the ends of justice, once it has been established that the grounds as set out in the said application warrant such relief. In determining whether the Court will issue the prayers as sought, the Defendant has to establish the grounds enunciated under **sub-rule (1) parts (a) – (d)**. If any of such good reasons have been established by the applicant, the Court will exercise its discretion and issue orders as it deems as fit.

7. The Defendant contends that the suit against it as instituted, is malicious and without reasonable cause. It is contended that the claim is vexatious and an abuse of the process of the Court in that it is premature and/or that it is predicated upon an Agreement to which the Plaintiff was not a party to. It is also contended that the same is an abuse of the process of the Court, given that the claim against it does not disclose any cause of action and that internal dispute resolution mechanisms have not been employed by the Plaintiff as a former officer and shareholder of the Applicant.
8. The Defendant submitted that the claim in the Amended Plaint violates the provisions of **Section 3(1)** of the *Law of Contract Act* as it cannot arise from a contract to which the Applicant was not a party to (see **Muchendu v Waita [2003] eKLR 419**). It also submitted that the claim is unsustainable prima facie as it discloses no reasonable cause of action as against the Defendant, and in that regard it referred the Court to **H.C.C.C No. 14 of 2012 Abdi Jama & 3 Others v Halima Mohamed & 4 Others**, **H.C.C.C No. 337 of 2010 Rose Wambui Kamau & 2 Others v Cecilia Mou Charles Harris & Another**, **Ali M. Ambala v Bhavsar (1966) EALR 557**, **Mpaka Road Development Ltd v Kana 1EA 161**, **Christopher Ndungu v Lyric Investments Ltd (2007 eKLR, Triple Eight Construction Co. (K) Ltd. v China Petroleum Pipe Bureau & Another HCCC NO. 186 of 2010 (unreported)**, **Muchendu v Waita (2003) KLR 419 (MSA)** as well as **Odgers Principles of Pleadings & Practice (1981) 2<sup>nd</sup> Edition page 148** and **Mulla on Civil Procedure Vol. 1 (1908) 13<sup>th</sup> Edition pages 731 – 734**. The Defendant also relied on the case of **W.J Alan & Co. v El Nasr Export [1972] QB 189** on the issue of estoppel and waiver of rights. It was contended that the Plaintiff was aware that the disbursement of funds was to be used for long term investments of the Defendant Company and repayment was not to be made on demand but on the trading performance of the Defendant company, which it is further submitted, had not been achieved as yet.

9. In response thereto, the Plaintiff submitted that the Defendant had not satisfied the grounds for striking out an application as enunciated in the cases of **D.T Dobie & Co. (K) Ltd v Muchina (1982) KLR 1, H.C.C.C No. 2180 of 1994** **Dr. Murray Watson v Rent-A-Plane Limited** and **H.C.C.C No. 891 of 1996 Lynette B. Oyier v Savings & Loans Kenya Limited**. It was further submitted that the issues raised in the Defence as to the disbursement of funds by the shareholders to the Applicant was not predicated upon any agreement, nor were the disbursements denied, but the mode in which repayment was to be made, whether on demand or otherwise had to be agreed by the parties. It is the Plaintiff's contention, therefore, that the issues as raised in the Amended Plaint were a matter for defence and not for striking out. He relied on **Atterbury v Jarvie 2 H & N 113, 157 E.R 47** and **Norton v Ellam 2M & W 461, 150 E.R 839** to buttress his submissions. He also submitted that he ceased to be the Chief Executive Officer of the Applicant as at 29<sup>th</sup> August, 2012 and therefore could not pursue internal dispute resolution mechanisms as perpetrated by the Defendant, who further described **Saibaba Kola** as the (new) C.E.O in its affidavit in support of the application.
10. A cause of action as defined in the Blacks' Law Dictionary, Ninth Edition, at 251 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”.**

Further reference is made to the writing of **Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 170** (2 ed. 1899) in which the learned author writes:

**“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be- (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunctions; or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.”**

The allegations as set out by the Plaintiff in the Amended Plaint at paragraphs 6A, 8, 12(a) and (b) are for the immediate repayment of the monies disbursed to the Defendant by the Plaintiff by way of loans and for interest at Court rates. These issues are objected to by the Defendant in its submissions in that it, as enunciated in the Affidavits and the Application before Court, are predicated upon a Shareholders' Agreement for which it was not a party to. In **D.T Dobie & Co. (K) Ltd v Muchina** (supra) the Court determined *inter alia*:

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”**

It was also held in **Anderson v Bell Mobility Inc. (2008) NWTSC 85** that:

**“In an application to strike a statement of claim, the allegations of fact are accepted without evidence and the question is whether those allegations of fact disclose a cause of action... [T]hat a pleading will be struck only if it is “plain and obvious” that it discloses no reasonable claim.”**

11. In reading the authorities cited and the diction by Edwin E. Bryant (sic), for an applicant to succeed in an application to strike out, it has to be shown, and indeed established, in a plain and obvious manner, that there is no reasonable or justifiable cause of action. The Defendant's contention is that the Amended Plaint is an abuse of the process of the Court, frivolous and vexatious, in as much as it need not be backed by evidence at this juncture, as provided under **Order 2 Rule 15(2)**. However, it has to lay the basis of the allegation, such as to persuade this Court that indeed the pleading, in this instance the Amended Plaint, offers no reasonable cause of

action and occasion no prejudice to the Plaintiff should the same be allowed. The Court's discretion in such an instance should be exercised only in the clearest of cases (see **H.C.C.C No. 3356 of 1989 Samuel Gitonga v Peter Mugweru**) and not capriciously nor in aid of a wrong doing, contrary to justice and the fair determination of issues (see **H.C.C.C No. 6662 of 1991 Trade Bank Ltd v Kersam Ltd**).

12. Whether the Plaintiff enjoyed privity of contract in relation to the Shareholders' Agreement and whether repayment of the loan disbursements to the Defendant were upon demand are issues to be determined by the Court in due course. Once an issue(s) has been raised by a claimant, as has been by the Plaintiff in this matter, through his Amended Complaint, such may only in my view, be effectively be canvassed during the hearing of the suit. As had been reiterated above, there is no definitive interpretation of the term "cause of action" but it is clear that it encompasses the violation of certain rights, or the apprehension of the violation of such rights, as may be enunciated by a claimant in his or her claim. To dismiss such a claim, as was reiterated in **Samuel Gitonga v Peter Mugweru** (supra), is a draconian measure, to which the Court will only revert, once it has been established, in plain and obvious circumstances (see Ringera, J. in **Dr. Murray Watson v Rent-A-Plane Limited**) and the determination of Madan, J in **D.T Dobie & Co. (K) Ltd v Muchina** (supra)) that there is no reasonable cause of action.
13. Whether the Respondent was to be paid on demand or whether the claim as per the Amended Complaint is predicated upon the Shareholders' agreement are in my view, issues better placed to be heard and determined before the Court at a full hearing, and not to be wantonly or arbitrarily cast aside without the benefit of trial. These are the Plaintiff's issues, and his cause of action as against the Defendant. Such should be given the privilege of being presented before the Court for its determination. It is the duty and obligation of this Court, as punctuated under **Section 1A and 1B** of the *Civil Procedure Act*, as well as *Article 159(2)* of the Constitution, to dispense justice to all, in an equitable, expeditious and fair manner and, in so doing, give effect to the overriding objective.
14. Having considered the application, the affidavits both in support and in opposition to the Defendant's application, the submissions made by the parties hereto and the arguments for and against the Motion, the Court finds that the application is undeserving. For a pleading to be dismissed pursuant to the provisions of **Order 2 rule 15(1)**, it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant. In my opinion, the Defendant has failed to establish that the Amended Complaint as filed by the Plaintiff is without a reasonable cause of action to warrant its dismissal summarily. As a result, it is therefore, this Court's conclusion that the Defendant's application dated 18<sup>th</sup> September 2013 is unmeritorious the same is hereby dismissed with costs to the Plaintiff.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of June 2014.**

**J. B. HAVELOCK**

**JUDGE**