



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 235 OF 2012

SAFARICOM LIMITED.....PLAINITFF

VERSUS

AIRTEL NETWORKS KENYA LIMITED.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 27th June 2012 has been brought under the provisions of Order 2 Rule 15(1)(b), (c) & (d) of the Civil Procedure Rules, 2010. It seeks the following orders:-

a. THAT the Statement of Defence dated 30th May 2012 be struck out and judgment be entered in favour of the Plaintiff as against the Defendant in terms of the Plaint dated 11th April 2012.

b. THAT the costs of the Application and of the suit be paid by the Defendant.

2. The grounds on which the Plaintiff has relied on in support of the application are as follows:-

a. THAT the Statement of Defence is scandalous, frivolous and vexatious.

b. THAT the Statement of Defence may prejudice, embarrass or delay fair trial of the suit.

c. THAT the Statement of Defence is otherwise an abuse of the Court Process.

3. The Plaintiff's application was supported by the Affidavit of Jennifer Caroline Gakunga, the Plaintiff's Principal In-House Counsel sworn on 27th June 2012.

4. In the said affidavit, the deponent has explained that the Defendant's Statement of Defence was scandalous, frivolous or vexatious for the reason that the terms pleaded in Paragraph 4 (a)-(e) of the Plaint and denied at Paragraph 3 of the Statement of Defence were express terms of the Interconnection Agreement dated 15th July 2012 (hereinafter referred to as "the Agreement").

5. I have noted the Plaintiff's assertions in the said affidavit that though the Defendant paid the principle amount upon the demand by the Plaintiff, it had refused to pay the interest sum as had been provided for

in the interest clause of the Agreement. As a result, the Plaintiff incurred collection charges for the legal recovery of the debt in the sum of Kshs 3,043,069/= which it is now claiming.

6. It was the Plaintiff's case generally that the Statement of Defence was otherwise an abuse of the court process as the Defendant could not seek to defend an action in respect of which the principal issues were expressly set out in the Agreement.

7. In response to the said application, Linda Kaai-Kiriko, the Defendant's Legal Affairs Manager swore a Replying Affidavit on 11th July 2012 in which she stated that the Plaintiff's application was incompetent and utterly defective as the same offended the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules.

8. She contended that the Plaintiff had deliberately misinterpreted the provisions of the Agreement. The Defendant would be asking the court to look at the true meaning and purport of the agreement at the appropriate time.

9. Linda Kaai- Kiriko was emphatic that that there was no sum due and owing to the Plaintiff and that the Plaintiff's advocates demand for legal charges was an illegality and contravened the Advocates (Practise) Rules.

10. As I can glean from the documents and arguments by the Defendant, it is necessary that this matter proceed to trial to enable the trial court determine the dispute on its facts. The Defendant submitted that granting the prayers sought by the Plaintiff would deny it an opportunity to be heard on the substantive issues.

11. The Defendant also filed a Notice of Motion application also dated 27th June 2012. The said application has been brought under the provisions of Section 3A and 18(1)(a) of the Civil Procedure Act, Order 51 (1) of the Civil Procedure Rules and Rule 13 of the Advocates (Practise) Rules. It seeks the following orders:-

a. The Plaintiff's claim in respect of the collection charges as detailed in prayer (b) of the Plaint dated 11th April 2012 be struck out.

b. After striking out the claim in respect of the collection charges, this Honourable Court be pleased to transfer the remainder of the claim to the Chief Magistrate's Court for hearing and final determination.

c. THAT costs of the Application be provided for.

12. The Defendant relied on the following grounds:-

a. The claim for collection charges for Kshs 3,043,069/= is illegal and unenforceable.

b. Neither the Plaintiff nor its Advocate is permitted to found rights upon a deliberate breach of the law or professional ethics.

c. The court cannot entertain the claim by the Plaintiff for debt collection charges or fees under the Advocates Act.

d. The claim is barred under the Advocates Act.

e. The remainder of the claim can only be heard and determined in the Chief Magistrate's Court.

13. On 27th June 2012, Linda Kaai- Kiriko swore the affidavit in support of the said application.

14. In the said affidavit, she has deposed that Rule 13 of the Advocates (Practise) Rules barred the Plaintiff's advocates from demanding, in a demand letter before action, payment for professional services other than its client because such charges were strictly between Client and Advocate and not on a party to party basis.

15. The Defendant was categorical that at the time of the Plaintiff's demand, there were no monies that were due and owing for the reason that the sum of Kshs 90,847,354.19 had already been settled and the sum of Kshs 81,904,499.87 was not due for payment.

16. It was the Defendant's position that the Plaintiff's claim for recovery of collection was not justified and that the same should be struck out. The Defendant annexed copies of the demand letter and demands for the Plaintiff's advocates collection charges in the sum of Kshs 3,043,069/= addressed to both the Plaintiff and the Defendant to lay a basis of its prayer.

17. It further argued that the remainder claim for the sum of Kshs 1,146,385.03 be heard at the Chief Magistrate's Court which had the appropriate pecuniary jurisdiction.

18. The Defendant was emphatic that the Statement of Defence was otherwise an abuse of the court process as the Defendant could not seek to defend an action in respect of which the principal issues were expressly set out in the Interconnection Agreement.

19. In response to the said application, Jennifer Caroline Gakunga swore a Replying Affidavit on 18th September 2012. She stated that the Plaintiff incurred the said collection charges towards enforcement of the Defendant's obligations under the Agreement dated 15th July 2012 inter alia the recovery of the principal debt in the sum of Kshs 172,751,854.06.

20. She further contended that the Defendant's average annual liability for interest on late payment of interconnection charges under the said Agreement was Kshs 77,608,568.21 and as at 18th September 2012, the same stood over Kshs 17,146,271.31 as evidenced by copies of Statement and computation of interest.

21. For this reason, the Defendant's final liability on late payment for interconnection charges was way beyond the pecuniary jurisdiction of the Chief Magistrate's court. She prayed that the suit is not transferred to the subordinate court.

22. When the matter came up for hearing on 4th December 2012, Mr Havi and Mr Ojiambo counsel for the Plaintiff and the Defendant respectively agreed that their respective Notice of Motion applications both dated 27th June 2012 be heard simultaneously. They highlighted their written submissions dated 8th October 2012 and 22nd October 2012 respectively.

23. In respect of the Plaintiff's application, Mr Havi reiterated the issues raised in the Supporting Affidavit sworn by Jennifer Caroline Gakunga on 27th June 2012. He submitted that the Defendant had admitted the existence of the Agreement but denied the term as regards the payment of interest contained therein. For that reason, it was his view that the Defendant's denial for the entire liability for interest was not genuine.

24. The Plaintiff relied on the case of **Muguga General Stores vs Pepco Distributors Ltd [1987] KLR at page 4** in which the court held:-

“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was carried out and it failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

25. The Plaintiff prayed for the striking out of the Defendant's Defence dated 30th May 2012 and prayed

that judgment be entered in favour of the Plaintiff as prayed in the Plaint dated 11th April 2012.

26. In opposing the said application, Mr Ojiambo stated that the Plaintiff's application was a declaratory suit and could not be given in a summary manner. He submitted that even if interest was payable, the same was not due for payment and that an invoice would be raised for monies to be paid within 30 days without interest being charged.

27. He added that the Plaintiff had agreed with the Defendant that interest on late payment would not be charged and this had been observed for 11 years. The Plaintiff was thus forborne from demanding interest. He cited the case of **Hughes vs Metropolitan Railway Co [1877] UKHL 1 (5 June 1877)** in which Lord Cairns stated that :-

“ ...if one party leads the other to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

28. Mr Ojiambo pointed out that the Defendant had raised weighty issues. It was important for the court to look at the reconciliation accounts, determine the rate of interest and consider whether or not the Plaintiff's advocates' had breached the Advocates (Practise) Rules demand for collection charges before it could strike out the Defendant's Defence.

29. He argued that the interest in the Plaint could not be said to be escalating as the principle amount had already been paid. It was his submission that the allegation of a claim for Kshs 17,000,000/= was not founded on any evidence adduced before the court.

30. Mr Ojiambo also submitted that the after the claim for the collection charges was struck out, the value of the subject matter would be Kshs 1,146,385.06. He also argued that even if the said amount was not struck out, the total value of the claim was Kshs 4,189,454.06 which was still within the pecuniary jurisdiction of the subordinate court.

31. As regards the competency of the Plaintiff's application, Mr Ojiambo tried to persuade this court to find that the Plaintiff contravened Order 2 Rule (15) of the Civil Procedure Rules because there cannot be consolidation of many grounds. He relied on the decision of **Apidi vs Shabir & Another [2003] KLR 588 at page 593** where the court stated:-

“the grounds upon which an application that has been brought under Order VI should never be merged or be complimentary to one another...It clearly indicates that each of the grounds should be a separate ground hence the words “or” at the end of the enumerated grounds....this application is fatally defective, in which case it is bound to fail.”

32. He prayed that the Plaintiff's application be dismissed and that the claim be heard by the subordinate court as prayed for in the Defendant's application.

33. In response to the Defendant's application, Mr Havi told me that the amount claimed for interest was beyond the pecuniary jurisdiction of the subordinate court. He also submitted that if the court were to find there were triable issues, then this court could direct the same to proceed for trial but after entry of judgment on the core issue of whether the Defendant is bound by and obliged to observe its obligations under clause 7.5.1. of the Agreement

34. To advance this point, Mr Havi was guided by the case of **Blue Sky Epz Limited vs Natalia Polykova & Another [2007] eKLR** where the court entered judgment for part of the claim and directed trial for the disputed amount.

35. It was also his submission that there was nothing in the Advocates Act that barred the Plaintiff from recovering the collection charges. He was categorical that there was no basis for striking out the claim for

the recovery expenses and that at the worst, the matter should be remitted to full trial.

36. In his oral submissions, Mr Havi told the court that there was no request to transfer the suit herein to the subordinate court. He reiterated that the Defendant's annual liability for interest on late payment of interconnection charges was Kshs 77,608,568.21. The Defendant's liability for interest on late connection charges was over Kshs 17,146,271.31 which was way above the pecuniary jurisdiction of the subordinate court.

37. In view of the fact that two applications were being canvassed simultaneously, I will first address my mind to the Plaintiff's application for striking out the Defendant's Defence and entry of judgment as prayed in the Plaint dated 11th April 2012.

38. On the issue of whether the Plaintiff's application was incompetent and incurably defective for having merged more than one ground, I have seen the holding in the **Re: Apidi** case and respectfully take a different view from Gacheche J. I say so because if that was the correct position, it would mean that a party who wishes to rely on more than one ground would have to bring different applications when seeking orders for striking out thus leading to a multiplicity of court action.

39. An application can be scandalous and otherwise an abuse of the court process. I take the view that more than one ground can exist at any given time. If the rule had used the word "and", it would have meant that a party would have needed to prove all the grounds to succeed in an application seeking orders for striking out. In my mind the use of the word "or" connotes a situation where a party can bring an application relying on any or all of the grounds and only succeed on the grounds that he able to prove.

40. In this regard, I reject the Defendant's arguments that the Plaintiff's application dated 27th June 2012 is defective and incurably defective.

41. However, even if I were wrong on this point, I would still hold that the Plaintiff's application cannot be dismissed by dint of Article 159 (2) (d) which provides that:-

" In exercising judicial authority, the courts and tribunals shall be guided by the following principles..

(d) justice shall be administered without undue regard to procedural technicalities."

42. Having found that the Plaintiff's application is properly on record, I now turn to the question whether I should order for the striking out of the Defendant's Defence.

43. It is trite law that a party must be given a fair and reasonable opportunity to present its case. As has been held in many cases, striking out of a party's pleadings is a draconian step and should be used sparingly and very cautiously. This is to afford such party that fair and reasonable opportunity to ventilate its case.

44. Mr Ojiambo relied on the case of **Geminia Insurance Co Limited vs Kennedy Otiemo Onyango [2005] eKLR** to fortify the Defendant's case. In that case, Musinga J had the following to say:-

"It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."

45. I have listened to the Defendant's submissions and perused its Defence and I am satisfied that the Defence raises triable issues on the question on the rate of interest applicable, whether the Plaintiff was estopped from levying interest on late payments and whether the Plaintiff's advocates were entitled to demand collection charges from the Defendant. This case is distinguishable from the **Blue Sky Epz case** cited hereinabove as the Defence therein appeared to have consisted of mere denials.

46. In that respect, I am not persuaded by the Plaintiff's submissions that this is a proper case for striking

out of the Defendant's Defence or for entry of judgment for part of the claim and accordingly dismiss the Plaintiff's application dated 27th June 2012.

47. Turning to the Defendant's application, I have taken a similar view on the seriousness of striking out parties' pleadings and decline to strike out the Plaintiff's claim in respect of collection charges as prayed by the Defendant. The question of whether the Plaintiff's advocates were entitled to collection charges is an arguable issue that cannot be determined without hearing both parties during trial.

48. In respect of the Prayer No (b) of the Defendant's application, I note that the subject value of the claim which is discernible from the Plaintiff's claim is Kshs 4,189,454.03. Mr Havi argued that there was no request by the Defendant to transfer the suit from the High Court. However, it is clear that the Defendant cited Section 18 (1) (a) of the Civil Procedure Act and sought the prayer in the body of its application. I am therefore satisfied that the Defendant did make the request to transfer the suit to the High Court of Kenya.

49. I have considered the parties' applications, the affidavits in support thereof, the annexures thereto, oral and written submissions as well as the cases cited in support of the parties' cases submitted on behalf of the parties by their respective legal counsel. As matters stand now, the Plaintiff is bound by its pleadings which show that this matter can be handled by the subordinate court which has the appropriate pecuniary jurisdiction.

50. I would agree with Mr Ojiambo that since there is no other evidence placed before me to suggest that the Plaintiff is claiming additional monies to warrant the matter being heard by the High Court, this matter should be determined by the subordinate court which has a pecuniary jurisdiction of Kshs 7,000,000/=.

51. For that reason, I hereby direct that this suit be transferred to the Chief Magistrate's Court Milimani Commercial Court Nairobi which is competent to try and dispose of the same.

52. Accordingly, the upshot of my ruling is that the Plaintiff's Notice of Motion application dated 27th June 2012 is not merited and is hereby dismissed. For the avoidance of doubt, the Plaintiff's claim for collection is not struck out and the Defendant's Notice of Motion application also dated 27th June 2012 succeeds only to the extent that this suit be and is hereby transferred to the subordinate court for hearing and final determination. Costs in both applications shall be in the cause.

53. Orders accordingly.

J. KAMAU

JUDGE

DATED and DELIVERED at NAIROBI this 24th January 2013