REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 229 of 2006

KENYA AIRPORTS AUTHORITY……...……..….PLAINTIFF

- VERSUS –

MASOOD ISHTYAQUE MUGHAL & SAHIR M. MUGHAL T/A

KENYA TRUCK & TRACTORS…….. DEFENDANTS

RULING

1. The plaintiff filed this suit on 3rd May 2006. It is a claim against the defendant to release the plaintiff's fire engine held by the defendant or to pay Kshs 16,500,000 being the value of the engine as at 15th January 2004. There is also a claim for general damages. The defendants counterclaimed for Kshs 2,699,160 for towing, dismantling, testing and storing the fire engine. The defendant asserted its right of lien and for damages.

2. The plaintiff has now filed a chamber summons dated 27th September 2010. The plaintiff prays that the defendant's counterclaim be struck out. The plaintiff had purported to file a similar application dated 27th October 2010. By directions dated 15th November 2010, L. Njagi J ordered the plaintiff to elect to proceed with only one of the applications. The application that was argued on 30th May 2011 before the Judge is the one dated 27th September 2010. It is predicated upon section 34 of the Kenya Airports Authority Act and Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules (now repealed). The gist of it is that the counterclaim was filed out of time and without service of the mandatory statutory notice. To that extent, the plaintiff contends that the counterclaim is scandalous, frivolous, vexatious and an abuse of court process. Those matters are set out in detail in the supporting affidavit of Joy Wanjiru Nyaga of even date.

3. The application is contested. There is filed a replying affidavit sworn by Sahir Mughal on 19th October 2010. There is also a supplementary affidavit of the same deponent sworn on 1st February 2011. The acting corporation secretary of the defendant Joy Wanjiru Nyaga has in turn sworn a further affidavit in answer dated 14th February 2011. In a synopsis, the defendant avers that since the cause of action arose in August 2005, the counterclaim was filed within time on 2nd June 2006. The defendant contends that the plaintiff had notice of the action and that in view of a consent dated 13th December 2006, it is estopped from denying the defendant's claims. In particular, it is averred that two payments were made by the plaintiff to the defendant of Kshs 350,000 and Kshs 2,319,160 representing the value of the defendant's counterclaim. It was submitted that when the defendant released the remaining fire engine, it extinguished the plaintiff's prayers numbered 1 and 2 in the plaint. Lastly, the defendant's case is that parties had expressed an intention to proceed with the suit and that it would be unjust to strike out the counterclaim now.

4. Those submissions were first made before Leonard Njagi J on 30th May 2011. Ruling was reserved by the learned Judge for 13th October 2011. For reasons that are not on the record, the ruling was never delivered. In the meantime, the Judge was removed from the bench by the Judges and Magistrates Vetting Board formed under the Constitution of Kenya 2010 and the Vetting of Judges and Magistrates Act. On 15th March 2013, both parties agreed, that in the interests of justice, I determine the summons on the basis of the earlier submissions made before Leonard Njagi J.

5. I am of the following considered opinion. There are clear legal benchmarks for striking out pleadings. At any stage of the proceedings, the court may strike out a pleading if it discloses no reasonable cause of action; is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 (unreported). See also *Francis Ngira Batware Vs Ashimosi Shatanbasi & Associates Advocates and 2 others* Nairobi, High Court, case 476 of 2009 [2013] e KLR.

6. The reason is that at this stage, the court is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This principle of restraint was restated recently by the Court of Appeal in *Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan* Kisumu, Civil Appeal 32 of 2003 (unreported). See also the *The Cooperative Bank Limited Vs George Wekesa* Civil Appeal 54 of 1999 (Court of Appeal, Nairobi, unreported). In addition, regard must now be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The court is now enjoined to do substantial justice to the parties. The overriding objective of the court is clearly laid out in those statutory provisions.

7. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418 when he delivered himself thus;

"*To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad*"

See also *Musa Misango Vs Eria Musigire* [1966] E.A. 390 at 395 where Sir Udo Udoma C.J. cited with approval the above passage.

8. When I juxtapose those principles against the facts here, I find further as follows. The impugned defence and counterclaim was filed in court on 2nd June 2006. That was 4 years to the date of the application to strike out. After close of pleadings the plaintiff filed an application for summary judgment. It was dismissed on 6th October 2006. In the meantime, the parties had entered into a consent filed in court on 18th December 2006. Under the terms of that consent the defendant was to return the fire engine. The plaintiff was to deposit a sum of Kshs 2,319,160 in a joint interest earning account. Certain sums were to be paid to either party depending on the outcome of the trial. Granted those circumstances, there has been undue laches by the plaintiff in bringing this motion. It has all the hallmarks of an afterthought. That in turn prejudices it from grant of a discretionary relief.

9. An application to strike out a pleading must be brought with expedition. Where there has been inordinate delay in bringing it, the court will frown upon it and will not exercise its discretion in favour of the applicant. See *Meru Farmers Co-operative Union Vs Abdul Aziz Suleman* (No 1) [1966] E.A. 436 for the proposition that an application to strike out a pleading on ground it discloses no cause of action should be made promptly.

10. I now turn to the merits of the application. Its bedrock is section 34 of the Kenya Airports Authority Act which provides:

"34. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-

(a) The action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent;

(b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury or damage, within six months next after the cessation thereof"

11. The defendant has not controverted the plaintiff's claim that no formal notice of intention to sue was delivered before the filing of the counterclaim. The defendants answer at paragraph 6 of the replying affidavit is that the section does not apply to the type of contract in issue. The requirement of the notice is mandatory and express. The failure by the defendant to serve the statutory notice may as well be fatal. The only question is whether it was cured by the consent entered by the parties on 13th December 2006 and filed on 18th December 2006.

12. Similarly is the question whether the cause of action is statute barred. The plaintiff's case is that the cause of action in the counterclaim arose on 2nd February 2004 and should have been presented not later than 2nd February 2005. The defendant does not agree. The defendant states the cause of action arose in August 2005 and was thus in time when he filed the counterclaim on 2nd June 2006. The defendant states that the plaintiff is estopped by the consent I referred to from denying the claim. It is important to set out the terms of that consent *in extenso:*

"1. That the defendants do hereby immediately release and return to the plaintiff the plaintiff's Kronenburg Fire Tender Detroit Engine in their custody in the same state and condition in which it was when collected by them from the plaintiff's premises on 15th January 2004 in exchange for the plaintiff banker's cheque for Kshs 350,000/- payable to the defendants.

2. That the plaintiff do deposit the sum of Kshs 2,319,160/- in an interest earning account with Chase Bank Limited, Wabera Street Branch in the joint names of M/s K. Mwaura & Company Advocates and M/s B.A. Ouma & Associates Advocates pending the hearing and determination of the suit.

3. Upon the hearing and determination of this suit:-

(a) If judgment is delivered in favour of the plaintiff, the defendants shall immediately refund the sum of Kshs 350,000/- paid to them by the plaintiff in terms of clause 1 hereinabove and the sum of Kshs 2,319,160- held in the joint interest earning account shall forthwith be released to the plaintiff's advocates.

(b) If judgment is delivered in favour of the defendant, such sum as shall be sufficient to satisfy the decree, less the sum of Kshs 350,000/- paid by the plaintiff to the defendants in accordance with clause 1 hereinabove, shall be paid to the defendants' advocates from the monies held in the joint interest earning account and the balance thereof shall be released to the plaintiff's advocates".

13. The present application would require the court to determine a matter of fact: whether the cause of action arose on 2nd February 2004 or in August 2005. From the nature of the contract and conflicting affidavit evidence, I am ill placed to make that determination. Secondly, from the terms of the above consent, it is clear that both parties agreed to have the suit determined on merits. I agree that the order of consent did not compromise the suit. The consent did not acknowledge the counterclaim. It cannot even be a waiver for the express statutory requirements of section 34. See *Kai Nam (a firm) Vs Man Kam Chan [1956]* 1ALL ER 738, *Republic Vs The Public Procurement Complaints and Review Board and another*

Nairobi, High Court Misc. Cause 50 of 2004 [2005] e KLR. But striking out the counterclaim this late in the day will leave the defendant holding the shorter end of the stick. Parties are entitled to a fair trial. One key ingredient is to maintain the parties at equal arms length. If the plaintiff had brought this motion timeously and the issues not too clouded in dispute, I may as well have come to a different conclusion.

14. Recently in *Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 [2013] e KLR, I said the following:

"While I commiserate with the plaintiff, the court must execute a delicate balancing act to ensure that both parties remain at equal arms length. In our adversarial system of justice, even the weak and vanquished must be granted a say at the throne of justice. The plaintiff may strongly feel that the defence set up is a strategy to delay justice but on the face of it, it cannot be said to be frivolous, vexatious or an abuse of court process. The veracity of that defence can only be fully tested on evidence at the trial".

15. I would thus fall back upon the wise counsel in *Wenlock Vs Maloney and others* [1965] 1 WLR 1238 at 1242:

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power".

16. For all the above reasons, the plaintiff's chamber summons dated 27th September 2010 is hereby dismissed. Costs shall abide the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 30th day of April 2013.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Ms B.A. Ouma for the Defendant.

Mr. C. Odhiambo Court Clerk.