



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 660 OF 2009

CAPITAL CONSTRUCTIONS COMPANY LIMITED ::::::::::: PLAINTIFF

VERSUS

EQUITY BANK LTD. ::::::::::: 1ST DEFENDANT/RESPONDENT

NEPTUNE CREDIT

MANAGEMENT LTD. ::::::::::: 2ND DEFENDANT/RESPONDENT

WILLIE OMORO ::::::::::: 3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Notice of Motion application before the court is dated **6th September 2012** and filed in court on **7th September 2012**. The application is filed by the **2nd** and **3rd** Defendants under Order 1 Rules 3, 4, 5, 15 & 24, Order 2 Rule 15 of the Civil Procedure Rules, Sections 3 & 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
 1. ***That the 1st Defendant's/Respondent's Notice of Claim Against a Co-Respondent dated 23rd November 2009 be struck out and dismissed with costs to the 2nd and 3rd Defendants.***
 2. ***That the 1st Defendant/Respondent be condemned to pay the costs of this application.***
3. The application is premised on the grounds set out thereon and is supported by affidavit of **Bryan Yongo** dated **6th September 2014**.
4. The **1st** Defendant opposed this application and filed a Notice of Preliminary Objection on **20th September 2012** and a Replying Affidavit by John Nyanjua Njenga on **21st November 2012**. The **2nd** and **3rd** Defendants/Applicants opposed the said Preliminary Objection through Grounds of Opposition filed in court on **21st September 2012**. The Plaintiff also opposed the application.
5. Parties filed written submissions to the application which I have considered. The Applicants' case in brief is that the 1st Defendant by a letter dated 1st July 2009 instructed the 2nd Defendant/Applicant to demand and collect a debt therein stated due to the 1st Defendant/Respondent from the Plaintiff Company and to place the Plaintiff Company under receivership if need be, based on the Debenture the 1st Defendant/Respondent was holding for the sum of Kshs.861,438,063.05 and the 1st Defendant furnished the 2nd Defendant with all the Original Debentures and Certificates of Mortgages to enable the 2nd Defendant execute the instructions aforesaid and which documents the 2nd Defendant is still holding as proof of such

instructions by the 1st Defendant/Respondent. The Applicants avers that by an Affidavit on record herein deponed by Joseph Kamau sworn and filed herein on 29th September 2009 at paragraph 10 thereof, the 1st Defendant/Respondent expressly admits having appointed the 3rd Defendant/Applicant as its Receiver/Manager of the Plaintiff Company, and that the 2nd Defendant/Applicant's actions were authorised by the 1st Defendant/Respondent. It is the Applicant's case that the 1st Defendant/Respondent's Notice of Claim Against a Co-Defendant dated and filed herein on 23rd November 2009 against the 2nd and 3rd Defendant/Applicants is caught by the doctrine of "ESTOPPEL IN PAIS" and discloses no cause of action, is scandalous, frivolous and vexatious, prejudicial, embarrassing and objectionable as being an abuse of the court process fit only to be struck out with costs to the 2nd and 3rd Defendants/Applicants

6. The 1st Defendant's case as per its Notice of Preliminary Objection is that the Application is incompetent for being in breach of Order 2 Rule 16 of the Civil Procedure Rules. It is incompetent in so far as it is premised on the affidavit of Joseph Kamau sworn and filed in court on the 29th September, 2009 yet the same was struck out and expunged from the court record in a ruling delivered by Ogola J on 27th June 2012. The said affidavit is also sworn, drawn and filed by an Advocate who had not complied with Section 32 of the Advocates Act as per the findings in a ruling delivered by Musinga J on 22nd November 2011. The 1st Defendant's case is that the irregularity of the purported receivership is acknowledged and admitted by the 2nd and 3rd Defendants in letters of Neptune Credit Management Limited dated 30th September 2009, displayed in the exhibits of the Replying Affidavit of Bryan Yongo sworn and filed on 9th December 2009 in Milimani High Court Civil Case No. 871 of 2009 Equity Bank Limited vs Neptune Credit Management Limited.
7. The parties submitted that the main issue for determination is whether the purported placement of the Plaintiff under receivership and appointment of the 3rd Defendant was regular. The 1st Defendant relied on the Preliminary Objection filed on 20th September 2009 and the Replying affidavit of John Nyanjua Njenga filed on 21st November 2012, and on its Amended Statement of Defence and Counterclaim and the affidavit sworn by its Strategic Director and Company Secretary Mary Wamae filed on 23rd September 2009 in reply to the Plaintiff's Application for injunction and suit. The 1st Defendant submitted the purported placing of the Plaintiff under receivership and appointing of the 3rd Defendant as Receiver/Manager of the Plaintiff was carried out by the 2nd Defendant without any authority and instruction from the Bank. It is the 1st Defendant's submission that the purported receivership is irregular as far as there were no instructions from the Bank. Further, it can be seen from the 1st Defendant's Statement of Defence that it has issued a notice of claim as against the 2nd and 3rd Defendants for purporting to act on behalf of the Bank without any instructions to do so. The 1st Defendant further contended that the 2nd and 3rd Defendant have confirmed that they did not have any instructions to put the Plaintiff under receivership as seen in the letter of 2nd November 2009 as follows;

. . . find enclosed herewith the "appointment of receiver/manager" (four (4) copies) for your execution.

Further in a letter dated 11th November 2009 the 2nd Defendant seeks instructions to regularize the appointment of the receiver;

This is to put you in NOTICE that unless you submit to us the "Deed of Receivership" duly executed within the next twenty-four (24) hours from the date hereof, we shall be constrained to deem it that you do not intend to pursue this debt any further as that is the instrument that would give us "locus standi" to pursue the funds. . .

8. The 1st Defendant submitted that the above letters dated 2nd and 11th November 2009 from the 2nd Defendant to the 1st Defendant were seeking to regularize the alleged receivership of May/June 2009 and clearly confirm that no authority existed at the time of the purported receivership. Simply put, the purported receivership is irregular and is acknowledged by the 2nd

- and 3rd Defendants in the letters of Neptune Credit Management limited dated 30th September 2009 and 3rd November 2009, page 9 & 10 and pages 30 to 32 in the exhibits of the Replying Affidavits of Bryan Yongo sworn and filed on 9th December 2009 in Milimani High Court Case No. 871 of 2009 – Equity Bank Limited Vs Neptune Credit Management Limited.
9. The 1st Defendant also disputed the validity of affidavit of Joseph Kamau in support of the application. It is submitted that the affidavit of Joseph Kamau was prepared by Kenneth Watta of Watta & Associates Advocates in violation of section 32 of the Advocates Act. The Court held in **High Court Case No. 645 of 2009 Equity Bank Limited Vs Capital Construction Limited & 3 others** that;

“Any pleading that was drawn by Mr. Kenneth Watta in violation of Section 32 of the advocates Act is invalid and is for striking out.”

10. I have carefully considered the application. The main issue to determine is whether or not the 2nd Defendant was instructed by the 1st Defendant to put the Plaintiff under receivership and to appoint the 3rd Defendant the Receiver Manager. This is a matter which is seriously disputed by the parties. The 2nd and 3rd Defendants/Applicants have not made the issue any clearer. An application to strike out pleadings must be clear, concise and easily determinable. Any pleadings to prove the same should be clear and concise and to the point to convince the court of the Applicant's conviction in the application. Where the Applicant has to go to great lengths in terms of voluminous proceedings to try to prove its point, that itself is a clear pointer to the fact that the issue at hand is not as clear as the Applicant purports it to be. In this case, I am not particularly impressed with the pleadings by the Applicant. The nature of the application, the paragraphs of the supporting affidavit, and those in the opposition to the Preliminary Objection; the sheer volume of the Applicant's submissions and supplementary submissions, rather than attempt to clear the issues only make the issues at hand more controversial. It is my view that an application to strike out proceedings must be as clear as day, and as convincing in logic without much labour on the part of the Applicant. This requirement ensures that no deserving party is sent out of the courtroom by striking out its pleadings. The court must always take care that a deserving party is heard on merit, and where there is any doubt, the hearing of the suit on merit has no logical alternative. In the case of **Nguruman Limited – Vs – Shompole Group Ranch & Others, Civil Appeal Number 73 of 204 [2007] 2EA 353** the Court of Appeal citing the case of **D.T. Dobie** stated that the power to strike out pleadings is a discretionary one and it is to be exercised with the greatest care and caution. In reliance on that case, I am satisfied that this is not a proper case in which I can exercise my discretion to strike out the said pleadings. Indeed, the Plaintiff and the 1st Defendant have raised, in addition, issues of technicality concerning the affidavit of a Mr. Joseph Kamau filed in court on 29th September 2009 which had been struck off by this court, but used by the Applicants herein to support this application. In my view, the issues raised in this application can best be addressed in a full hearing where all parties will be at liberty to ventilate their case on merit, noting that paragraphs 18, 21, 22 and 23 of the supporting affidavit of Bryan Yongo clearly raises triable issues.
11. In the upshot, the application herein dated 6th September 2012 and filed in court on 7th September 2012 is herewith dismissed with costs to the Respondents.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Khasiani holding brief for Wandabwa for the Plaintiff

Millimo holding brief for Ondieki for 1st Defendant

Akosala holding brief for Ogot for the 3rd Defendant

Teresia – Court Clerk