



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 622 OF 2012

COMMODITY HOUSE LTD. PLAINTIFF

VERSUS

SIMBA MERCHANDISING CO. (K) LTD. 1ST DEFENDANT

AMASEL BUILDERS LTD. 2ND DEFENDANT

TITLE BY WAY OF COUNTERCLAIM

AMASEL BUILDERS LTD. PLAINTIFF

VERSUS

SIMBA MERCHANDISING CO. (K) LTD. 1ST DEFENDANT

HAREN KUMAR DAMJI MANDAVIA 2ND DEFENDANT

ELIJAH G. KIMANI 3RD DEFENDANT

COMMODITY HOUSE LTD. 4TH DEFENDANT

RULING

1. For the determination of the Court is the Notice of Motion application dated 14th December, 2012 by the 2nd Defendant. The application is brought under **Order 2 Rule 15 (1) (d)** of the *Civil Procedure Rules* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The 2nd Defendant seeks therein for orders to have the Plaintiff failed and/or ignored to comply, necessitating the instant application. The 2nd Defendant contends that the actions by the Plaintiff are tantamount to an abuse of the process of the Court, contumelious, contemptuous and a clear disobedience of Court orders.
2. The application is supported by the Affidavit of **Abdulaziz Shahkaran Chakerahi** sworn on even date as the application. The deponent, in reiterating the grounds upon which the application is predicated, avers that on the diverse dates aforementioned, the Court issued orders which the

Plaintiff disrespectfully disobeyed, thereby necessitating the filing of the instant application. He further deponed that allowing the Plaintiff to act in the manner that it has, would amount to an abuse of the process of the Court and such should not be entertained by the Court. The 2nd Defendant also filed its list of authorities which includes **Republic v Communication Commission of Kenya & 2 Others (2005) eKLR**, **Hytec Information Systems Ltd v Coventry City Council (1997) 1 WLR 666**, **Tolley v Morris (1997) 1 WLR 592** and **Janor v Morris (1981) 1 WLR 1389** to buttress its claim.

3. In response to the application, the Plaintiff filed the Replying Affidavit of **Masumali Gulamali** sworn on 20th December, 2012. The deponent averred that the Orders sought by the 2nd Defendant are draconian and untenable and as such the application is misconceived and should be dismissed. It is also the Plaintiff's contention that the 2nd Defendant's application would be utterly unjust as it would amount to dismissing its claim as against the 1st Defendant. It maintained that each party should be accorded an opportunity to be heard on their respective claims.
4. The substantive law on striking out pleadings is based upon **Order 2 Rule 15** of the *Civil Procedure Rules*. That provision, as read together with **Section 3A** of the *Civil Procedure Act*, empowers the Court to make substantive orders as to the striking out of pleadings if the grounds upon which the application to strike out the pleadings are predicated and satisfy the principles as per the requirements set out in the Act. At **sub-rule 15 (1) (d)** of the aforementioned Order, it is provided that:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(d) it is otherwise an abuse of the process of the court,

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

The law on striking out of pleadings has been well settled by the Court of Appeal in the case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** in the finding of **Madan, Miller & Potter, JJA** wherein the court stated:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

In **D.T Dobie & Co. Ltd v Muchina** (supra), the Court of Appeal analyzed the issue of striking out of proceedings and deduced therefrom the principles that govern the Court's inherent and unfettered power to strike out a pleading which were: (a) that the remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleadings in question were unsustainable; (b) it is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

5. The Court on 5th November, 2012 issued Orders against the Plaintiff. Mutava, J in his Ruling, issued the following Orders:

“2. Commodity House Ltd should give a bank guarantee in favour of the Deputy Registrar of the Court in the sum of Kshs. 25 Million to be furnished by 12.00 p.m on 5th October, 2012.”

These Orders were not complied with by the Plaintiff. Instead, in extracting the Orders, whether inadvertently or knowingly, it was stated that the amount to be guaranteed was Kshs. 2 Million. This issue was raised by the 1st, 2nd and 3rd Defendant at the hearing before Court on 17th October, 2012. The Court reviewed its Ruling of 4th October, 2012 and thereupon issued Orders for the deposit of Kshs. 40 Million in the joint names of the Advocates representing the parties. This amount was to be

deposited by 19th October, 2012. Unfortunately, this Order was also not complied with. On 8th November, 2011, the Plaintiff made an appeal to the Court on the issue of compliance and stated that it had been unable to come up with the cash amount to be deposited. The Court, thereupon in consideration of the Plaintiff's plea, issued Orders for the Kshs. 40 Million to be deposited by way of an irrevocable bank guarantee in the name of the Deputy Registrar to be provided by the close of business on 19th October, 2012. Again and to date, these subsequent Orders have not been complied with, necessitating the instant application by the 2nd Defendant.

6. Although this Court is empowered by the provisions of Order 2 Rule 15(1)(d) and the authority of **D.T Dobie & Co. Ltd (K) Ltd v Muchina** (supra) to strike out any pleadings, these powers should be exercised cautiously and in consideration of the circumstances of the case. Prayers 2) and 3) of the 2nd Defendants application seeks Orders for the striking out of the Plaintiffs suit in its entirety i.e. in **H.C. Civil Suit No. 622 of 2012** as consolidated with **H. C. Civil Suit No. 619 of 2012** and that judgment be entered as prayed for in the Counterclaim. It is also prayed that the amount deposited in Court by bank guarantee be liquidated and the amount i.e. Kshs. 2 Million be released to the 2nd Defendant.
7. Potter, JA in dismissing the appeal in **D.T Dobie & Co. Ltd v Muchina** (supra) and in following the ruling of Romer, LJ in **Hadkinson v Hadkinson [1952] 2 All E.R 567** held that the action by the appellant company could not be treated as an abuse of the process of the Court, and as such was not beyond the peradventure that the action would not succeed. In the case of **Hadkinson v Hadkinson** (supra) it was held that:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction, to obey it unless and until, that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be regular or even void.”

8. The obligation of the Plaintiff as ordered by the Court was for the deposit of Kshs. 40 Million by way of irrevocable bank guarantee. This obligation has not been met and even the Court's subsequent Order was not met. This is therefore, invariably, a disobedience of Court Orders. The Plaintiff has not propounded or given any reason as to why the said Orders have not been complied with. However, for the entire suit to be dismissed would not only amount to a draconian cause that has been disapproved by the Courts but would also be denying the Plaintiff an opportunity to ventilate its claim as against the 1st Defendant.
9. For every action there is a remedy: the remedy to the instant application is as provided by Denning, LJ in **Hadkinson v Hadkinson** (supra) in which he held;

“The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed.”
(Underlining mine).

The Lord Justices, in that matter, refused to hear an appeal by the appellant, until and unless she had complied with the Court orders issued prior thereto. It was the Appeal Court's decision that in as far as there was disobedience of Court orders, the circumstances of the matter dictated that the appeal would not proceed, until and unless the Court Orders that had been made, were complied with.

10. As I read the second Defendant's Application dated 14th December 2012, this Court is being asked to strike out the Plaintiff herein for being an abuse of the process of the court. In fact, I consider the Application to be more one of contempt in not complying with Court Orders rather than such an abuse. In my opinion, the second Defendant has come before this Court under the wrong provision of the *Civil Procedure Rules/Civil Procedure Act*. I do not consider that the

failure of the Plaintiff, in this instance, to comply with this Court's Orders as related above, amounts to an abuse as envisaged by **Order 2 rule 15 (1) (d)** as that rule, in my opinion, **relates strictly to the pleadings of a party** not its actions or lack of action in the prosecution of the suit before Court. (Emphasis mine).

11. It therefore follows that, in the interest of justice and in ameliorating the matter for just, fair and expeditious determination as envisaged in **Section 1A** of the *Civil Procedure Act*, the application dated 14th December, 2012 by the 2nd Defendant is dismissed. However, before the Plaintiff prosecutes this suit further, it is to furnish the Court with a Kshs. 40 Million irrevocable bank guarantee, as ordered by Mutava, J on 18th October, 2012 within 30 days from the date hereof. Failure to do so will leave the 2nd Defendant and/or any other party to the suit the option to file contempt proceedings against the Plaintiff. In all the circumstances, there shall be no order as to costs.

DATED and delivered at Nairobi this 28th day of June, 2013.

J. B. HAVELOCK

JUDGE