



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

Civil Suit 647 of 2007

BANK OF AFRICA LIMITED.....PLAINTIFF

VERSUS

JOHN MAINA NGARE.....DEFENDANT

RULING

This is a Notice of Motion application dated 7th May, 2008 brought under order VI rule 13(c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It seeks to strike out the Defendant's defence and to have judgment entered for the Plaintiff as prayed for in the plaint.

The application is premised on the grounds that:

- (a) The Defendant is justly and truly indebted to the Plaintiff for the amount Kshs.3,149,377.68.
- (b) There is no bona fide answer to the claim in that the reliefs sought by the Plaintiff are under the terms of an undisputed agreement of the parties.

The application is supported by the affidavit sworn by Anne Kahindi dated 7th May, 2007 and annexures thereto which I have considered.

The Defendant did not file any replying affidavit. It seems that there is a fall out between the Defendant and his advocate. The current advocate for the Defendant, that is Kalwa and Co. Advocate have on two occasion filed applications to cease acting for the Defendant under Order II Rule 12(1) of the Civil Procedure Rules. The 1st application was filed on 17th June, 2008 and the second on 25th November, 2008. Both applications have however not been prosecuted.

The Plaintiff filed this suit on 13th December, 2007 seeking judgment in the sum of Kshs.3,149,377.68 and a declaration that the Plaintiff is entitled to possess and sell the motor vehicle registration No. KAW 535D, which was used to secure the loan facility granted to him by the Plaintiff. It is the Plaintiff's contention that the Defendant is indebted to it in the sum claimed and further that the Plaintiff is entitled to keep the suit vehicle, which it repossessed from the Defendant, when he defaulted in repayments. The Plaintiff has pleaded in paragraphs 17, 18 and 19 of the plaint that the Defendant filed a suit in the Chief Magistrate's Court against the Plaintiff seeking to stop the Plaintiff from enforcing the security over the vehicle. The Plaintiff has pleaded that despite an order of that court directing it to release the suit vehicle which is also the subject matter of this suit, it was still holding it.

The striking out of a pleading is a very draconian step and it is now well established that the court, in exercise of that jurisdiction should only exercise it in plain, obvious and clear cases. It is trite that where the statement of defence raises even one triable issue, the Defendant is entitled to an unconditional leave to defend the suit. See Choitram v Nazari CA No 8 of 1992 [1984] KLR and D.T. DOBIE VS. MUCHINA [1982] KLR 1

Counsel for the Applicant relied on the case of Waruru vs. Oyatsi (2002) 2 EA 664, where the Court of Appeal approved the holding in the case of Sunday Principal Newspaper Limited [1961] 2 All ER 758 as follows:

“It is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. For the purposes of this appeal, we are not in anyway concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine. I have come to the conclusions, in relation to each of the four headings, that it is quite impossible for us to take this drastic course.”

It is trite that all the Defendant needs to show is that it has a triable issue in order to get leave to defend the suit. In Provincial Insurance Company of East Africa Limited vs. Kivuiti [1995-1998]1 EA 283 the Court of Appeal held:

“In an application for summary judgment even one triable issue, is bonafide, would entitle the Defendant to unconditional leave to defend (Kundulal Restaurant vs. Devshi and Co. [1952] 19 EACA 77 and Hasmani vs. Bandeau Congo Belge [1938] 5 EACA 89 applied)

The issues raised by the Appellant were weighty issues which could not be tried in a summary manner of affidavits. It was not open to the judge to say that the respondent was a bonafide purchaser as that would have been a matter for the trial Court. The Defence and counter-claim by the appellant were not shams. The striking out by the Judge of the counter-claim, where it had not been prayed for, was wrong and the Order ought to be set aside. The counter-claim, although interwoven with the defence, was a distinct claim.

A Judge is bound to carefully consider any summary Judgment or striking out application and ought, when specific bonafide triable issues are raised, to give unconditional leave to defend.”

I have looked at the defence and I note that the Defendant has pleaded that due to misrepresentation by the Plaintiff the contract between itself and the Defendant was frustrated. The particulars of the frustration and misrepresentation have been pleaded at paragraph 5 of the defence. The Defendant at paragraph 6 pleads that as a result of the Plaintiff's actions the contract between the parties was completely frustrated and that it made it impossible for the Defendant to perform his part of the contract. In paragraph 8 of the defence, the Defendant avers that the Plaintiff is in contempt of the court in terms of paragraph 18 of the plaint, and is therefore not entitled to any orders, and/or prayers. In paragraph 18 of the plaint, the Plaintiff avers that on 7th December, 2007 an order was made in the CMCC 8830 of 2007 requiring the Plaintiff to release the vehicle to the Defendant. Looking at the plaint and the prayers under the plaint, it is quite clear that the Plaintiff is still holding the motor vehicle which the Chief Magistrate's Court ordered it to release to the Defendant.

I have considered the Plaintiff's submissions together with the skeletal arguments filed in court on 20th June, 2008. It is the Plaintiff's contention that since the Defendant did not file any replying affidavit to the instant application, the facts contained in the supporting affidavit together with the annexures annexed thereto were not controverted and in the circumstances the Plaintiff should get the orders sought.

Mr. Ogunde for the Plaintiff relied on the case of Mohamed and Anor. vs. Haidara for the proposition that where facts stated in an affidavit are not controverted, those facts are taken to have been admitted by the Defendant. Mr. Ogunde submitted that the Defendant's claim that the Plaintiff frustrated the contract has

been answered in the supporting affidavit to the instant application. Counsel argued that from the facts stated in that affidavit, it was evident that there were certain understandings on payment which were made between the Plaintiff and the Defendant but that the Defendant failed to honour its obligation. Counsel continued to argue that since those facts have not been disputed by way of affidavit evidence, it must be deemed that the Defendant admitted them.

Regarding the issue of the Plaintiff's contempt in failing to comply with the court orders to release the suit vehicle, Mr. Ogunde submitted that, that point was untenable since this court had had an occasion to deal with that question.

As stated at the beginning of this ruling the Defendant did not file any replying affidavit and therefore technically, the application is unopposed. That state of affairs would not justify the striking out of the defence and entry of judgment for the Plaintiff against the Defendant as prayed. In an application under order VI rule 13 (1) (c) and (d) of the Civil Procedure Rules, the court is mandated to look at the defence filed and determine whether it may prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of the court. It is my view that even where the Defendant has not opposed an application under this rule, that would not preclude the court from looking at the statement of defence and determining the application. The application by its very nature challenges the defence as filed. It is therefore only prudent that the court examines the statement of defence and determine whether it answers the averments in the plaint, or whether it raises any triable issue. To demonstrate this point, I will quote from the Court of Appeal case of Waruru v Oyatsi [2002] 2 EA 664 where it quoted with approval the English case of Sunday Principal Newspaper Limited [1961] 2 All ER 758 as follows:

“It is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. For the purposes of this appeal, we are not in anyway concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought be set up is so unarguable that it ought to be struck out in limine. I have come to the conclusions, in relation to each of the four headings, that it is quite impossible for us to take this drastic course.”

It is therefore a fallacy for the Plaintiff to argue that since no affidavit in opposition to the instant application was filed, then the court should allow the application as unopposed. This is so because the issue before the court is not whether the Plaintiff has evidence to support its claim against the Defendant but whether the Defendant has raised any issue that ought to go to trial. I am guided by the cases which are cited at the beginning of this ruling. The principle enunciated in all these cases is that before the court strikes out a defence, it must be satisfied that it raises no triable issue.

The Plaintiff relied on rule 13(1) (c) and (d) of order VI. It was incumbent upon the Plaintiff to demonstrate the manner in which the defence may prejudice, embarrass or delay the fair trial of the action or the manner in which it was an abuse of the court process. I did not see any such demonstration. The Plaintiff made heavy weather of the lack of opposition to the application but omitted to meet its own obligation of demonstrating why the Defendant's defence should be struck out as an abuse of the court process or as one that may prejudice, embarrass or delay the fair trial of the suit.

The Defendant has raised two issues in the defence. The first one is that the Plaintiff frustrated the contract between the parties because of unilaterally changing the terms of their agreement and also because of unjustifiably repossessing the suit vehicle. There was no reply to the Defendant's defence and therefore the issue of the frustration of the contract is a controversial issue and if successful, may lead to the dismissal of the Plaintiff's suit. On the other hand, there is clear admission by the Plaintiff that it repossessed the Defendant's vehicle and that it has continued to hold that vehicle despite being ordered to release it by a court of law.

The issue of the suit vehicle brings in the second issue raised in the defence, which is that the Plaintiff is in contempt of a court order and that therefore is undeserving of any orders from this court. The Plaintiff has not denied holding the vehicle even though there is a subsisting order from the court that it should

release that vehicle to the Defendant. The Plaintiff's argument that that court had no jurisdiction to entertain the suit in the first place is untenable because the least the Plaintiff should have done was to challenge the order by that court or to file an appeal against it. It is not clear from these proceedings whether the Plaintiff has taken either action. As long as that order subsists, and as long as that order has not been complied with, the Plaintiff is in contempt of the court orders.

In view of the fact that the Plaintiff/Applicant has admitted that it is in disobedience of a court order, which is still subsisting, this court is not persuaded that it should exercise its discretion in its favour. There are several cases where a party who is found to be in disobedience of a court order have had their suit struck out or their applications dismissed simply on account of disobeying court orders. See Asea Brown Boveri Limited vs. Bawazir Glass Works Limited [2001] 1 EA 336, Hunter vs. Chief Constable of West Midlands [1981] 3 All ER 727 (House of Lords). Since there is no application to strike out the Plaintiff's plaint, or to dismiss the suit on that ground, the proper order to make in the instant application is to decline to grant the orders sought.

Accordingly, for this and other reasons as contained in this ruling, I will dismiss the instant application with costs to the Respondent.

Dated at Nairobi this 30th day of January 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Ogunde for the Applicant

N/A for the Plaintiff/Respondent

LESIIT, J.

JUDGE