



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 149 of 2011

HABO GROUP OF COMPANIES LTD.....PLAINTIFF

VERSUS

1. MERCY VOSENA MUSERA.....1ST DEFENDANT

2. NATIONAL BANK OF KENYA LTD.....2ND DEFENDANT

Coram:

Mwera, J.

Amuga for Plaintiff/Respondent

Ojiambo for 2nd Defendant/Applicant

Furaha Court Clerk

RULING

The application due for determination is a notice of motion dated 14th November, 2011 which the 2nd defendant bank brought under Order 4 rule 1 (6) and Order 2 rule 15 (1) (b) (c) (d) of the Civil Procedure Rules. The main prayer was:

(i) that this suit be struck out as against the applicant.

In the grounds it was claimed that the suit is incompetent and defective; frivolous, vexatious and an abuse of the court process. It could only prejudice and embarrass or delay the fair trial of the action. And that, under the banking contract, the plaintiff could not maintain this suit against the 2nd defendant/applicant.

Damaris Gitonga, a manager with the applicant bank averred in the supporting affidavit that the initial plaint herein was filed on 6th June, 2011. It was later amended on 25th July, 2011 and served on the 2nd

defendant on 3rd November, 2011. It did not aver that it related to the plaintiff herein as required by Order 4 rule 1 (1) (f) and specifically that the verifying affidavit accompanying the plaint had to state that the cause of action related to the plaint on the plaintiff. And being a corporate entity the verifying affidavit had to be sworn by the plaintiff's officer duly authorized under the seal of the company to do so. There was no such authority in the present case.

That the claim herein related to money allegedly stolen by the 1st defendant, as per criminal charge sheets available, from companies related to the plaintiff company and other individuals. The sums did not wholly relate to the plaintiff. Those firms from whom the money was stolen were Habo Agencies Limited, Halb Trading (EA) Limited and one, Hezron Bollo, who swore the verifying affidavit. Those sums did not belong to the plaintiff. Other two or three 3rd parties whose money was said to have been stolen by the 1st defendant were referred to to emphasise that the plaintiff's claim had been based on monies allegedly stolen from 3rd parties. That the plaintiff could not therefore bring this suit, apparently on behalf of 3rd parties whose money was allegedly stolen – not its own. To bring such a suit was scandalous and an abuse of the court process. The suit was intended to embarrass the applicant.

Further, it was deponed that by clauses 7, 22 of the business account opening form, which created a contract between the plaintiff and the 2nd defendant, the former was required to report any irregularity or wrongful entries in its bank statement within thirty (30) days. Such statements were made available to the plaintiff company on a daily basis and by internet viewing facility. No complaint/objection was raised; this suit followed two years down the line. Liability did not therefore lie against the 2nd defendant because of time lapse and accordingly this suit ought to be struck out as prayed.

The plaintiff filed eight grounds of opposition terming the present application misconceived and lacking in merits. That the plaint as drawn clearly showed that the cause of action relates and accrued to the plaintiff as against the two defendants. The plaint was accompanied with a valid verifying affidavit in conformity with Order 1 rule (1) (4) of Civil Procedure Rules. That the criminal case charges/cases pending related to thefts of money belonging to the plaintiff or companies associated with it but those charges had no direct link to this case which will be decided on evidence to be tendered at the trial and not evidence from the criminal court. And that the cause of action against the 2nd defendant had been clearly set out in the statement of claim and the same was not scandalous or an abuse of the court process.

The parties filed submissions and appeared to highlight, all in a manner as set out in the supporting affidavit and the grounds of opposition. There was expansion by either side on Order 1 rule 4 Civil Procedure Rules with the sub-rules and clause 22 of the form, business account opening form, the banking contract (annexture DG.6). Then of course reference was made to some of the cases cited. In essence while Mr. Ojiambo maintained that the suit should be struck out as against the 2nd defendant as sought, Mr. Amuga held the position that the trial court be the final arbiter in this suit after taking evidence. And that if any omission, default or error be detected e.g. in the plaint or the verifying affidavit this court do grant due amendment.

The notice of motion, sprung from the pleadings of the parties herein. In its amended plaint the plaintiff gave the history of the 1st defendant who was its employee in finance/accounts department and that her duties took her to work for the plaintiff's subsidiary companies – Habo Agencies Limited and Halb East Africa Limited. Then:

“5. At all material times hereto, the plaintiff operated a Current Account Number 2096398700 with the 2nd defendant at its Portway House Branch in Mombasa.....”

That the plaintiff effected financial banking transactions through that account all the time confident that as per implied/contractual mandate the 2nd defendant would exercise reasonable care and skill when processing its orders, directions to process payments through the said account. However, due to breach of the said banking contract and duty owed to the plaintiff either through collusion or negligence by the 2nd defendant's staff, it can be said, led a sum of Shs. 75,805,099/= to be irregularly paid/withdrawn from the

said account to the loss of the plaintiff, when the 1st defendant withdrew or converted to her own use the said sum. Then the plaint continued, in part:

“8. The plaintiff avers that the theft by the 1st defendant was aided by the gross negligence or collusion on the part of the 2nd defendant, its servants, agents and employees.”

The plaintiff proceeded to give particulars of alleged negligence/collusion on the part of the 2nd defendant and the particulars of fraud on the part of the 1st defendant. And then of course, particulars of loss and damage.

In its defence, the 2nd defendant denied all claims of negligence or collusion, forgeries, wrongful withdrawals, alterations, or fraud leveled against it in the plaint and set out the duties it owed the plaintiff and how it endeavoured to fulfill the same. Clause 22 referred to in the motion was brought out in the defence excluding/exempting the 2nd defendant from liability. The 1st defendant similarly filed a defence denying any collusion, fraud, theft, etc. of the plaintiff’s money. In either defence it is not denied that account number 2096398700 belonged to the plaintiff, and no other, with the 2nd defendant.

On 25th July, 2011, the plaintiff filed a reply to the 2nd defendant’s defence joining issue but repeating its claims against that party. It denied having been given daily statement or viewed the same via the internet. Nothing was said of monthly bank statements, if any.

Turning to the motion before us: Can it be said that the prayer to strike out the suit against the 2nd defendant/applicant be granted? As referred to already, the main bases for this prayer is the application of Order 4 rule 1 (6) – the validity or lack of it of the verifying affidavit and the discretion of this court to strike out pleadings at any stage (Order 2 rule 15 Civil Procedure Rules). If we can confine ourselves to the pertinent parts of Order 1 Civil Procedure Rules in the present case:

“1. (1) The plaint shall contain the following particulars –

(a)(e).....

(f) an averment that there is no other suit pending, and there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to plaintiff named in the plaint.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1 (1) (f) above.

(3)

(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

Then as per sub-rule 6 the court on its own motion or on application may strike out any pleading deficient in the above.

Mr. Ojiambo’s position, while submitting and as has been garnered from the amended plaint, is that the plaintiff company was suing on behalf of its subsidiary limited liability companies whose money was allegedly stolen/lost in what forms the cause of action here. This court’s answer to that is that the plaint is clear that the plaintiff held a certain account with the 2nd defendant and by negligence or collusion, its Shs. 75 million was stolen from it. The banking relationship borne out as a banking contract, was between the plaintiff and the 2nd defendant and a certain account was stated to be the one in which the transactions were executed. Accordingly, it was not correct to claim that the plaintiff brought this suit on behalf of its subsidiaries, Habo Agencies Limited and Halb East Africa Limited. Those are places where the 1st

defendant worked as an employee of the plaintiff and not where money, the subject matter here, was lost.

Then the point of Hezron Bollo swearing the verifying affidavit. He described himself as the chairman and chief executive officer of the plaintiff company. The plaintiff company is a limited liability company and therefore a corporation. On swearing this verifying affidavit it was imperative that an instrument of authority to so swear bearing the plaintiff's seal do accompany the affidavit (Order 4 1 (4) Civil Procedure Rules). Such an instrument does not appear on record and Mr. Amuga, saw that as an omission that can be cured by amendment or other.

In this court's view that was an omission/error not fundamental to the suit. It is not shown that failure to annex/exhibit authority under seal in order for Bollo to swear the verifying affidavit, invalidated the suit or it prejudiced the defendants. In that regard and not to be governed by a procedural technicality that leaves no prejudice, the plaintiff will have to swear, file and serve a proper verifying affidavit in respect of the plaint herein. Then the suit will be determined on its merits and justice will ultimately be done.

The more vexing point was the said clause 22 in the banking contract between the plaintiff and the 2nd defendant in a customer-banker relationship. It reads:

“22. Statements

The contents of any statement of account of any other nature which has been issued by the Bank to the Customer, and which the Customer has not objected within thirty days of receipt thereof, shall be deemed approved by the Customer, and shall not thereafter be challenged by the Customer on any ground whatsoever, whether lack of mandate, forged or inadequate signature of endorsement of cheques, forged alteration thereof or otherwise.”

In perusing the plaint, the 2nd defendant's defence and reply to it, it does not appear as if any party spoke of supply or failure to supply **monthly** bank statements. All seemed confined to **daily** statements and **daily** viewing of such statements on the internet. One side denies the others position on these. But be that as it may. There was a thirty (30) day-time bar to raise any complaint regarding a statement rendered. The contract stated that if the customer, here the plaintiff did not raise any objection to the entries in the statement within thirty (30) days of furnishing it, then, it was presumed to endorse the statement and what it contained. A neat exemption in favour of the 2nd defendant, one can say. And the case of **Tai Hing Cotton Mill Limited vs. Lin Chong Hing Bank Limited & Others** [1986] AC 80 was cited. It is a Hong Kong case.

In that case a company with current accounts at three banks authorized the banks to pay cheques drawn on behalf of the company signed by the managing director or nominated signatures. The express terms of the company's contracts with the banks included a requirement that the company should notify the banks within a stipulated time of any errors in its monthly bank statements, which would otherwise to be deemed to be correct. Over a given period an accounts clerk forged the managing director's signature on some cheques purporting to be drawn by the company. The bank honoured the cheques on presentation and debited them against the company's accounts. The company's internal financial control was not adequate to prevent or detect the forgery which was discovered some four (4) years later. The company then filed an action in the High Court for declarations that the banks were not entitled to debit its accounts with the amounts of the forged cheques. In the High Court it was found for bank herein that the company was not entitled because it failed to challenge the debits in the statements and thus it was estopped from asserting that the accounts had been wrongly debited. The company went to Court of Appeal where it was thrown out on the ground, *inter alia* that since the company was in breach of a duty of care owed to the banks in contract and in tort it was not entitled to the relief sought. The company proceeded to the Judicial Committee. The Judicial Committee reversed the decision in the Court of Appeal stating, *inter alia*, that the express terms of the banking contracts were not sufficiently clear and unambiguous to impose upon the company a contractual obligation to examine its bank statements and to accept them as accurately stating the debits if not challenged within the stipulated time limit. Thus the company was not in breach of any duty to the banks and it was not estopped from asserting that the accounts had been incorrectly debited. Accordingly, the banks had no authority to pay the forged cheques. The banks had to

pay the company the sums lost together with interest.

In essence Mr. Ojiambo was urging the court to find that a banking contract like the present one with clause 22, protected the bank from liability in respect of forged/fraudulently induced payments it made, because the anomalies complained of were not raised within thirty (30) days when statements were rendered.

Going over this case, it appears as if the Hong Kong case is more in support of the plaintiff here than the 2nd defendant/bank, the only missing link being that the actual clause in the **Tai Hing** case was not reproduced to compare its wording with clause 22. But the main distinction between the two cases is that whereas there is no cause of action based on negligence, fraud, conspiracy or collusion in the **Tai Hing** here it is so pleaded as reproduced above. The plaintiff is suing the bank on those aspects, and that makes the difference. Charges of negligence/collusion made against the applicant bank can only be better handled at the trial with evidence subjected to rigours of cross-examination.

In sum, this application is dismissed but with costs being in the cause.

Delivered on 17th July, 2012.

J. W. MWERA

JUDGE