REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 467 OF 2011

PETER MUHIA WANJIKU.....……PLAINTIFF

VERSUS

MICHAEL OWUOR….....….....….DEFENDANT

R U L I N G

By a plaint dated 17th October 2011 and filed in this court the following day on 18th October 2011, the plaintiff is seeking judgement against the defendant for the following **orders**:

"(a) The sum of US$18,553.50 or its equivalent in Kenyan Currency at the rate prevailing plus interest accruing thereon at the rate of 15% per month with effect from 31st July, 2011 until payment thereof in full.

(b) Refund of the sum of US$450.00 or its equivalent in Kenyan Currency at the prevailing rate plus interest accruing thereon at court rates from the filing of this suit until settlement thereof in fully.

(c) Costs of this suit together with interest thereon at such rate and for such period of time at this Honourable Court may deem fit and just to grant.

(d) Any other or further relief as this Honourable Court may deem appropriate".

The cause of action herein arose from an agreement executed between the parties herein on 14th April 2011 in which the plaintiff remitted a sum of US $ 9,000.00 (the fund) to the defendant for purposes of investment for return in forex exchange trade. Pursuant to the said agreement the defendant was entitled to deduct an agreed management fee and was also to remit an agreed sum to the plaintiff at a stipulated time. It is the plaintiff's case that the defendant is in breach of the said agreement as the defendant has failed to refund the said fund, an additional amount remitted pursuant to the said agreement as well as profits cumulatively amounting to $ 18,553.50 as well as $ 450.00 deducted from the fund at the commencement of the agreement since according to the plaintiff it is manifestly clear that no services were rendered.

On being served with the plaint the defendant filed a defence on 23rd November 2011 in which while admitting the existence of the agreement contended that the said agreement was varied by an agreement

of the parties thereby transferring the management of the fund to Gain Capital Forex .Com UK Ltd under which arrangement the defendant became a mere agent of the plaintiff and cannot therefore be held liable for the management of the fund. According to the defendant on termination of the agreement the plaintiff transferred the fund to the said entity. He accordingly denies liability to the plaintiff.

Faced with this defence, the plaintiff filed a notice of motion dated 28th November 2011 seeking summary judgement which he eventually withdrew on 17th January 2012. It was after the said withdrawal that the plaintiff instituted the application the subject of this ruling. The application was brought by way of Notice of Motion and expressed to be brought under Order 2 rule 15(1)(b)(c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. In the said motion the defendant seeks principally an order that the defendant's defence dated and filed herein on 23rd November 2011 be struck out and judgement be entered in favour of the plaintiff as prayed in the plaint. The plaint also prayed for costs both of the application and the suit.

The application is supported by an affidavit sworn by **Peter Muhia Wanjiku**, the plaintiff herein, on 1st February 2012. In the said affidavit the plaintiff avers that the defendant is truly and justly indebted to the plaintiff in the sum of US $ 18,553.00 on account of investment made by the defendant on the plaintiff's behalf. According to the plaintiff, in the month of April 2011 he entered into a Forex Fund Management Agreement pursuant to which the plaintiff remitted US $ 9,000.00 to be invested in the forex trade. The said agreement was meant to last for a period of 3 months till 14th July 2011 subject to renewal on expiry. It was a term of the said agreement that the defendant would be entitled to deduct US $ 450.00 from the fund representing 5% of the fund being management fee while the defendant would pay the plaintiff variable monthly sums between 10% and 15% of the Fund computed on a monthly basis, representing the profit. The first of such payment was to mature on the Expiry date and further payment on 14th of every subsequent month, subject to renewal thereof. The plaintiff was at liberty to make additional contribution to the said fund in which event the payable profits would be adjusted in accordance with the proportion of the additional funds. Whereas the defendant was to be solely responsible for the running and operation of the trade, he was to discharge his obligations under the agreement to the highest standards of professional and ethical competency and integrity and would diligently and faithfully perform his duties thereunder.

The said sum of us $ 9000.00 was duly paid into the defendant's account and on 30th May 2011, the plaintiff remitted a further sum of US $ 5,000.00 to the defendant for the same purpose. However, the deponent contends that in breach of the said agreement the defendant did not make any payment at the said expiry date and has never done so. He, however, on various occasions admitted owing the plaintiff and made promise to remit to the plaintiff US $ 18,553.00. Despite demand made by the plaintiff through his advocates the said sum has not been paid. It is in view of the foregoing that the plaintiff believes the defence files herein contains bare denials without raising any triable issues and is only meant to delay the fair determination of the suit, is frivolous and vexatious and is otherwise an abuse of the process of the court hence the orders sought in the present application.

The application was opposed by way of a replying affidavit sworn by **Michael Owuor**, the defendant herein on 13th February 2012. According to the defendant, the contract between him and the plaintiff was varied in material aspect as a result of which there was a change in their contractual relationship. He further states that the plaintiff elected not to receive the funds but authorised re-investment of the same with Gain Capital/Forex.com hence the allegation that he refused to release the funds is untrue. Having performed his part of the agreement, the defendant denies liability to the plaintiff. It is therefore the defendant's position that the defence raises triable issues hence the defence cannot be struck out and any particulars if required can be obtained through a request for further and better particulars or amendment.

The application was prosecuted by way of written submissions which submissions were highlighted. In his submissions, the plaintiff through his learned counsel **Mr. Njoroge**, states that the agreement is not disputed. The averments in the plaint and the defence of the defendant having received from the plaintiff a total of US $14,000.00 and has not disputed as well as the fact that no payment has been made to the plaintiff. It is therefore submitted that the defence is a sham calculated at delaying and prejudicing a fair determination of the suit since there is no evidence of variation alleged in the defence which variation was

in any case to be done in writing. According to the plaintiff, the arrangement between the plaintiff and the defendant was that the defendant was to remit the sum to the plaintiff for re-investment in the new account which was not done and therefore it does not lie in the mouth of the defendant to contend that he is not obliged to pay the plaintiff. The appeal to prevailing economic and market realities, it is submitted, cannot excuse the plaintiff from his obligations under the agreement. In any case, it is submitted, there is no evidence of the alleged economic difficulties since the contractual rate was agreed. Mere denial, the defendant contends, is not sufficient to answer the plaintiff's claim. According to the plaintiff the so-called defence is, on the overall, frivolous and vexatious and, accordingly, un-maintainable, thereby providing a compelling justification for the court to exercise its discretion in favour of the plaintiff in light of the various acknowledgement of the debt by the defendant and the provisions of the agreement. In his submissions, the plaintiff relies on **Kenindia Assurance Co. Ltd vs. Alpha Knits Ltd & Anor. [2003] 2 EA 512**, **Lilian Njeri Mwangi vs. Municipal Council of Nakuru [2005] eKLR**, **ERF Kenya Limited vs. Bustrack Limited & Another [2005] eKLR**, **Magunga General Stores vs. Pepco Distributors Ltd [1987] 2 KAR 89**, **Mpaka Road Development Ltd vs. Kana [2004] 1 EA 124** and **National Bank of Kenya vs. Innovation Advertising Ltd & 2 Others [2005] eKLR**.

In his submissions the defendant, through his learned counsel **Mr. Ngii,** while not denying the existence of the agreement, reiterates that the defence raises triable issues with respect the variation as well as the rate of interest. The denial of the liability in respect of US $ 450.00 also, it is submitted, raises triable issue. Since these averments have not been denied by way of reply to defence or further affidavit, they cannot be dealt with by way of submissions. The so-called admissions, it is contended, were mere routine updates on the performance of the plaintiff's investment; otherwise the plaintiff would have applied for judgement on admission. According to the defendant, the defence raises serious triable issues which can only be determined in a full trial hence cannot be declared to be scandalous, frivolous, vexatious or otherwise an abuse of the Court process since it does not make imputations on the plaintiff. According to the defendant it will be against the set principles and the wider interest of justice for the court to exercise its discretion in favour of the plaintiff hence it will be prudent to allow the suit to go to full trial. For the defence reliance is placed on **Laurence vs. Lord Noreys 15 AC 210 at 419**, **Patel vs. E A Cargo Handling Services [1974] 75 at 76**, **Ramji Megji Gudka Ltd vs. Alfred Morfat Omundi Machira and Others**, **D T Dobie & Company (Kenya) Ltd vs. Joseph Mbaria Muchina and Another** as well as **Halsbury's Laws of England 4th Edn. Vol. 37 from page 318.**

I have now considered the application, the affidavits both in support and in opposition to the application as well as the rivalling submissions and authorities cited.

A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies.See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

A pleading is an abuse of the process where it is frivolous or vexatious or both.

Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See**Kemsley vs. Foot (1952) AC 325.**

In the **Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996**, the Court of Appeal held:

"If a general traverse…were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89*. The position of the law…is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to Constitute an admission of the issues raised in the Plaint".

In **Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

"Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given".

However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a

case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

In this case the existence of the Forex Fund Management Agreement is not disputed. I also cannot see any dispute with respect to the amount that accrued therefrom since there is no denial of the same. The issues raised by the defendant according to me are three:

1. Whether there was a variation of that agreement between the parties whose effect was to release the defendant.

2. Whether the plaintiff made it difficult for the defendant to perform his part of the said agreement.

3. Whether the sum of US$ 450 paid on account of fund management fee was refundable.

With respect to the first issue the defendant argues that the agreement was varied on termination thereof when the plaintiff elected not to receive his funds but agreed to the transfer of the fund to the Gain Capital Forex. Com. UK Limited. The plaintiff's position, however, is that the defendant purported to establish a direct customer relationship between the Plaintiff and the said entity under which arrangement the plaintiff was asked to and did open an owner-managed account with the said entity with the aim of

investing the expected funds from the Defendant in the forex trade under his new account. What comes out clearly from the pleadings is, whether by express agreement or not, that the third entity was brought to feature into the arrangement between the plaintiff and the defendant. What its exact role was in the whole transaction is, however, unclear. The plaintiff's position is that under clause 26.3 of the agreement the contract could only be varied by a written statement. There is no allegation that there was another agreement subsequent to the agreement executed on 14th April 2011. However, the issue whether the correspondences exchanged between the parties were such that they could be deemed to amount to an agreement is not capable of being determined on affidavit evidence in light of the admission by the plaintiff of the introduction of the third party to the transaction.

As regards the issue of the defendant's conduct, paragraph 5 of the defence in which the said allegation is contained, in its present form does not afford a defence. It in effect blames the defendant for showing an intention to repudiate the agreement. Even if I was to give it a liberal interpretation, there is no attempt by the defendant either in the defence or by way of an affidavit to show the conduct on the part of the plaintiff tending towards a breach. Courts, when faced with an application for striking out pleadings, deal with pleadings as they are on record and not as they might appear when particulars are furnished. A party who fails to furnish sufficient particulars in his pleading runs the risk of having the same struck out as not constituting a serious pleading. Such situation is worsened when the same party does not particularise the allegations even when confronted with a threat to have his pleading struck out. Accordingly I form a dim view of the second issue.

With respect to the third issue, a reading of the agreement does not show circumstances under which the said US$ 450 was to be refunded, if at all. According to the defendant the sum was not refundable at all while the plaintiff's contention is that since the defendant did not offer any services, it is not entitled to retain the said sum. In light of the issues raised above I cannot say with certainty that the issues raised in the defence with respect to the variation of the agreement and the refund of US$ 450.00 are so frivolous that they do not raise triable issues. If the plaintiff's claim includes profits accruing from the venture, then that would defeat the plaintiff's position that the defendant is not entitled to the said management fee; since the said profit would be as a result of the said management in which case the defendant would not be contractually bound to refund the said sum of US$ 450.00.

The law on striking out pleadings is clear that a Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. It is also trite that one issue, if bona fide, suffices for the purposes of a hearing of the case on the merit; whether or not the defendant will ultimately succeed on the issue is another matter. See **D T Dobie & Company (K) Ltd Vs. Muchina [1982] eKLR 1.**

In conclusion I do not agree with the plaintiff that there are no triable issues disclosed. I accordingly find no merit in the Notice of Motion dated 1st February 2012 with the result that the same is dismissed with costs to the defendant.

Ruling read, signed and delivered in court this 26th day of April 2012

G.V. ODUNGA
JUDGE
In the presence of:

Mr. Njoroge for Plaintiff

Mr. Wambua for Mr. Ngii for Defendant