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

Civil Suit 67 of 2007

NYATI (2002) KENYA LIMITED……APPLICANT

VERSUS

KENYA REVENUE AUTHORITY……..……
DEFENDANT

R U L I N G

Before me is an application by the Plaintiff dated 15th March 2007. It has been brought under order VI rule 13(1) (b) (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 for judgment to be entered in favour of the Plaintiff. It also seeks that the matter be listed for formal proof upon entry of judgment as prayed.

The application is premised on the basis that:

(a) The defence filed herein is scandalous, frivolous and vexatious.

(b) The defence may prejudice, embarrass or delay the fair trial of this action.

(c) That the defence is otherwise an abuse of the court process.

The application is supported by the affidavit sworn by Eng. Edward Mwongo dated 15th March, 2007 and annextures thereto which I have considered.

The application is opposed. The Defendant has filed a replying affidavit sworn by Charles Esonga Onduso, dated 31st March, 2008.

In brief the Plaintiff imported a used KATO 500 E5 mobile crane from the United Kingdom. The Defendant had the crane valued for purposes of assessing the duty payable. The Plaintiff was aggrieved by the valuation and therefore sought a review which was granted. The value of the crane was re-assed downwards and the value of the duty payable was tremendously reduced.

The Plaintiff has filed this suit seeking to recover general damages and loss and damages it suffered during the period the crane remained impounded by the Defendant. The Defendant has denied any liability and has blamed the Plaintiff for the delay in taking the delivery of the crane.

The law is very clear that striking out pleadings is a drastic remedy and therefore, one which ought to be exercised only in the clearest of cases and where the case is plain and obvious.

Each of the parties has relied on various authorities which I have considered. I will quote from 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 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 prove 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, if 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 am guided by these cases.

The Plaintiff contends that the Defendant's suit is scandalous, frivolous and vexatious. Mr. Aduda in his submissions on behalf of the Plaintiff took issue with the averment at paragraph 3 of the defence. In that paragraph, the Defendant avers that it is a stranger to the averments contained in paragraphs 3, 4 and 5 of the plaint and puts the Plaintiff to strict proof thereof. Mr. Aduda contends that the Defendant was aware of the valuations given by their Agents and of the Plaintiff's grievance. The Plaintiff contends that having known the same, the Defendant's denial at paragraph 3 and in the rest of the paragraphs of the defence were scandalous as they were denying what were plain and obvious facts, and that therefore they were frivolous and vexatious.

The Plaintiff has relied on the case of **J.P. Machira Advocate vs. Wangethi Mwangi & Others Civil Appeal No. 179 of 1997** where **Omolo JA** states:

"***I can find no warrant for restricting the meaning of the term scandalous to only that which is indecent, offensive or improper. Surely, if everybody knows a man including his parents, knows his names to be Tom Njuguna Onyango, and when he is sued under those names he pleads, 'I deny that my names are Tom Njuguna Onyango'. That kind of denial apart from being frivolous and vexatious can also be properly described as scandalous."***

Mr. Matuku for the Defendant has relied on the case of **Mpaka Road Development vs. Kana [2004] 1 EA 161** where Ringera J, (as he then was) stated:

"***A matter would only be scandalous frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example,***

imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is Ipso facto vexatious."

The issue is whether the Defendant's defence is scandalous, frivolous and vexatious and an abuse of the court process, or whether it raises a triable issue that warrants the court to grant the Defendant leave to defend the suit. I have looked at the Defendant's defence at length. Basically the Plaintiff seeks to recover damages for what he terms '*loss and damages during the period the crane remained impounded'*. The loss and the damages are not particularized in the plaint. In paragraphs 6, 7 and 8 of the defence, the Defendant has set out the various options the Plaintiff, in its opinion, had in order to take delivery of the crane within a reasonable time. These options include the taking of the delivery of the crane either before the final determination of the value by the Defendant or by furnishing of adequate bond to cover the assessed duties. The other options included the payment of the amount demanded by the Defendant before filing the suit for this determination of the dispute. In paragraph 8 therefore, the Defendant lays blame on the Plaintiff for the delay in taking delivery of the crane and avers that if any loss or damage was suffered by the Plaintiff, it was occasioned by the Plaintiff itself.

As already stated, it is trite that if a Defendant is able to establish even one triable issue, the Defendant is entitled to unconditional leave to defend. I do find that the Defendant has raised triable issues which are whether it is the Plaintiff or the Defendant who is to blame for the delay in taking delivery of the crane and of the consequential loss and damage, if any, suffered by the Plaintiff. This issue is a contentious issue and one which will need the adduction of evidence in order for the court to adjudicate on it. It is therefore an issue that should go to trial.

At this stage, the court is not concerned with whether the defence raised is likely to be successful. The mere fact that there is a triable issue raised is sufficient ground to allow the Defendant to defend the suit. I have come to the conclusion, in relation to the Defendant's defence, that there is a triable issue raised. I am satisfied that the Defendant did not admit any liability as alleged by the Plaintiff's advocate in his submission. The issue of the delay and of the party liable for any loss or damage suffered by the Plaintiff remains a contentious issue and one which ought to go to trial. Having come to this conclusion, I find that it is impossible for this court to take the drastic course sought by the Plaintiff. The foregoing analysis leads me to make the following orders:

1. **The Plaintiff's application dated 15th March, 2007 be and is hereby dismissed with costs.**

2. **The Defendant is granted unconditional leave to defend the suit.**

Dated at Nairobi this 30th day of January 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

N/A for Mr. Aduda for the Plaintiff

Ms. Lavuna holding brief Mr. Matuku for the Defendant

LESIIT, J.

JUDGE