



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 145 OF 2007**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**JOHNSON GITHAKA.....DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 16<sup>th</sup> May 2011 brought under section 1A, 1B, & 3A of the Civil Procedure Act and Order 2 rule 15 (b) & (d) and Order 51 rule 1 of the Civil Procedure Rules. The plaintiff/applicant hereinafter referred to as the applicant seeks the following orders that;
  - a. **The Defendant's Statement of Defence be struck out**
  - b. **Judgment be entered for the Plaintiff against the Defendant as prayed for in the amended plaint.**
  - c. **Costs be to the Plaintiff.**
2. The application is grounded on the grounds that;
  - i. On or about 29/4/2004, the Defendant applied for a mortgage facility from the Corporation amounting to Kshs.11,000,000.00 to enable him purchase L.R. No. 7158/548 (L.R. No. 89256) from one Cecilia Wairimu Muchemi. The total consideration for the property was stated to be Kshs.13, 600,000.00.
  - ii. On or about 10/6/2004, the Defendant represented to the Corporation that he had deposited a total of Kshs.3, 300,000.00 in the Corporation's bank account at Kenya Commercial Bank, Moi Avenue Branch, as a down payment of the purchase price.
  - iii. Subsequently, on or about 15/7/04, the defendant instructed the Corporation to disburse the said sum of Kshs.3, 300,000.00 to the vendor ostensibly on the grounds that it was taking too long to conclude the transaction. However, the Corporation declined the request and instead disbursed the said funds directly to the defendant.
  - iv. Investigations by the plaintiff revealed that Defendant only deposited Kshs.64,346.80 and the balance of Kshs.3,235,653.20 was in respect of a cheque drawn by a third party being payment due to the Corporation from the said third party.
  - v. In the premise, there are no triable issues meriting the full trial of this suit and he urged the Court to grant the orders sought.
3. The application is supported by the affidavit of George Makembeo sworn on 16<sup>th</sup> May 2011. He

depones that he is an investigator with the Kenya Anti-corruption Commission duly appointed as such under **Section 23(1)** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003** (hereinafter, “the Act”). He reiterated the grounds on the face of the application and further deponed that; the plaintiff, pursuant to its mandate under the provisions of the Act, investigated allegations that the Defendant, who was at all material times to this suit the Managing Director of Kenya Re-Insurance Corporation (hereinafter, ‘the Corporation’), fraudulently obtained payment of Kshs.3,235,653.20 from the Corporation; that investigations revealed that on or about 29/4/2004, the Defendant applied for a mortgage facility from the Corporation amounting to Kshs.11,000,000.00 to enable him purchase L.R. No. 7158/548 (L.R. No. 89256) (hereinafter, ‘the property’) from one Cecilia Wairimu Muchemi ;that the total consideration for the property was stated to be Kshs.13,600,000.00; that in the meantime, on or about 29<sup>th</sup> May, 2004, PTA Re-insurance Company (ZEP-RE) (hereinafter, ‘ZEP-RE’) forwarded to the Corporation cheque number 009246 for Kshs.3,235,653.20 (hereinafter, ‘the cheque’) in settlement of their debt; that on or about 3<sup>rd</sup> June, 2004, the cheque was banked in the Corporation’s account by the Financial Controller of the Corporation, one Mr. Faustin Kinyua; that on or about 10<sup>th</sup> June, 2006, the said deposit slip was receipted as money received from the Defendant as mortgage deposit and his mortgage account accordingly credited with the said sum of Kshs.3,235,653.20; that on the same day (10/6/2006), the Defendant made another deposit of Kshs.64,346.80 thereby depicting a total deposit of Kshs.3,300,000.00; that on or about 15<sup>th</sup> July, 2004, the Company Secretary of the Corporation wrote a note to the Financial controller and copied to the Plaintiff stating that it will take some time before the grant in respect of the property is extended and transferred to the plaintiff ; that subsequently, on the same day (15/7/04), the Defendant instructed the Corporation to disburse the deposit in his mortgage account to the vendor on the grounds that it was taking too long to conclude the transaction; that however, the Financial Controller declined the request and instead recommended that the said funds be disbursed directly to the Defendant; that on or about 23<sup>rd</sup> July, 2004, a payment for the sum of Kshs.3,300,000.00 was prepared and a cheque for the said amount was prepared and signed by three authorized signatories inclusive of the Defendant; that the said amount of Kshs.3,300,000.00 is reflected as part of the credit entry totaling Kshs.3,320,000.00 of 24<sup>th</sup> July, 2004 in the Defendant’s Barclays Bank account no. 3830146; that the Defendant has admitted the claim in this suit together with other claims against him; that the unjust enrichment must have been made possible by the fraud of the Defendant and the Financial Controller who banked the cheque and caused the proceeds to be credited to the mortgage account of the Defendant knowing that the cheque was rightfully due to the Corporation from ZEP-RE; that in view of the foregoing, it is clear that the Defendant has been unjustly enriched with the receipt of the sum of Kshs.3,235,653.20 at the expense of the Corporation and there is no single triable issue necessitating viva voce hearing of this suit.

4. The application was unopposed. The respondent despite being duly served through his duly appointed advocates did not file any response to this application. The plaintiff seeks orders that the Defendant’s statement of defense be struck out as provided under Order 2 Rule 15 (b) and (d) of the Civil Procedure Rules, 2010 which provides that:-

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

***(b) Its scandalous, frivolous or vexatious; 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.***

The defendant entered appearance and filed his statement of defence on 27<sup>th</sup> March 2007 and denied the plaintiff’s allegations and of receiving the said Kshs. 3,300,000. He further stated that the defendant lacked locus standi in bringing the suit. I have not seen any amended defense in the

court file.

In the case of D.T. Dobie and Company (Kenya) Ltd vs. Joseph Mabaria Muchina and another Civil Appeal No. 37 of 1988 (1982) KRL 1 the late Justice Madan, held that,

**“a pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the plaintiff has got no case at all, either disclosed in the statement of claim , or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved ”**

As I consider this application I am aware that the power to strike out pleadings under order 2 rules 15 (b) and (d) of the Civil Procedure Rules is discretionary, that striking out a pleading is a draconian act which a court should resort to only in plain cases and that it has to be exercised with the greatest care and caution.

In the case of **MOHAMMAD HASIM PONDOR & ANOTHER V. SUMMIT TRAVEL SERVICES LTD & 4 OTHERS HCCC 511of 2008**, the Court held that;

*“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...”*

I have carefully considered the pleadings filed, the applicant has set out its claim and supported it with the documents, however in the defense dated the 26<sup>th</sup> March 2006 the defendant /respondent denies the particulars of fraud that he did not present any deposit slips, that he did not utter the documents and that he received the money or that it instructed the Corporation to disburse the amount claimed to the vendor. These are issues to be considered at a full hearing. The applicant has the task to demonstrate that the defense is scandalous, frivolous or vexatious or that it’s otherwise an abuse of the Court process. The defense raises triable issues that need to be considered at a full hearing, and having noted that and in the interest of justice I will allowed the defendant to have his day in Court to defend the allegations levied against him. I therefore decline to grant the orders sought, the suit shall proceed to hearing once the parties comply with the provisions of order 11 of the Civil Procedure Rules. Costs to be in the cause.

Orders accordingly.

Dated, signed and delivered this **18<sup>th</sup>** day of **July** 2014.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

.....Court clerk