



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 202 of 2009

SEBASTIAN ASEMABO OPAKA.....PLAINITFF

VERSUS

VIJAYKUMAR SHAMJI PATEL.....1ST DEFENDANT

AMRATBEN PATEL.....2ND DEFENDANT

WARMWELL LIMITED.....3RD DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 9th July 2009 has been brought under the provisions of Order 2 Rule 15 (1), Order 13 Rule 2 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all the enabling provisions of the law. It seeks the following orders:-

a. **THAT the Defendant's Defence filed herein on 15th April 2009 be struck out and judgment be entered in favour of the Plaintiff as prayed in the Plaint.**

b. **THAT in the alternative, judgment on admission be entered against the Defendants jointly and severally.**

c. **THAT the costs of this suit and the application be borne by the Defendants/Respondents.**

1. The grounds on which the Plaintiff relied on in support of his application were as follows:-

a. **THAT the Defendant's Defence is a sham and discloses no reasonable cause of defence in law.**

b. **THAT the Defence frivolous, vexatious and is intended to prejudice, embarrass and delay the fair trial of this action.**

c. **THAT the Defendant's Defence is an abuse of the process of this Honourable Court.**

d. **THAT it is in the interest of justice that the Defendants' Defence be struck out.**

e. **THAT in any event, the Defendant (sic) had by an acknowledgment note dated 5th June 2007 admitted indebtedness to the Plaintiff.**

1. In support of his application, the Plaintiff also swore the Supporting Affidavit on 9th July 2012 in which he stated that on 5th June 2007, the 2nd Defendant received and duly acknowledged the cheque of the sum of Kshs 4,000,000/=.
2. He added that the ruling delivered on 26th June 2012 showed that the Defendants were truly and justly indebted to him as the said sum had not been paid to date.
3. The Plaintiff also deposed that the Defendants' Defence dated 15th April 2009 did not raise any triable and/ or bona fide issues to warrant a full hearing and consequently, the said Defence ought to be struck out and judgment be entered in his favour as prayed in the Plaintiff.
4. The Plaintiff annexed his Supporting Affidavit sworn on 4th May 2012 in which it is contended that the said sum was for full and final payment of the purchase price of L.R. No 9042/239 which had to be paid in full before the Defendants executed the Sale Agreement. He stated that he never signed the said Agreement as the Defendants became evasive.
5. In response thereto, the 1st Defendant herein swore the Replying Affidavit on 13th September 2012 on behalf of the other Defendants. He stated that M/S Robert Asembo & Co Advocates who were representing both the Plaintiff and the Defendants in the sale transaction issued the Defendants a cheque in the sum of Kshs 4,000,000/= drawn by Spell Investments Limited (hereinafter referred to as "Spell").
6. It was the Defendants case that the sum of Kshs 4,000,000/= by Spell constituted proceeds of crime which its directors were in the process of laundering to evade a government crackdown on illegal pyramid schemes.
7. The Defendants contended that after perusing the Task Force in Pyramid Schemes, it came to their attention that neither the advocate nor Plaintiff were directors in the said company and that Boniface Ngosia who was the bona fide director and who was the signatory of the cheque was deceased having died in a road traffic accident on 16th June 2007. The advocate had only been named in the said report as only having been involved in the activities of Spell while the Plaintiff is the advocate's father.

10.They stated that the Purchaser failed to sign the Agreement for sale necessitating the 1st Defendant to write his advocates asking them to avail the Purchaser, who the 1st Defendant insisted was not the Plaintiff herein, to sign the said agreement. Instead, the Advocates wrote to them cancelling the sale transaction vide a letter dated 4th October 2007 and demanded the refund of the said sum which was to be paid in the advocate's name. The Defendants averred that the Agreement for sale was between Spell and the 3rd Defendant.

11.The deponent also stated that interest on the purchase price should not arise as the Defendants had all along been ready and willing to refund the money to the rightful owners. It was the Defendants contention that the Plaintiff was a stranger to them and that the advocate was trying to get the said sum after learning that Boniface Ngosia was deceased.

12.In his written submissions dated and filed on 8th January 2013, the Plaintiff submitted that in a ruling dated 22nd March 2012, Musinga J (as he then was) dismissed the Defendants' Chamber Summons application dated 16th September 2009 seeking to strike out the Plaintiff's suit.

13.The Plaintiff argued that its Notice of Motion application dated 4th May 2012 was dismissed by the learned judge on 24th June 2012 on the ground that the said application had been brought under the wrong provisions of the law. The issue of the source of the monies for the purchase price was addressed in the said ruling.

1. The Plaintiff emphasised that it was not in dispute that the said monies were received by the Defendants and he had only made an additional prayer that the said sum should be paid with interest and costs. It was therefore his prayer that the Defence herein ought to be struck out and judgment entered in his favour.
2. On its part, the Defendant submitted that the Plaintiff has no *locus standi* to bring this suit against them. In view of the fact that there was a demand that the refund was to be made to the advocate

and the Plaintiff, the Defendants were at a dilemma as to who was the legitimate purchaser.

3. The Defendant further argued that the relief sought by the Plaintiff was a draconian remedy which could only be granted in the clearest of the cases. The Defendant also contended that the relief could only be granted if the Plaintiff was able to demonstrate that the Defence did not raise any triable issues.
4. The Defendant listed the triable issues emanating from its Defence as follows:-

- a. **The Defendants had denied having any business dealings with the Plaintiff and had equally not received any payment from the Plaintiff.**
- b. **Other than the Plaintiff, Robert Asembo, the advocate had also claimed the same funds from the Defendants. A formal demand to that effect had been issued by Kimanthi & Co Advocates.**
- c. **The funds which the Defendants were holding were paid by Spell whose known director, Boniface Ngosia, died in a road accident on 16th June 2007 and the Defendants do not know any other directors who can properly deal on behalf of the said company.**
- d. **The Defendants' Replying Affidavit had established beyond doubt that Spell was a pyramid scheme which was involved in the illegal business of defrauding unsuspecting members of the public and together with other pyramid schemes, they defrauded members of the public about Kshs 4 billion.**
- e. **From about 2009, the government was investigating the activities of these pyramid schemes with a view to recovering money stolen from the public.**
- f. **To avoid being caught and to enable them hide the proceeds of crime, Robert Asembo who was one of the Defendants' advocates took advantage of the Defendants and introduced Spell as purportedly being interested in LR No 9042/239 and upon such introduction, Spell paid Kshs 4,000,000/= to the Defendants as purchase price.**
- g. **The Defendants had now established beyond doubt the so called purchase by Spell was a hoax and the officials or associates including Robert Asembo were merely using the Defendants to launder pyramid scheme money in the guise of purchasing the Defendants' property.**
- h. **This was demonstrated by paying and then seeking cancellation and the crack down on pyramid schemes had cooled down.**
 1. The Defendants further submitted that the court could not enter judgment on admission as their admission of receipt of the monies was qualified and not unequivocal. They stated that the Plaintiff had not explained what his connection with Spell was to justify why monies paid by Spell were to be refunded to him. It was also the Defendants' submissions that this court could not close its eyes to an illegality that had been perpetrated by Spell.
 2. The Defendants also averred that interest was not payable as they had all along been ready and willing to proceed with the sale transaction until it was cancelled by the advocate for no apparent reason. In any event, commercial interest rates were not payable because the Plaintiff had not prayed the same in his Pleint.
 3. In his ruling of 22nd March 2012, the learned judge said the following as regards the Defendant's Notice of Motion application dated 16th July 2009 seeking the striking out of the Pleint herein and/or in the alternative striking out of the suit against the 1st and 2nd Defendants:-

“Although the 1st Defendant denied any knowledge of the said cheque and the acknowledgement note, whether the said documents are authentic or not can only be determined in a full hearing. In the circumstances there may be miscarriage of justice if prayer (b) is struck out at this stage. As for prayer (a), it is unsustainable and is consequently struck out. The rest of the plaintiff's claim shall proceed to full hearing...”

1. In prayer (a) of the Plaint, the Plaintiff had sought for an order for specific performance requiring the Defendants to transfer the property known as L.R. No 9042/239 situated at Nairobi off North Airport Road while in prayer no (b) he had sought for an order that in the alternative to prayer no (a), that he be restituted to the position he was in before the transaction hereby together with lost income and opportunity by virtue of the Defendants holding his money would cause great miscarriage of justice.
2. The Plaintiff's advocates submitted that they filed an application for striking out of the Defence as had been advised by the learned judge but the Defendants had failed to remit the monies to the Plaintiff. It was the Plaintiff' case that the Defendants' Replying Affidavit sworn on 13th September 2012 was on all fours with that sworn on 18th May 2012.
3. In his ruling of 26th June 2012 relating to the Plaintiff's Notice of Motion application dated 4th May 2012, Musinga J (as he then was) had this to say:-

“Since there was a statement of defence on record at the time the plaintiff applied for summary judgment, the application is unsustainable and must be struck out, which I hereby do. The plaintiff ought to have filed an application under Order 2 Rule 15 to strike out the statement of defence if he believed that it disclosed no reasonable cause of action.”

1. In their Statement of Defence, the Defendants denied that there was any agreement between themselves and the Plaintiff or that they had received any monies from the Plaintiff. The Defendants had by a note dated 5th June 2007 acknowledged receipt of a cheque in the sum of Kshs 4,000,000/= drawn by Spell. The learned judge dealt with this issue in his ruling of 26th June 2012 when he stated as follows:-

“There is no dispute that the sum of Kshs 4,000,000/= was received by the defendants. Mr Patel made reference to a sale agreement dated 5th June 2007 which is annexed to the replying affidavit of the plaintiff sworn on 19th October 2009. In that agreement which the defendants refused to sign until the full purchase price had been paid to them, the purchaser is identified as Sebastian Asembo Opaka, the plaintiff herein. For the purposes of this application, it matters not where the purchaser sourced the purchase price from. A purchaser can organise with a third party to pay purchase price on his behalf. The relationship between the plaintiff and Spell Investments Ltd is not important in determining whether the Defendants should refund the purchase price to the plaintiff... There is therefore no basis of holding that there was anything criminal about payment of the Kshs 4,000,000/= to the defendants. If that were so the police ought to have taken appropriate action. The defendants have no basis of holding the said sum of money.”

1. Perusal of the Defendants' Replying Affidavit sworn in 18th May 2012, in response to the Plaintiff's Notice of Motion application dated 4th May 2012, shows that it is similar to the Defendants' Replying Affidavit sworn on 13th September 2012. It, however, contained some rephrasing and additions giving more details of what transpired between the parties.
2. It appears to me that the issues raised in the latest Replying Affidavits were considered by the learned judge and determined conclusively. A party who feels aggrieved by any court decision is at liberty to appeal against it to the appellate court. There is nothing before me to suggest that the Defendants lodged any appeal against the rulings of the said judge. This court is of the same jurisdiction as that of the said judge. It is therefore not the place of this court to sit on appeal and determine the same issues that were determined by a court of competent jurisdiction.
3. The issue of who the director of Spell was or whether he is deceased or not is irrelevant for the purposes of determination of this application. In any event, save that the Defendants have alleged that the said sole director passed away, there is no proof provided before this court to show that he was the sole director of the said company and that he had passed away in an accident. I find that the Defendants have not been able to discharge their burden of proof in that regard.
4. That notwithstanding, it is clear from the ruling of the learned judge of 26th June 2012, that the question of who was to be refunded the said monies was determined when the court found that it was irrespective of who issued the cheque for the purchase price. Having heard the parties, in his

ruling of 22nd March 2012, Musinga J (as he then was) was satisfied that the agreement for sale was between the Plaintiff and the 3rd Defendant, a fact that was admitted by the 2nd Defendant and that the Defendants could not rely on the concept of limited liability as pronounced in **Salomon vs Salomon [1897] AC 22** by contending that they could not be sued for a refund of the purchase price except in respect of sale of the company property. This court cannot therefore hear and determine the same issues as they are *res judicata*.

5. It is on that basis that I will also disregard the Defendants' submissions and contents in their Replying Affidavit suggesting that the monies were allegedly embezzled from illegal activities of a pyramid scheme as that issue was also heard on merit and determined by the learned judge in his ruling of 26th June 2012. On the basis of the said ruling, the Defendants cannot purport to conduct investigations into the affairs of Spell as that is the domain of the police department. They cannot therefore unilaterally withhold the sum of Kshs 4,000,000/= on the ground that the purchase of the said property was for purposes of laundering monies that were allegedly obtained illegally from the Kenyan public. It is not within the jurisdiction of a private citizen to purport to do work reserved for an institution that is mandated to carry out investigations of alleged criminal activities or otherwise.
6. As the issues of the parties to the agreement for sale and who was to be refunded the monies were determined by the learned judge, I will not depart from the findings that he made in this matter.
7. I have carefully considered the import of the ruling of 26th June 2012 by the learned judge and do not find the same to have impliedly or explicitly stated that an application by the Plaintiff under Order 2 Rule 15 of the Civil Procedure Rules, 2010 would automatically be allowed. It was a qualified ruling. The Plaintiff was to bring such an application if he believed that the Defendants' Statement of Defence did not disclose any reasonable cause of action.
8. It was therefore incumbent upon the Plaintiff to demonstrate to this court that the Defendants' Statement of Defence was frivolous, vexatious, an abuse of the court or it was intended to embarrass and delay the fair trial of this action,
9. A Plaintiff is at liberty to proceed with full trial of the matter or in the alternative apply for an application for striking out of the Defence if he is convinced that such defence raised no reasonable cause of defence in law to save the court from wasting judicial time in hearing witnesses in a case.
10. The court must be cognisant of the judicial time wasted in engaging itself in hearing matters in a full trial where it is clear that evidence adduced at such a hearing would not change much or at all if it was to enter judgment following successful prosecution of an application for striking out of the pleadings or on admission. The Defendants acknowledged receipt of the sum of Kshs 4,000,000/=. This is also admitted in the Defendants' Replying Affidavit sworn on 13th September 2012.
11. This court finds that no value will be added if the matter proceeded for full hearing when this fact is admitted. The Defendants are also barred from leading any evidence on the illegality of the source of the monies or who the parties to the agreement for sale were for the reason that the said issues were determined by the learned judge.
12. The Plaintiff had brought the present application under Order 2 Rule 15 (1) and Order 13 Rule 2 of the Civil Procedure Rules, 2010. The court can only grant the prayers under either of the orders but not both.
13. Order 2 Rule 15(1) of the said rules provides as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

- a. **It discloses no reasonable cause of action or defence in law; or**
- b. **It is scandalous, frivolous and vexatious; or**
- c. **It may prejudice, embarrass or delay the fair trial of the action; or**
- d. **It is otherwise an abuse of the court process**

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be...”

1. Order 13 Rule 2 of the said rules provides as follows:-

“ Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just...”

1. From the facts before me, it is clear that there was also an admission of the receipt of the cheque in the sum of Kshs 4,000,000/= by the 2nd Defendant. I am therefore satisfied that the Plaintiff has been able to demonstrate to me that the Defendants’ Statement of Defence is frivolous, vexatious, an abuse of the court process and intended to delay the fair trial of this action.
2. The rulings of 22nd March 2012 and that of 26th June 2012 may appear to be at variance as to the course of action that was expected in this matter. In the former ruling, the learned judge stated that the authenticity of the acknowledgment note by the 2nd Defendant could only be determined in a full hearing. In the latter ruling, the learned judge held that the Plaintiff could file the appropriate application if he believed that the Defendants’ Statement of Defence did not disclose any cause of defence. It was in that ruling that the said learned judge made his observations as to who could be refunded the monies and whether the Defendants could withhold the monies.
3. What is evident from the rulings delivered by the learned judge on 22nd March 2012 and 26th June 2012 is that the issues in the Defendants’ Statement of Defence had been considered and a conclusive determination made in that regard.
4. The Defendants have not been able to exonerate themselves from the Plaintiff’s assertions that they are liable to reimburse him the sum of Kshs 4,000,000/=. I find that the Statement of Defence dated and filed on 15th April 2009 is a sham, it raises no reasonable cause of defence in law, it is frivolous, vexatious, an abuse of the court process and is intended to delay the fair trial of this action and ought to be struck out.
5. Where a Plaintiff seeks orders for striking out and entry of judgment or in the alternative judgment on admission against the Defendants, the order sought in the application must mirror the main prayer in the Plaint. The admission in the pleadings or otherwise must not be ambiguous. The claim for lost income and lost opportunity, by virtue of the Defendants’ holding the monies in prayer (b) of the Plaint dated and filed on 25th March 2009, was not been admitted in the Defendants’ pleadings or otherwise as required under Order 13 Rule 2 of the said rules. What was admitted in the Defendants’ Replying Affidavit sworn on 13th September 2012 is the sum of Kshs 4,000,000/= and this falls squarely within the parameters of admission under Order 13 Rule 2 of the said rules as it is a pleading.
6. As was alluded to by the learned judge in his ruling of 22nd March 2012, I find that the nature of the claim for loss of income and loss of opportunity requires that the same proceed for determination in a full hearing as it is subject to strict proof thereof. The Plaintiff would therefore not succeed under Order 13 Rule 2 of the said rules as the Defendants did not admit the said claim.
7. Despite the Plaintiff not having succeeded in prayer no 2 of his application, this court must be alive to the overriding objective of Section 1A of the aforesaid rules, which is, that the rules made thereunder are to facilitate the just, expeditious, proportionate resolution of civil disputes.
8. The Plaintiff opted to safeguard its interests when he sought prayers under the aforementioned orders. For purposes of furthering the overriding objectives, this court is mandated under Section 1B (1) (a) and (b) of the said rules to handle all matters with the purpose of the just determination of the proceedings and efficient disposal of the business of the court. This court is therefore in order to consider the merits of the Plaintiff’s prayers for striking out of the Defendants’ defence and entry of judgment in his favour as per Order 2 Rule 15 (1) of the said rules.
9. From the Plaintiff’s submissions, it is evident that he elected not to proceed to full trial to full ventilate all the prayers sought in the Plaint. He lost the opportunity to lead any evidence on or

- canvass his claim for loss of income and loss of opportunity which were part and parcel of prayer (b) of the Plaint in a full hearing.
10. It would be manifestly unjust to allow the Plaintiff to proceed with the hearing of his claim for loss of income and loss of opportunity against the Defendants who would ideally have no Statement of Defence once the same is struck out. This is because it would be a gross violation of Article 50 of the Constitution of Kenya, 2010 which affords each and every person a right to fair hearing. It is therefore clear that this court can only allow the restitution of the Plaintiff to the place he was in before the transaction, which in essence is the refund of the sum of Kshs 4,000,000/=.
 11. Having found that the Defendants' Statement of Defence is a sham, it raises no reasonable cause of defence in law, it is frivolous, vexatious, it is an abuse of the court process and is intended to delay the fair trial of this action, I hereby strike out the said Statement of Defence dated 15th April 2009 and enter judgment in favour of the Plaintiff for the sum of Kshs 4,000,000/= together with interest thereon at court rates from the date of filing suit together with costs.
 12. I must point out that the Plaintiff did not provide any justification to this court why he should be awarded interest at commercial rates. I am wholly in agreement with the Defendants' counsel that the Plaintiff could not be awarded the same as it was not sought for in the Plaint. To that extent, I will not attach any weight to the Plaintiff's submissions that he was entitled to interest at commercial rates.
 13. Accordingly, the upshot my ruling is that the Plaintiff's Notice of Motion dated 9th July 2009 is merited and it is hereby allowed with costs to the Plaintiff.
 14. It is so ordered.

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

J. KAMAU

JUDGE