



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 163 OF 2004

SISO LIMITED ::: PLAINTIFF

VERSUS

CAROLINE WANJIHIA

T/A C.W. WANJIHIA & CO. ADVOCATES ::::::::::::::::::: DEFENDANT

R U L I N G

1. The Notice of Motion application before the court is dated 5th September 2013 and filed in court on 19th September 2013. It is filed under Order 2 Rule 15, Order 51 Rule 1 and 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
 - ***That the Defendant's Statement of Defence be struck out.***
 - ***That Judgement be entered in favour of the Plaintiff as prayed in the Plaintiff.***
 - ***Costs of the suit.***
3. The application is premised on the grounds that the statement of Defence is scandalous, frivolous and vexatious, that the Defendant has acknowledged being indebted to the Plaintiff for the sum of Kshs.6,499,769/=; that the Defence is a mere sham and raises no triable issues and finally that the defence is an abuse of the court process.
4. In support of the application is an affidavit dated 5th September 2013 sworn by the Plaintiff. Attached to the affidavit are many annexures establishing the cause of action and the allegations of admission of the claim by the Defendant.
5. The Defendant in opposition of the application filed grounds of opposition on 14th November 2013 and a Notice of Preliminary Objection on 21st January 2014.
6. The brief history of the application is as follows. The Plaintiff is a Company that develops properties for sale and is the owner of LR No. 1870/x33 Malakel Court. The Plaintiff had instructed the Defendant, an advocate, to sell it apartments on the property which the Plaintiff did. Subsequent to the sale, the Plaintiff requested the Defendant to prepare a statement of account. Pursuant to reconciliation accounts, a final statement was allegedly agreed upon whereby the Defendant acknowledged being indebted to the Plaintiff in the amount being claimed. There are alleged to be several communications between the parties indicating that the Plaintiff had admitted the debt. However, in the cause of time, the Defendant refused to pay the said amount, causing the Plaintiff to file this suit.
7. The Defendant on its part denied owing the Plaintiff the said money and also filed a defence to the suit dated 1st July 2013 in which it denied owing the Plaintiff the sum claimed. The application

- herein now seeks that the said defence be struck out and judgement be entered for the Plaintiff.
8. Parties with the leave of this court agreed to dispense with the applications by way of written submission. The Applicant filed its submission on 20th January 2014 while the Defendant did that on 28th January 2014.
 9. The Defendant has also raised a Preliminary Objection based on the following grounds:-
 1. ***That there is no admission of liability in the Defence herein.***
 2. ***That there are pertinent issues which have been raised in the defence concerning settlement of accounts which can only be determined by hearing the suit on merits.***
 3. ***That the suit is fatally defective as pleaded in paragraph 11 of the Defence and the Defendant shall move this Honourable court to dismiss the suit with costs.***
 10. The Defendant has also raised Preliminary Objections based on the following grounds of opposition:-
 1. ***That this suit is fatally defective as it does not accord with the provisions of Order 52 Rule 4 of the Civil procedure Rules, being a claim based on the existence of an Advocate-Client relationship.***
 2. ***The suit having been styled as a claim for accounts from the Advocate, ought to have been brought by way of Originating Summons in accordance with the provisions of Order 52 Rule 4 (2).***
 3. ***Where lien and costs have been asserted by the Advocate as in this case, this Honourable Court has no other jurisdiction to determine the issues other than under the provisions of Order 52 Rule 4 (3).***
 4. ***In the alternative, this matter is filed before the wrong forum, as the pecuniary jurisdiction for the claim is with the Chief magistrate's court.***
 11. I have considered the application together with the Plaintiff and Defence. I have also considered the submissions of the parties. It seems to me that the issues for determination in this application are as follows:-
 1. ***Whether the Plaintiff/Applicant has established that the Defendant had admitted the claim.***
 2. ***Whether the grounds of opposition and the grounds contained in the Defendants Preliminary Objection filed in court on 21st January 2014 are tenable.***
 12. In answer to the first issue, I have carefully considered the annexures to the affidavit of LORENZO BERTOLI, who is a Director of the Plaintiff Company. Those correspondences speak for themselves and I will not reproduce them here, suffice to state categorically that they establish without a doubt the fact that the Defendant admitted owing to the Plaintiff the amount claimed herein. Those admissions were made way before the defence herein was filed. Vide the Defendant's lawyer letter dated 3rd February 2013 exhibit No. "**LB15**", the Defendant promised to pay the claim and even asked for the Plaintiff's bank details. That letter was written on a '**without prejudice**' basis, but is in my view admissible because upon receipt of that letter, the negotiations which were being protected by using the word "**without prejudice**" were complete and parties were accordingly discharged. So, by the time the Defendant filed her defence herein, denying the said claim in total, that defence became scandalous, frivolous and vexatious only meant to delay justice herein. The Defendant does not herself believe in that defence. I therefore establish as a matter of fact that the Defendant had in many ways admitted owing the Plaintiff the claim herein.
 13. The second issue is as to whether the court can strike out the defence and enter judgement despite the Preliminary Objection and the grounds of opposition filed by the Defendant. At paragraph 11 of the defence, the Defendant states that this suit is fatally defective as it does not conform with Order 52 Rule 4 (1) of the Civil procedure Rules, the same being a claim on the existence of an Advocate – Client relationship. Order 52 Rule 4 (1) states as follows:-

“Where the relationship of advocate and client exist or has exited the court may, on the application of the client or his legal representative, make an order for –

- a. *The delivery by the advocate of a cash account.*
- b. *The payment of delivery up by the advocate of money or securities.*
- c. ...
- d. ...”

4 (2) provides –

“All applications under this rule shall be by originating summons, supported by affidavit and shall be served on the advocate.”

14. Clearly, the suit herein constitutes a claim for accounts from the Advocate (Defendant). Therefore, the claim having been brought by way of a Plaint instead of an Originating Summons, the same may appear to be defective.
15. The Defendant in her defence lays a claim to costs, and claims a lien on moneys due to the Plaintiff. Under Order 52 Rule 4 (3) once the Advocate (Defendant) alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and protection of the advocate’s lien, if any, as the court deems fit. This means that the particular claim can only be determined within the confines of Order 52 Rules (1) (2) and (3) and not through the Plaint. The above position remains true until one recognises that the claim before the court had been admitted by the Defendant. That admission accordingly has taken the claim out of the purview of Order 52. The accounts have already been rendered and therefore there is no longer any need for taxation required under Order 52. The Defence is therefore a sham and a mere defence. Order 52 applies only where the claim is disputed. Once the claim is admitted and remains outstanding, it is claimable as a debt through the normal plaint proceedings.
16. In that regard, I make order as follows:-
 - a. ***The Notice of Motion dated 5th September 2013 succeeds and the Defendant’s Statement of Defence is hereby struck out and Judgement entered in favour of the Plaintiff as prayed in the Plaint.***
 - b. ***Costs of the suit shall be for the Plaintiff.***

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kassim holding brief for Gitau for Plaintiff

No appearance for Defendant

Jason – Court Clerk