IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 241 OF 2011

CABRO EAST AFRICA LTD…….PLAINTIFF

VERSUS

ROSOGA INVESTMENTS LTD……DEFENDANT

RULING

The Notice of Motion dated 24/10/2011 is filed by the plaintiff company who seek orders that the defence filed herein be struck out, judgment be entered in favour of the plaintiff as prayed in the plaint and costs be awarded to the plaintiff. The application is brought pursuant to **Order 2 Rule 15(1)(b)** and **(d)** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The grounds upon which the application is premised are that the defence is a mere sham, a bare denial, it is frivolous, vexatious and intended to prejudice and delay the fair trial of this action. The application is supported by an affidavit sworn by the directors of the Company, Fizan Ashraf dated 24/10/2011 and to it are several annexures. The applicant also filed submissions on 9/12/2011 and further submissions on 28/2/2012.

The application was opposed and the replying affidavit was sworn by Shadrack Too, the Financial Manager of the respondent on 28/11/2011 and submissions filed in court on 15/12/2011.

By a plaint dated 1/9/2011, the plaintiff/applicant sued the defendant/respondent for Kshs.4,793,064/- plus interest at commercial rates for services rendered by the plaintiff to the defendant as was set out in paragraph 4 and 5 of the plaint. The defendant/respondent filed a defence on 12/10/2011 denying the claim in its totality and put the applicant to strict proof. In his affidavit, Fizan deponed that the applicant and respondent entered into a contract relationship where the respondent delivered wooden poles for chemical treatment by the applicant and also purchased some CCA Tanalith chemical for the treatment of wooden poles from the applicant in the years 2009 to 2011. After treatment, the respondent would await a loading order issued by the respondent detailing what was treated and loaded. "FA". The applicant then prepared delivery notes and treatment certificates before they were delivered to the respondent. He exhibited the delivery notes and certificates FA2 and receipts for supply of chemicals FA3. The respondent then made payments on account (FA4) the last payment having been made on 10/11/2011. He annexed the payments that were made – FA5. Payment was supposed to be made within 30 days of the dleiverey in default they would become due. As of 10/1/2011, when the last payment was made, the claim against the defendant was Kshs.4,793,064/- as set out at paragraph 5 of the plaint. Upon denial the respondent promised to pay FA 67 but so far no payment ahs fbeen made. It is the applicant's contention that the defence does not contain the decision of Mbito J, in HC 2870/1988**, Banklays Bank of Kenya Ltd. V Wananchi Sanitary & Hardware Ltd.,** on whom the court should strike out a defence; that the defendant having denied any contractual relationship in its defence, and yet in the replying affidavit, claims to have an intention to file a counterclaim is a clear indication that the respondent intends to delay the payment of the sums and has no defence to the claim at all. The applicant also relied on **Bullen and Leake and Jacob's Precedents of pleading 12th Ed. At pg 146** which defines a pleading that tends to

prejudice, embarrass or delay the fair trial of a case and which should on that basis be struck out.

Mr. Odongo, counsel for the applicant urged that the decisions relied upon by the respondent are distinguishable from this case because in **Gichiem Construction Co. v Amalgamated Trade & Services,** CA 17/1983 the defence disclosed the grounds relied upon; In **Manstyle Ltd v Kabansora Ltd CC 1465/94**, a counter claim had been filed; **National Bank of Kenya Ltd v Duncan Kinyanjui Wanjuu** CC 270/2000, the facts in issue were pleaded in the defence; **Rosemary Ltd v Nairobi City council** CC 300/2001, the defence raised the issue of delivery notes; **Camille v Amin Mohamed Merali (1966) EA 411**, there was a counter claim and **Ahmed v Magugu CC 2632/88,** there was a counter claim.

In opposing the application, the respondent at paragraph 4 indicates that they are in the process of filing a counter claim for Kshs.1,980,000/- for rejected poles and that therefore triable issues are raised at paragraph 3 and 4 of the defence and that at paragraph 4, the sum claimed is disputed and therefore raises a triable issue.

Mr. Kisila who appeared on behalf of the respondent urged that the very fact that the application is accompanied by voluminous documents which the court needs to continue in the form of invoices and deliveries, whether the documents are admissible or not takes it out of the purview of the jurisdiction of striking out of pleadings. Mr. Kisila further urged that under **Order 2 Rule 15(b)(c)** and **(d)** one only needs to demonstrate that the defence is scandalous, frivolous, vexatious, prejudicial, embarrassing or may delay fair trial or is otherwise an abuse of the court process; that under **Rule 15(b)(c)** and **(d),** evidence can be adduced; that however, under **Rule 15(a)** where an application seeks to strike out and relies on the ground that it does not disclose any reasonable cause of action or defence in law, then the court has only to consider the pleadings but not the merits of the case. **Order 15(2)** prohibits the adducing of evidence when an application is brought under **Order 2 Rule 15(a)**. Counsel suggested that the applicant should have sought summary judgment as opposed to striking out. Counsel relied on the decisions of **D.T. Dobie v Joseph Mbaria Muchina CA 371/1988** and the other authorities which the applicant's counsel alluded to which he sought to distinguish with the instant case.

I have considered the rival affidavits, submissions and the authorities referred to by all counsel. I do subscribe to the well settled principles that striking out of pleadings is a draconian measure and should be invoked sparingly. In the **D.T. Dobie** case, the court held:-

> **"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously."**

Madan, J, in his obiter said:-

> **"The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."**

The instant application was brought pursuant to **Order 2 Rule 15(1)(b)(c)** and **(d).** It is not brought under **Rule 15(1)(a).** This is because **Rule 15(1)(a)** must be read with **Rule 15(2)** which provides that no evidence shall be admissible on an application under **subrule 15(1)(a)** but the application shall state concisely the grounds on which the application is made. It means that the court would only look at the pleadings to determine whether or not the pleadings are so hopeless that they should not be sustained. In this case, though the applicant has not cited R**ule 15(1)(a)** yet one of the grounds relied upon is that the defence does not raise any triable issues that would need to be considered at a trial. Having come under **Rule 15(1)(b)(c)(d)** the applicant should only demonstrate that the defence is scandalous, frivolous, vexatious, will embarrass, delay or prejudice a fair trial or is an abuse of the court process.

I have looked at the defence and it is true that it is a general denial of the allegations raised in the plaint. However, in the replying affidavit filed by the respondent, it is alleged that the defendant will be filing a

counter claim against the plaintiffs. One would wonder why the respondents have not moved the court to amend their defence since 2011 when they filed the defence. However, looking at the defendant's documents filed with the defence e.g. the letter dated 4/8/2011, it is obvious that the respondents were disputing the sums claimed by the applicants. In the list of documents are also several delivery notes which relate to rejected poles. Even if the defence on the face of it looks like a bare denial, yet the respondents exhibits and replying affidavit do raise issues that this court would need to consider.

Apart from the above, I do agree with Mr. Kisila, counsel for the respondent that, the applicants have annexed a bundle of documents in support of their application. The court would need to carefully scrutinize the said documents, viz a vis those filed with the defence to ascertain whether or not they support the claim. In an application to strike out, it should be such a clear cut case that there would be no need for the court to go scrutinizing the documents in search of evidence.

Bullen and Leake and Jacob's Precendents of pleadings 12th Ed. At pg. 145 state that frivolous and vexatious pleadings are. It states:-

> **"Any pleading or an action is frivolous when it is within substance or groundless or fanciful and is vexatious when it lacks bona vides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasonable argument. Again a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some forceful advantage or when it can really lead to no possible good."**

Bullen and Leake and Jacob's (supra) also define a pleading that tends to prejudice, embarrass or delay fair trial as follows;-

> **"Any pleading or indorsement of writ which may prejudice, embarrass or delay the fair trial of the actions may be ordered to be struck out or amended. The power is designed to prevent the pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties, and to ensure as far as the pleadings are concerned, a trial or fair terms between the parties in order to obtain a decision which is the legitimate objection of the action."**

In light of the averments in the replying affidavit, read with the documents listed as part of the defendant's documents to be relied upon, the respondent's defence cannot be said to be frivolous, vexatious or tending to prejudice or embarrass the defence. This is because the respondents are claiming that some of the poles supplied were rejected and therefore they will be raising a counter claim. In my considered view, this is not a suit for striking out and needs to go to full trial for the applicant to establish its claim. The suit is not beyond redemption because it can be injected with life by amendment. For the foregoing reason the application is hereby dismissed with costs being in the cause.

DATED and DELIVERED this 12th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Kahunga holding brief for Odongo for the plaintiff

Mr. Morintat holding brief for Mr. Kisila for the defendant