REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 197 OF 2012

APAR INDUSTRIES LTD. ……..……. PLAINTIFF

VERSUS

JOE'S FREIGHTERS LTD. ..…… DEFENDANT

R U L I N G

1. This Notice of Motion Application by the Plaintiff dated 18th October, 2012 is brought under the provisions of **Order 2 Rule 15(1) (b)** and **(c)** of the *Civil Procedure Rules, 2010* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Plaintiff seeks for the court to determine and issue orders striking out the Defendant's Defence and Counterclaim and that judgment be entered in its favour. The grounds upon which the application is brought are that the Defence is a mere denial, frivolous, a sham and an abuse of the process of the court. The Plaintiff maintains that the case is clear, beyond doubt and that the Defence and Counterclaim are unsustainable and unarguable. The Application is supported by the Affidavit of Ashwin Shah, the Vice President (Marketing) of the Plaintiff, sworn on 18th October, 2012. It is contended therein that the claim against the Defendant is as a result of a fraud perpetuated by the Defendant in a contract that was entered on 12th August, 2010 for clearing and forwarding of certain cargo to a 3rd party, Kenya Power & Lighting Co. (hereinafter "Kenya Power"). It is the Plaintiff's contention that the Defendant received all the required remittances to facilitate the processes but fraudulently falsified documents and unlawfully cleared the cargo, as a result of which it cost the Plaintiff Kshs. 103,449,021/-. The deponent further maintained that the Defendant admitted liability for Kshs. 70,225,732/- in taxes not submitted to the Kenya Revenue Authority but undertook to remit the same and that the Plaintiff stands to suffer irreparable loss unless the orders sought are given.
2. The application is opposed. In his Replying Affidavit sworn on 14th November, 2012, Joseph Karuoro Claudio, the Managing Director of the Defendant Company, admitted that even though his company entered into a contract with the Plaintiff, the services that were to be provided were limited only to advising on the requisites of clearing import cargo and facilitating delivery of the same to Kenya Power and it was in no way engaged in the paying of taxes as alleged by the Plaintiff. It was further contended that the allegations of fraud made against it by the Plaintiff were as against a 3rd party, not a party to the instant suit. The same were not only frivolous but untenable and unenforceable against it by the Plaintiff. It is the Defendant's contention that the Plaintiff's claim against the Defendant is neither a proven debt nor a valid claim as the same is

disputed and that the allegations of fraud are not only false but also libelous and solely aimed at embarrassing, humiliating and scandalizing the Defendant and its Directors.

3. Here it should be noted that the Plaintiff had leveled accusations at the directors and contributories of the Defendant company, Joseph Karuoro Claudio and Joyce Muthoni Claudio in saying that while well aware of the claim as against the Defendant, they had voluntarily resolved to wind up the Defendant by filing Winding-up Cause No. 6 of 2012. As regards that Winding-up Cause, it was the Defendant's contention that the same is a matter of public record, the matter having been publicized in the Kenya Gazette and the local dailies and notice issued to all who may lay claim as creditors. The Defendant maintained that the said Winding-up Cause was filed on 6th March, 2012 whereas the Plaintiff's claim herein was filed on 30th March, 2012.
4. In considering an application to strike out pleadings, the authoritative case as referred to this court in the Plaintiff's submissions, is that of **D.T Dobie & Co. (K) Ltd v Muchina (1982) KLR 1**, the Court of Appeal observed at page 6 *inter alia*;

> ***'Let's understand the principles upon which the court acts when dealing with an application under Order VI rule 13*** (now **Order 2 rule 15 (1))**
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> ***"No exact paraphrase can be given but I think 'reasonable cause of action'means a cause of action with some chance of success when (as required by paragraph (2) of the rule) the allegations in the plaint are considered."***
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> ***Per Lord Pearson in Drummond-Jackson versus British Medical Association (1970) 2 WLR 688 at p 696.***
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> ***"A cause of action is an act on the part of the defendant that gives the plaintiff his cause of complaint."***
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> ***Words and Phrases Vol 1 p 228.***
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> ***"There is some difficulty in fixing a precise meaning to the term 'reasonable cause of action'…. In point of law and consequently in the view of a court of justice, every cause of action is reasonable cause but obviously some meaning must be assigned to the term 'reasonable'…. A pleading will not be struck out unless it is demurrable and something worse than demurrable."***
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> ***Per Chitty J in Republic of Peru –vs- Perurian Guano Company 36 Ch. Div 489, at pages 495 and 496.***
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> ***"It has been said more than once that the rule is only to be acted upon in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution."***
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> ***Per Swinfen Eady L.J in Moore –vs- Lawson and Anor (1915) 31 TLR 418 at 419***
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> ***"It is a very strong power indeed. It is a power which, if it is not most carefully exercised might conceivably lead a court to set aside an action in which there might really after all be a right and in which the conduct of the defendant might be very wrong and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon…. Therefore unless the case be absolutely clear, I do not think the statement of claim to be set aside as not showing a reasonable cause of action"***
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> ***per Denman J in Kellaway v Bury (1892) 66 LT 599 at pp 600 and 601. Upon appeal:***
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> ***"That is a very strong power and should only be exercised in cases which are clear and beyond all doubt…. The court must see that the plaintiff has got no case at all, either as***

disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."

Per Lindley J ibid p 602.

"It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution".

Per Lord Justice Swinfen Eady in Moore v Lawson and Another (supra) at p 419 .

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved."

The Court of Appeal in the **D.T Dobie** case was dealing with the issue of summary procedure and dealing with the determination of a suit without the benefit of trial. The courts have to be very cautious in exercising such jurisdiction, but may be called upon when, in very clear circumstances, the issues are an abuse of the court process or will delay and embarrass the trial process. As summed up by ***Madan JA*** in the ***D. T. Dobie case:***

"it is relevant to consider all averments and prayers when assessing under Order VI rule 13 whether a pleading discloses a reasonable cause of action and also the contents of any affidavits that may be filed in support of an application……. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way.' (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed on the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overreact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, providing it can be injected with real-life by amendment, it ought to be allowed to go forward for a court of justice ought not act in darkness without the full facts of a case before it."

5. This Application is brought under **Order 2 Rule 15 (1) (b)** and **(c)** in that it is scandalous, frivolous and vexatious, it may prejudice, embarrass or delay the trial of the action and is an abuse of the court process. The Plaintiff allegations are that the Defence is a mere denial, is scandalous, frivolous and vexatious and is unsustainable and unarguable. Further, the provisions of the Civil

Procedure Rules that the Plaintiff has employed in its Application are that the matter may embarrass or delay the trial of the action. The cases that it referred to in its submissions included **D.T Dobie & Co (K) Ltd v Muchina (supra), Waters v Sunday Pictorial Newspapers Ltd (1961) 2 All E.R 758** and **Abubakar Zain Ahmed v Premier Savings & Finance Ltd (formerly known as Mombasa Savings & Finance Ltd) & 4 Others [2007] eKLR.** The common thread amongst those cases is that the exercise of the Court's inherent and discretionary power to strike out pleadings should be judiciously and cautiously exercised so as to avoid an inadvertent denial of justice to an aggrieved party. The court should be very reluctant to exercise this power if it can be determined that there is even the slightest chance of a matter proceeding to hearing, notwithstanding the frivolity or vexatious nature of a pleading.

6. In that regard, the Plaintiff has alleged that the Defendant fraudulently falsified documents in order to unjustly enrich itself from the remittances intended to facilitate its importation of the cargo of electric conductors destined for Kenya Power. It has made allegations that the Defendant admitted to withholding Kshs. 70,225,732/- in moneys remitted to it, meant for tax purposes (which the Defendant has strenuously denied). These allegations, coupled with the fact that the Plaintiff maintains it spent over USD 12,824 in extra expenditure, are serious charges against which, in my opinion, the Defendant has to be provided an opportunity to defend itself. A claim for over Kshs. 100,656,998/- is a very large sum indeed for which an entity would no doubt wish to defend itself, if such claim was made against it. As a consequence, the Defendant has filed a Defence and Counterclaim herein, refuting the claims by the Plaintiff. Further the Defendant has made out a counterclaim against the Plaintiff for unpaid fees on account of services rendered under the contract entered into between the parties. In the statement of Defence and Counterclaim, the Defendant. at paragraph 7, denies any falsification of documents and transaction receipts in order to unjustly enrich itself. Any such allegation has, in my opinion, to be closely examined and the court will not merely look at the documentary evidence placed before it, but also will call for an examination of the same at the full hearing of this suit. Any matter that raises any doubt in the mind of the court, the same should be set down for hearing for the dispute to be heard and determined on its merits. This was the observation of Kimaru, J in the case of **Mary Adhiambo Anyango v Jubilee Insurance Co Ltd (2007) eKLR** a case referred to by the Defendant in its submissions, where the learned judge held inter alia;

> ***"…although the Plaintiff annexed a certificate of insurance and further annexed a notice purportedly sent to the Defendant, in light of the denial by the Defendant that it did not insure the motor vehicle in which the Plaintiff was traveling as a fare paying passenger, it is only right that the issues in dispute between the Plaintiff and Defendant be ventilated in a full trial. This court cannot, on affidavit evidence placed before it, reach a conclusive determination that the issues raised by the Defendant in its defence are not triable. On the contrary, it is the finding of this court that the defendant has established that its defence raises triable issues which ought to be heard by a court in full trial. The defendant is thus given unconditional leave to defend its suit."***

7. Further, in its submissions dated 17th December, 2012, the Defendant maintained that the Plaintiff's entire claim is based on alleged actions involving third parties, more particularly the Kenya Revenue Authority, who is not a party to the suit. It is the Defendant's submissions that the evidence adduced by the Plaintiff cannot be corroborated and thus it would be in the interests of justice that the Defendant be afforded an opportunity to 'interrogate' the documents issued by the Kenya Revenue Authority, at a full hearing. From the aforegoing submissions by the Defendant and its Replying affidavit, the Defence filed clearly raises issues that are triable and these can only be conclusively be determined with the benefit of a full trial. It would be prejudicial and presumptuous for the court to declare the matter as determined at this early stage, without the benefit of the parties ventilating their issues in court. It is only then that the court can make a final determination of the dispute, having accorded both the Plaintiff and Defendant to present their claims in court. To this end, the allegation by the Plaintiff that the Defendant company was deliberately put into receivership by its directors and subscribers is yet another issue that needs to

be addressed and ventilated at the hearing of this suit in due course.

8. The conclusion to all the above, is that I dismiss the Plaintiff's Notice of Motion dated 18 October 2012 with costs to the Defendant. As both the Plaintiff and the Defendant herein have filed their lists and bundles of documents as well as their lists of witnesses and witness statements, it seems that this case is ready to proceed to hearing straightaway, just as soon as the parties have agreed upon the issues for determination at the hearing hereof.

DATED and delivered at Nairobi this 24th day of January 2013.

J. B. HAVELOCK

JUDGE