



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 255 of 2007

TOTAL KENYA LIMITED PLAINTIFF

VERSUS

BASHIR M. HAJI.....DEFENDANT

RULING

1. The Chamber Summons dated 9th November 2009 is brought by the defendant under the provisions of **Order 6 Rules 13 (1) b, c and d of the Civil Procedure Rules**. The applicant is seeking for an order that the suit be struck out with costs. This is on the grounds that the plaint is scandalous frivolous and vexatious. The plaint is also meant to prejudice or delay the fair trial of this matter. It is otherwise and abuse of the court process. The application is supported by the affidavit of the defendant sworn on 9th November 2009. It is mainly contended that the suit by the plaintiff is time barred according to the Limitations of Actions Act.
2. According to the plaint the cause of action arose between 1998 and 2004 when the plaintiff alleges the defendant purchased some products on credit and others on loan but failed to settle the account. The defendant denied liability in their statement of defence. The defendant applied for particulars which the plaintiff supplied. It is contended that the documents supplied show that the cause of action arose in 1998. The bulk of the invoices show that the claim by the plaintiff was for supplies made between 1998 – 2000.
3. Thus there is no suit capable of proceeding to trial and no amendment would give any life to the suit thus there is no point of allowing this claim to proceed on trial. Counsel referred to the case of **Abubakar Zain Ahmed vs Premier Savings and Finance Limited (2007) eKLR**. In which the Court of Appeal held that:-

“The appellant has also complained that the learned Judge ought to have found that the suit was sustainable or curable through an amendment and that it should not have been struck out. We do not think so. The court will generally give leave to amend a defective pleading where there is reason to suppose that the case can be improved or served by a legitimate amendment, and indeed an amendment has been made in this case. But the facts of this case militate against further leave to amend being granted. The claim was hopelessly time barred and it would be an exercise in futility if left to go to trial. In fact no useful purpose would be served in trying to sustain the suit by further amendment. In our view, the learned Judge was right when he observed:

“There would be no point in allowing this claim to go to trial. Doing so would be allowing the parties to waste large sums of their own or somebody else’s money in an attempt to pursue a cause of action which must eventually fail. We agree and must therefore reject the complaint.”

4. This application was opposed by the plaintiff; reliance was placed on the replying affidavit by **Bonface Ambala** sworn on 14th December 2009. The plaintiff contends that the claim by the plaintiff raises triable issues. The application by the defendant to strike the suit is circumventing or fishing for evidence prematurely before the suit is heard or before the discovery is done. Before the suit is heard and determined a party is entitled to amend the pleadings or adjust or partly withdraw a claim. Thus the plaintiff’s claim can be amended which is the principle enunciated in a long list of authorities by the Court of Appeal especially the case of **DT Dobie and Company Kenya Limited vs. Muchina 1982 KLR**.

5. Moreover the defendant claimed that he paid the debt but no evidence was put forth to prove that he paid the debt. The cause of action was a contract which can only be proved through evidence. As regards the so called defects in the replying affidavit the plaintiff can be given leave to file a supplementary affidavit as was held in the case **of Mobil Oil Kenya Limited vs Weld Well Limited Miliminani HCCC NO.222 of 2007**. Counsel for the plaintiff urged the court to find this matter can effectually and completely be adjudicated upon after a full hearing and not through summary proceedings.

6. This application invokes the jurisdiction of Order 6 Rule 13 which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

- a) it discloses no reasonable cause of Action or defence or*
- b) It is scandalous, frivolous or Vexatious; or*
- c) It may prejudice, embarrass or delay The fair trial or the action; or*
- d) It is otherwise an abuse of the Process of the court, an may order The suit to be stayed or dismissed or Judgment to be entered Accordingly, as the case may.*

7. It is trite law that striking out pleadings is a drastic measure which is sparingly done and it is done when the pleadings complained about are an abuse of the court process and discloses no triable issue. (See the case of **DT Dobie & Co. Limited vs. Muchina [1982] KLR**) as per Madan JA:

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

8. The plaintiff’s claim as pleaded under paragraph 4 and 5 of the Plaint is that the defendant purchased products from the plaintiff on credit and on loan between 1998 and 2004 which the defendant failed to settle. The defence by the defendant denies that the defendant was a financial dealer of the plaintiff and contends that he was simply operating and managing the Narok Total Petrol station until September 2000 when he handed over the operations and the management to the plaintiff and one Ruth Kahungu and the handing over was duly documented.

9. In my view that is a triable issue which can only be determined through a trial. It is settled law that even if a suit raises only one issue, it should proceed to trial. Many issues were raised regarding the plaintiff’s suit being statute barred but the pleadings refer to a loan, I think it is premature to ignore that issue until it is determined. Similarly the contention that this claim is time barred is a triable issue. Accordingly, this application cannot succeed. It is dismissed with costs to the plaintiff.

RULING READ AND SIGNED ON 16TH JULY 2010 AT NAIROBI.

M. K. KOOME
JUDGE