REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 107 OF 2006

RAKAI CLEARING & FORWARDING LTD. …….....……..PLAINTIFF/RESPONDENT

VERSUS

PRIME BANK LIMITED ……..……..DEFENDAN/APPLICANT

RULING

1. The application before me is the Defendant's chamber summons dated 30th November, 2012. It seeks that the plaint be struck out, and that the suit against the Defendant be dismissed with costs. It is premised on the grounds that the plaint discloses no reasonable cause of action; and is frivolous, vexatious, without merit and amounts to an abuse of the court process.

2. The application is supported by the affidavit of Hasu Silveira Essentially, he depones that the plaintiff filed this suit seeking two prayers of which one was an injunction intended to preserve the motor vehicles Nos. KAL 400W, KAL 400N, KAK 144P and KAM 150 S. The injunction was granted, and was subsequently varied by a consent dated 12th September, 2007 after which the court ordered the sale of the vehicles and proceeds be deposited in a joint account in the names of the parties' counsel. The suit also sought an order for a proper taking of account to determine the amount due and payable to the Defendant on the overdraft account applying the core and agreed interest rate of 15% per annum.

3. The application is opposed vide the plaintiff's grounds of objection. There, it states that the application is male fides and an abuse of the court process, premature as the parties have not complied with the pre trial process and that the Defendant is seeking to rely on a technical route to avoid substantive justice on merit.

4. The parties filed written submissions to dispose of the application.

The plaintiff admits that its first prayer in the plaint was determined by consent. The outstanding matter is the second issue, namely, the proper taking of accounts to determine the exact amount due to the Defendant applying the correct and agreed interest rate of 15% per annum. This, argues the plaintiff, is a reasonable cause of action and has high chances of success.

5. The Plaintiff referred to **DT Dobie & Company (K) Ltd. Vs Joseph Mbana Muchina & Ano. [1982] KLR**, where Madan, J. said

"….No exact paraphrase can be given but I think 'reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the rule) only the allegations in the plaint are considered ……."

Further the court stated:

"A court of Justice should aim at sustaining a suit rather than terminating it ….. No suit sought 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 uncurable by amendment. …."

6. The defendant argues that the plaintiff brought the suit when the Defendant attached its vehicles. Since, by consent, the court ordered three of the attached vehicles sold and the proceeds be placed in joint account. Thus that the consent order was effected but only one vehicle was sold, the other two not being operational, prayer 2 of the plaint is spent.

7. The Defendant also points out that

"Sometimes in September, 2008 the advocates on record informed the court that only the issue of interest remained for determination, pursuant to which an order was recorded that an independent audit of the plaintiff's account with the Defendant be done at the plaintiff's cost, the results of which would be filed in court upon completion. The matter was then stood over …… [and] to date the Plaintiff has never complied and it failed to appoint an auditor….."

8. I have perused the Plaint and the record. It is not in dispute that the parties are in agreement that there was a consent order resulting in prayer 1 of the plaint being spent. The only outstanding issue is the status of prayer 2. On this, the record shows that on 30th September, 2008 the parties appeared before Justice Sergon when the followingtranspired:

"Ouma: We have discussed and we think we need to appoint an independent auditor to sort out the issue of interest. We pray for a mention date to see whether we can record a settlement.

Mrs. Kibe: That is the position

Court: Mention on 21st November, 2008 to record a settlement"

9. Accordingly, it is clear that prayer (i) of the plaint remains pending as the parties have neither entered a settlement nor prosecuted the same. In the circumstances, it cannot be said that this is a cause of action without some chance of success nor that it is a frivolous vexatious or unmeritorious claim in terms of the DT Dobie principles.

I cannot, therefore agree with the Applicant, in its chamber summons application, to dismiss the suit or to strike out the plaint. This is particularly so when one considers that the parties were negotiating a settlement on that very prayer.

10. Accordingly I dismiss the application with costs to the Plaintiff. Having noted that the Plaintiff has been dilatory in prosecuting its claim, I order that the parties do file and serve their bundles of documents, witness statements and list of issues within thirty (30) days from the date hereof. The parties shall thereafter forthwith take a hearing date. Should there be default by the plaintiff the plaint shall be struck out.

Dated, signed and delivered this 26th day of July, 2012.

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……
b) ……
c) ……
d) ……..