REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 601 of 2009

PELICAN HAULAGE CONTRACTORS LIMITED…….......................……PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL OF KENYA………….....................…. DEFENDANT

RULING

1. The Plaintiff by way of a Notice of motion dated 5th March, 2012, has applied to this Court under Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules, and Sections 1A , 1B and 3A of the Civil Procedure Act, to have the Defendant's Statement of Defence struck out and judgement entered in its favour. The Grounds for the application are set out on the face of the application. The Motion is also supported by the Affidavit of Gideon Mwalimu, the General Manager of the Plaintiff duly authorized to swear the affidavit.

2. It is contended that the Defendant's statement of defence is a mere sham and consists of denials which amount to abuse of the court process. That the police officers in Garissa purportedly behaved in a callous manner by arresting and detaining the Plaintiff's lorries without cause and arresting the Plaintiff company's drivers without just cause, thus exposing the Plaintiff's company to serious financial peril. That the arrest and detention of the Plaintiff's motor vehicles was an abuse of police powers and allegedly constituted malicious prosecution and violation of the fundamental rights and freedoms of the Plaintiff.

3. The Plaintiff also contends that the Defendant became party to the aforesaid illegal actions by refusing to demand for the immediate release of the Plaintiff's lorries and by abusing the Criminal law process in the filing of a Criminal revision application in the High Court of Nairobi Criminal Revision No. 66 of 2008. That the detention of the Plaintiff's lorries was a gross contempt of the court and a challenge to the dignity of Garissa Principal Magistrate's Court. In view of the foregoing, it is contended that the statement of defence of the defendant should be struck out for being scandalous, vexatious and abuse of the process of the Court and that further judgment be entered for the Plaintiff as prayed.

4. The Defendant opposed the Motion by way of a Replying Affidavit sworn by Jacqueline Omol on 1st October 2012. In it, the Defendant contended that its defence is not likely to prejudice, embarrass or delay the fair trial of this suit and that the same should be heard on merit. It was further averred that whether or not the defence can be sustained is a matter to be determined at the hearing of the suit and upon production of evidence. That further, the issues on financial loss and special damages that the Plaintiff has raised require proof supported by evidence and this can only be done at the trial. It is further contended that the Plaintiff has taken two years to bring the instant application with the sole intention of short-changing the Defendant, who has the right to be heard and as such the matter should heard in open court on merit. The Defendant thereby urged the Court to dismiss the Plaintiff's application.

5. I have considered the Supporting and Replying Affidavit of the respective parties. I have also considered the submissions of the learned counsel for the Plaintiff. I also note that the Defendant failed to appear before this court on 28th November 2012, at the appointed time for the hearing of the Application. The matter therefore proceeded ex-parte after being satisfied that the Defendant was served with the Hearing Notice. The Defendant therefore did not offer any submissions on the application. The matter in contention is simple. Should the Defendant's Statement of Defence dated 1st December, 2009 be struck out for being a sham and an abuse of the Court process? And further, should Judgment be entered against the Defendant?

6. A brief background into the matter reveals that the suit emanated from criminal proceedings against the Plaintiff's Drivers. The Plaintiff being in the transport business, owned six Lorries namely KBB 118F, KBB 119F, KBB 121F, KBB 122F, KBB123F and KAG 875F. The said Lorries were hired by a scrap metal dealer to transport a cargo of scrap metal from Elwak to Nairobi. However, were the drivers for the lorries were arrested and the lorries detained in Garissa Police Station. The Drivers were subsequently acquitted from all the charges which were based on the Environmental Management Act, in the Garrisa SPM Criminal Case No. 504 of 2008. The Court also ordered the release of the exhibits. There was however an application for the revision of the case by the High Court in Criminal Revision No. 66 of 2008, it was however submitted that the Court rejected this application and ordered the release of the six lorries in detention on 6th November 2008. The same were released on 9th November 2008. This prompted the institution of this civil case where the Plaintiff, has sued the Defendant for a Claim of Kshs. 48,188,576/= in financial losses together with general and exemplary damages, including costs of the Suit.

7. With this in mind, the Court has to consider whether to strike out the Defendant's statement of Defence for being frivolous and vexatious, a mere sham and denial and an abuse of the Court process. The law on this issue is clear. A pleading should only be struck out it is manifestly hopeless. So hopeless that it amounts to an abuse of the court process. In so holding, the court ought to exercise its jurisdiction sparingly and only in exceptional cases, as the same is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. **Madan J.A.** in his judgment in the case of **D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1** discussed the issue at length. Although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with the broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case, inter alia, that:-

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits……. No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption……….a court of justice ought not to act in darkness without the full facts of the case before it" (Emphasis mine)

So has the Plaintiff demonstrated that the Statement of Defence in this matter is manifestly hopeless to warrant the drastic measure of striking out?

8. Looking at the issues advanced, I note that the Plaintiff has reproduced what is contained in the parties' primary pleadings. The issues arising are the alleged wrongful prosecution, financial loss and damages. The defence has denied the allegations in the plaint in its entirety. It has contended that the arrest was lawful, and with justifiable cause, the special loss is also denied. With such averments, can the court be able to evaluate them and make a conclusion without there being evidence. What is scandalous or frivolous and vexatious about denial of specials? Although the figures for Kshs.48,189,576/- is tabulated. Where are the receipts in the supporting Affidavit? I am doubtful if requiring evidence of such a loss can be termed embarrassing or vexatious.

9. On the issue of the defence being a sham and mere denial at best, I find that the Plaintiff has not successfully persuaded this court in its contention. The issue raised as to the lawfulness or otherwise of the arrest of the Plaintiff's drivers and detention of the lorries is one that require production of evidence and cross examination of such evidence. Although the same was dealt with in the Criminal proceedings in Garissa SPM Criminal Case No. 504 of 2008, I find that an outcome in a criminal case does not necessarily bind a Civil Court. There are different standards of proof applied in the two jurisdictions. Furthermore, in the case of **BLUE SHIELD INSURANCE COMPANY LTD v JOSEPH MBOYA OGUTTU Civil Appeal 262 of 2003 [2009 eKLR]** the learned judges held that;

"In law, only one issue raised in defence, if it constitutes a genuine defence and not necessarily a successful defence, would warrant a full hearing."

In view of the above, I find that the Defendant is not required to have a Defence that shall be necessarily successful, but the same should constitute a genuine defence to warrant a hearing. Having examined the Defendant's Statement of Defence and I am of the view that at least the issue of loss of Kshs. 48M is good enough requirement to go for a full trial so as to allow parties, the opportunity to adduce proper evidence and test it in cross-examination.

10. In the foregoing, I find that the application dated 5th March, 2012 has no merit and accordingly dismiss it. The suit should be set down for hearing at the earliest opportune time. I shall make no orders as to costs.

DATED and **DELIVERED** at Nairobi this 20th day of December, 2012.

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A. MABEYA

JUDGE