REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 492 OF 2009

JACQUELINE WANGUI HILL………………...………..…. PLAINTIFF

VERSUS –

ISHMAEL MURIGA KIBE …... DEFENDANT

RULING

1. This is the plaintiff's chamber summons dated 5th November 2009. It is expressed to be brought under Order VI rules 13 and 16 of the Civil Procedure Rules (now repealed) and section 3A of the Civil Procedure Act. The plaintiff prays that the statement of defence be struck out for being frivolous, vexatious or an abuse of court process. In the alternative, she prays that the defence be struck out for failure to disclose a reasonable defence to the action.

2. The application is predicated on an admission contained in paragraph 5 of the defence. The plaintiff's case is that there is an unequivocal admission by the defendant that he owes the plaintiff Kshs 1,600,000. The contention by the defendant that the money was a gift is thus a red herring and was never raised before action. The defence is thus attacked as a sham and an abuse of process of court.

3. The application is contested. There are filed two depositions in reply dated 17th September 2010 and 20th December 2010. The plaintiff has in turn replied to those depositions by a replying affidavit sworn on 14th December 2010. The respondent's position is that he was in a relationship with the plaintiff. The plaintiff did not disclose that she was married. Their relationship ended. He denies that they are blood relatives. As to the crux of the matter, he avers that the sum of Kshs 1,600,000 was a "gratuitous gift from the plaintiff". He categorically denied that the money was advanced to him to purchase Safaricom shares for the plaintiff.

4. Those submissions were first made before Leonard Njagi J on 24th January 2011. Ruling was reserved by the learned Judge for 10th March 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 14th 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 as follows. Paragraphs 3, 4 and 5 of the defence dated 13th August 2009 pleads the following:

> *3. The Defendant specifically denies that he entered into an agreement with the plaintiff for the purchase of Safaricom shares as alleged in paragraphs 3 and 4 of the Plaint or at all and puts the plaintiff to strict proof thereof.*
>
> *4. In the alternative and strictly without prejudice to the aforesaid, if which is denied, the plaintiff and the defendant entered into an agreement, the defendant avers that the same is unenforceable for total lack of consideration.*
>
> *5. The defendant contends that the sum of Kshs 1,600,000.00 transferred into his account was a gift inter vivos from the plaintiff made voluntarily with the full intention that the said money shall not be returned to her, accordingly the plaintiff is neither entitled to revoke the gift nor to demand it as she purports to or at all.*

The defendant on the one hand alludes to possible existence of an agreement. He pleads that such agreement, if it exists, for purchase of Safaricom shares was unenforceable for want of consideration. The defendant then sets up an inconsistent defence at paragraph 5 that the sum of Kshs 1,600,000 was a gratuitous payment or gift that the plaintiff cannot renege upon. The remainder of the defence is a plain and mere denial of indebtedness to the plaintiff.

9. I have then looked at the plaint. It is pleaded at paragraphs 3,4,5 and 6 as follows:

> *3. On or about 26th November 2008 the plaintiff and the defendant mutually agreed that the defendant would purchase for the plaintiff and in her own name shares of Safaricom Limited of Kshs 1,600,000/- in value.*
>
> *4. Pursuant to the aforesaid agreement, the plaintiff instructed her bankers, Standard Chartered Bank, Malindi Branch, to transfer to the account of the defendant number 0100229922900 at Standard Chartered Bank of Kenya Limited, Koinange Branch, Nairobi, a sum*

of Kshs 1,600,000/-. The said sum of money, Kshs 1,600,000/-, was duly transferred to the said defendants account.

5. The plaintiff avers that the defendant in breach of the aforesaid agreement and in breach of the trust placed upon him as a special agent of the plaintiff as aforesaid did not buy any shares for the plaintiff in Safaricom Ltd.

6. Save as aforesaid, the plaintiff avers that there was no other purpose in respect of which the said sum of Kshs 1,600,000/- was paid as aforesaid to the defendant and that he has given no consideration therefore to the plaintiff.

10. The defendant does not contest receiving the sum of Ksh 1,600,000. He says it was a gift. It behoved the defendant to explain a little more the circumstances under which the plaintiff donated a princely sum of Kshs 1,600,000 particularly in view of the explanations made by the plaintiff. The defendant says he had an intimate relationship with the plaintiff which formed the basis of the "gratuitous gift". But the plaintiff retorts that her and the defendant are blood relatives. I thus find that the defendant is less than candid and has not offered a plausible basis in his deposition for the alleged gift. I find it is possible but highly improbable. I find it more persuasive from the evidence available that the plaintiff instructed her bankers Standard Chartered Bank, Malindi Branch to transfer the sum of Kshs 1,600,000 to the defendant's account number 0100229922900, Standard Chartered Bank, Nairobi to purchase shares for the plaintiff.

11. In a synopsis, the defendant has presented paucity of evidence to establish the gift or any other consideration for that payment. Looked at from those lenses, the defendant's contention that the sums were an irrevocable gift is a red herring. It must follow as a corollary that the defence set up against the plaintiff's claim for that sum is not an adequate traverse. It is a sham and a stratagem contrived to delay justice. To that extent, it does not meet or answer the plaintiff's claim and it thus vexatious and scandalous. At the very least, the defence is bogus and an abuse of court process.

12. The defendant had submitted that the application is defective because the plaintiff filed the replying affidavit I referred to. An application under the former Order VI rule 13 (a) on the ground that a pleading does not disclose a reasonable cause of action should not be supported by evidence. All that the applicant should plead is a concise statement of facts. See ***Desai Vs Patel t/a Sandpipers Construction & Civil Engineering Services & 13 others*** [2001] KLR 20. First, the chamber summons application dated 5th November 2009 was not supported by affidavit evidence. To that extent it did not fall afoul of that rule. The replying affidavit was in reply to the defendant's affidavit. Secondly, the application was not based solely on rule 13 (a), but the entire rule 13. But even assuming that the replying affidavit was wrongly filed, it is the kind of technicality that flies in the face of article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act. The overriding objective to do justice enjoins this court to avoid such technicalities and to delve into the root of the dispute. See ***Stephen Boro Gitiha Vs Family Finance Building Society & 3 others*** Nairobi, Court of Appeal, Civil App. NAI 263 of 2009 (unreported).

13. In the result I order that the statement of defence dated 13th August 2009 be and is hereby struck out with costs to the plaintiff.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 18th day of April 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms M. Wakio for Ms Wawira for the Plaintiff.

Mr. H. Orina for Mr. Odera for the Defendant.

Mr. Collins Odhiambo Court Clerk.