



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 892 of 2009

DEWDROP ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

BOMCO BUILDING CONTRACTORS LTD.....2ND DEFENDANT

RULING

The two applications before the Court are brought by Chamber Summons dated 27th April, 2010 and 13th July, 2010 and are taken out under **Order VI Rule 13(1)(b) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act** and all other enabling provisions of the law.

By the first application dated 27th April, 2010, the applicant seeks from the Court orders that:-

- 1. The 2nd Defendant's defence be struck off for being frivolous, vexatious and an abuse of the court process;**
- 2. The 2nd Defendant do pay the plaintiff Value Added Tax of Kshs. 133,276.04;**
- 3. The 2nd Defendant do issue the plaintiff with a Withholding Income Tax certificate for Kshs. 24,989.26;**
- 4. Costs of this application be in the cause.**

The application is supported by the annexed affidavit of EDWARD THIONG'O WACHIRA, the Managing Director of the plaintiff company, and is based on the grounds that :-

- (a) The 2nd Defendant has illegally refused to pay Value Added Tax to the plaintiff;**
- (b) The 2nd Defendant has illegally refused to issue the plaintiff with a Withholding Income Tax certificate;**
- (c) The 2nd Defendant's Statement of Defence is frivolous, vexatious and an abuse of the process of the court.**

Opposing the application, the 2nd Defendant Company's Director, Mr. TARSEM S. DEVGUN swore a replying affidavit on 11th May, 2010. In that affidavit, he avers that the applicant's application as filed is

misconceived, frivolous and an abuse of the court process as the same is Res-Judicata in that the applicants have filed a similar application between the same parties herein and touching on the same issues in the lower court in **SRMCC No.13180 of 2006**.

At the hearing, Counsel for the Applicant sought the striking out of the defence on the ground that it raised no triable issues or arguable points. Counsel submitted that it is trite law that a Defence must raise arguments that require the court's deliberation. On his part Counsel for the 2nd Defendant opposed the application on the basis that not only was it frivolous but also vexatious and an abuse of the court process. It was also res-judicata in that the applicant had filed a similar suit between the same parties herein touching on the same issues in the lower court in **SRMCC No.13180 of 2006**.

On the second application dated 13th July, 2010 the applicant seeks orders that:-

- 1. The 1st Defendant's written statement of Defence dated 28th January, 2010 be struck off for being frivolous, vexatious and an abuse of the court's process;**
- 2. This Honourable Court be pleased to enter judgment in favour of the plaintiff against the 1st Defendant as prayed in the plaint for Kshs. 4, 708, 817.74 together with compound interest thereon at the rate of 3% per month from 28th June, 2006 until payment in full;**
- 3. The costs of this application be in the cause.**

The application is supported by the annexed affidavit of EDWARD THIONG'O WACHIRA, the Managing Director of the plaintiff's Company and is based on the grounds that:-

- (a) The 1st Defendant's written Statement of Defence dated 28th January, 2010 is a nullity and may delay the fair trial of the action because it was illegally drawn and filed by an unqualified Advocate;**
- (b) The 1st Defendant is vicariously liable for the acts of the 2nd Defendant;**
- (c) The 1st Defendant's written Statement of Defence dated 28th January, 2010 is frivolous, vexatious and an abuse of the process of the Court;**
- (d) It is fair and just to grant this application.**

The application is opposed by the annexed replying affidavit of Mr. ABWAO ERICK ODHIAMBO, the 1st Defendant's Assistant Director of Legal Affairs and is based on the grounds that-

- 1. He holds the qualifications specified in section 13(1) of the Advocates Act and therefore qualified to act as an Advocate;**
- (2) He is employed by the 1st Defendant as Legal Counsel currently being the Assistant Director, Legal Affairs;**
- (3) He is qualified to act as an Advocate in connection with the duties of his office in accordance to section 10 of the Advocates act;**
- (4) He is an advocate duly appointed by the 1st Defendant to act on its behalf and therefore the 1st Defendant's Statement of Defence does not offend sections 9, 31, 33 and 34 of the Advocates Act and Order III R. 1 of the Civil Procedure Rules;**
- (5) The statement of defence filed on 28th January, 2010 was legally drawn and filed and does not amount to a nullity;**

- (6) The 1st Defendant's Statement of Defence filed on 28th January, 2010 is not frivolous, nor is it an abuse of the court process as the same was legally drawn;
- (7) The plaintiff has not filed a reply to the defence filed by the 1st Defendant and therefore there is a joinder of issue of the said defence;
- (8) That it is in the interest of justice that this matter proceed to trial;
- (9) That the Chamber summons dated 13th July, 2010 has no merit and discloses no cause of action against the 1st Defendant and should be dismissed.

After considering the pleadings and rival submissions of Counsel for the respective parties, I find that the issues for determination are whether the 2nd Defendant's Statements of Defence have raised any triable issues. Even one triable issue would justify a trial. The other issue is whether the 2nd Defendant is indebted to the plaintiff. As for the 1st Defendant the issues for determination are firstly, whether the 1st Defendant's Statement of Defence is defective and an abuse of the process of the court.

Has the 2nd Defendant's Statement of Defence failed to disclose any triable issues as claimed by the applicant herein? I do not think so. The applicant has relied on the case of **EMERG INVESTMENTS v LABAN QUTTO & 9 OTHERS (KERICHO HCCC NO. 21/2009)** where the court held that "*a pleading may be struck off where it fails to raise arguable points. Such is the case where the Defence is a mere challenge to the plaintiff to prove his case, or where the Defence is vague, evasive and embarrassing. In such situations it ought to be struck off*".

The court has a duty to consider all the facts carefully. The 2nd Defendant relied on a decision by the Court of Appeal in **RAMJI MERGI GUDKA LTD v ALFRED MICHIRA AND 2 OTHERS (2005) eKLR** where the court held that *in dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court.*

I am satisfied that the 2nd Defendant's Statement of Defence has indeed raised triable issues in the instant case, and one such issue touches on the contractual relationship between the parties. Serious issues are also raised as to who is truly indebted to the Applicant.

On the issue of the 1st Defendant's Statement of Defence being drafted by an unqualified Advocate, the applicant relied on the decision of **KENYA POWER AND LIGHTING CO. LTD v CHRIS MAHINDA T/A NYERI TRADE CENTRE 2005 eKLR** where the court held that *an Advocate is not entitled to act as such if he does not have a practising certificate in force at the time of so acting. Not only must the Advocate have been admitted to the Roll of Advocates but he must also have a practising certificate and the same must be in force.* Counsel for the applicant submitted that the **Advocates Act** requires that in order for one to practise as an Advocate, one must have been fully admitted to the Roll of Advocates and have in force a practising certificate. We should also not lose sight of the fact that the same **Advocates Act** provides in **Section 10(a), (b), (c) and (d)** for certain officers to be entitled to act as Advocates. In particular **Sub-section (c)** refers to any person holding office in a local authority established under the **Local Government Act**. Therefore, I agree with Counsel for the 1st Defendant that Mr. ABWA ERICK ODHIAMBO being the Assistant Director, Legal Affairs of the 1st Defendant which is a local authority, and having been admitted to the Rolls of Advocates, has satisfied conditions (a), (b), (c) and (d) as laid out under **Section 13(1) and Section 10(c)** of the **Advocates Act**. The applicant's argument that the statement of defence herein was drafted by an unqualified Advocate lacks merit and has no legal basis.

The Applicant's case is not so plain and clear as to justify this court to strike out the Statements of

Defence and enter judgment against the defendants herein. This would amount to denying the defendants a chance to put forward their case. In **D.T. DOBBIE & COMPANY (KENYA) LTD v MUCHINA** [198] 2 KLR. 1, MADAN J.A. observed at page 9-

“If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to over act by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance 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”.

The 2nd and 1st Defendant’s Statements of Defence filed herein are not frivolous, vexatious and an abuse of the court process as claimed by the applicant. After perusing them, I find that they no doubt raise some pertinent and serious, triable issues such as the ones mentioned above.

In view of the foregoing, and in the interest of fairness and justice to the parties, I find that the applications for striking out the 1st and 2nd Defendants Statements of Defence lack merit and is accordingly dismissed. The application for summary judgment against 1st Defendant also lacks merit and is accordingly dismissed. The applicant will pay costs of both applications to the Defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of July, 2012.

**L.NJAGI
JUDGE**