



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CENTRAL REGISTRY

CIVIL SUIT NO 471 OF 2007

PEOPLE AND COSMETICS INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

MASTERMIND TOBACCO LIMITED.....1ST DEFENDANT

TYSONS LIMITED.....2ND DEFENDANT

RULING

The application before me is an amended Notice of Motion dated 21st January 2013 brought under section 1A, 1B of the Civil Procedure Act, Order 2 Rule 15 (b) and Order 51 Rule 1 of the Civil Procedure Rules. The applicant is seeking for orders that:-

1. The 1st Defendant's amended Defence and counterclaim dated 8th August 2012 be struck out with cost to the plaintiff.
2. Judgment be entered for the plaintiff against the 1st Defendant for Kshs 1,510,800/=together with interests at court rates from 1st February 2007 till payment in full.
3. The cost of this application and the suit be awarded to the plaintiff as against the 1st Defendant.

This application is premised on the grounds and the supporting affidavit of Kung Suk Lee deposed on 21st January 2013. The deponent deposes that he is the chairman and managing director of the plaintiff company. That on 25th January 2007 the 1st Defendant through the 2nd Defendant offered to lease the plaintiff office premises on Kimathi House 1st Floor, LR No 209/9326. That on February 2007 the plaintiff paid to the 2nd Defendant Kshs 2,014,400/=as security deposit one month's rent and service charge. That by a letter dated 4th June 2007 the 1st defendant rescinded the letter of offer and refused to accept rent for the said premises and by a cheque No.006897 drawn on Commercial Bank of Africa dated 15th November 2007 the 1st Defendant refunded to the plaintiff the costs of renovating the premises. That by a letter dated 4th February 2008 the 2nd Defendant confirmed that the security deposit was being held by the 1st Defendant pending conclusion of this case. That in the affidavit of Robert Mutuma dated 18th June 2007 and that of Mr Alfred Mugwe dated 18th July 2007 sworn on behalf of the defendants in this matter the defendants stated that there was no lease agreement between the plaintiff and the 1st Defendant and therefore the 1st Defendant has no basis for withholding the release of the Kshs 1,510,800/=security deposit which belongs to the plaintiff and that the 1st Defendant ought to be ordered to pay the plaintiff Kshs 1,510,800/=together with interest from 2007 till payment in full because it has had benefit of trading with the plaintiff's funds without any justifiable cause. The applicant therefore prays that the 1st

defendant's amended defence and counterclaim be struck out because it is frivolous and merely meant to delay the determination of this matter.

This application is opposed. Mr. Robert Mutuma the company secretary of the 1st defendant company swore a further replying affidavit on 25th February 2013. In his affidavit he depones that the application is an abuse of the court process and ought to be dismissed with costs. That he knows that the defendants have a formidable defence that raises multiple triable issues and thus the said application ought to be dismissed with costs. That striking out of a pleading is a jurisdiction that is exercised sparingly as doing so would be tantamount to offending one of the rules of natural justice that a party cannot be condemned unheard. The plaintiff is therefore seeking a step that amounts to condemning the defendants unheard and thus the application ought to be dismissed. That the claim by the plaintiff for the refund of the deposit was actually appropriated towards rent for the premises on account of occupation by the plaintiff when it was not paying for rent. That in January 2007 the 2nd defendant offered to lease the plaintiff office premises on Kimathi House 1st Floor. LR No 209/9326. That on the 1st February 2007 the plaintiff paid to the 2nd defendant Kshs. 2, 014,400.00 as security deposit and one month's rent and service charge. That contrary to the plaintiff's allegations at paragraph 4 of the applicants supporting affidavit, the 1st Defendant states that it rescinded the offer made to the plaintiff due to the plaintiff's non-compliance with the conditions of the lease contract and admits that it refunded the plaintiff the cost of renovating the premises. The respondent further states that there was an agreement between the plaintiff and defendants that the security would act as rent for a particular time which actually happened as the plaintiff being the tenant was unable to pay rent for a particular time which actually happened as the plaintiff remained in occupation for a period of six months without meeting its obligations to pay rent. In fact the amount paid by the plaintiff as security deposit was not sufficient and thus the 1st Defendant still has a claim against the plaintiff as outlined in its counterclaim. The respondents state that though it was true that there was no lease between the plaintiff and the 1st defendant after the rescission such did not in any way mean that the obligation of the plaintiff to pay rent had been overtaken or that the plaintiff was entitled to continue occupying the premises without paying rent. As a matter of fact it was in communication that the plaintiff ought to have vacated the premises due to its non-compliance with the terms and conditions of the offer. That the 1st Defendant has not utilised any funds for the plaintiff and on the other hand the plaintiff who has denied the defendant enjoyment of its property by failing to pay the sum stipulated in the counterclaim and the amended defence and counterclaim raise multiple triable issues for which summary procedure cannot be adopted by the plaintiff and in the premises the application ought to be struck out.

On 18th March 2013 parties appeared in Court and reiterated the contents of their affidavits. I have considered the affidavits and pleadings filed and the submissions made in Court. Striking out pleadings is a judicial discretion and this being a drastic action that would detrimentally close out a party in a suit the Court has to be very cautious in striking out a pleading. Madan, J.A in **D. T. DOBIE & COMPANY (KENYA) LIMITED VS MUCHINA [1982] KLR, 1**: - *"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 resemblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."* It is on this breath that since the 1st Defendant amended his defence and from the reading of the amended defence I find that the defence raises triable issues that need to be canvassed in the main hearing. I therefore dismiss this application dated 21st January 2013. Costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 31st day of May 2013

R. E. OUGO

JUDGE

In the presence of:-

..... Plaintiff/Applicant

..... Defendant/Respondent

..... Court Clerk