REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 636 of 2007

FRANKLIN MITHIKA LINTURI ..... PLAINTIFF

VERSUS

SAFARICOM LIMITED ..... DEFENDANT

RULING

The defendant, Safaricom Ltd. has filed this current application, a Chamber Summons dated 4th March, 2008, under Order VI rule 13(1) (b) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Order 13 (1) (b) states:-

"A**t any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-**

(b) It is scandalous, frivolous or vexatious or ---"

The Court will confine itself to Order VI rule 13(1) (b) as the same substantially covers the defendant's application.

In the application the defendant prays for 2 orders.

1. That the plaint be struck out for being frivolous and vexatious.

2. Costs of the application and the entire suit.

The application was supported by the affidavit of one *Nzioka Waita* the head of Legal and Regulatory Affairs of the defendant. The Defendant's argument is that at the material time the defendant had no services as claimed by the Plaintiff and further that defendant did not represent to the Plaintiff ,or any other party that it was in a position to offer services such as the one the Plaintiff wanted.

The Plaintiff filed a replying affidavit on the 19th of January, 2009 opposing the application, on the ground that, the Plaintiff was at the material time a customer of the defendant and entitled to unhindered mobile telephony services. That at the material time, the Plaintiff was not only denied access to the services, but also charged for service not rendered.

The summary of the case is that the Plaintiff filed suit on the 7th of September, 2007 claiming inter alia

negligence, fraud and breach of contract on the part of the defendant. The Plaintiff claims general, special and exemplary damages among other prayers. On its part the defendant filed a defence on the 28th of September, 2007, stating that the suit is defective, it discloses no reasonable cause of action against it and that the Plaintiff is not entitled to the reliefs sort.

I have considered the submissions by both learned counsels for the parties, the affidavits and cases cited.

The main issue before the court is – whether the plaint is frivolous and vexatious and ought to be struck out.

In arriving at its ruling the Court will consider the below mentioned authorities namely (1) ***NYATI (2002) KENYA LIMITED*** vs. ***KENYA REVENUE AUTHORITY CIVIL SUIT NO.67 of 2001***. In this case the Learned Lady Justice J. Lessit made reference to the case of ***SUNDAY PRINCIPAL NEWSPAPER LIMITED (1961) 2. ALL E.R. 758*** where it was held that:-

"**It is 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 any way 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 conclusion in relation to each of the four headings, that it is quite impossible for us to take this drastic course".**

The above case is quite clear that a plaint can only be struck out where it is clear, plain and obvious that the same is frivolous and vexation.

(2) In ***MPAKA ROAD DEVELOPMENT*** v. ***KANA*** (***2004) 1 EA*** at 161 Ringera J (as he then was) described what would be frivolous & vexatious as:-

"**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 an 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."**

Guided by the above authority the questions that comes to mind is whether the claim by the Plaintiff is frivolous and vexatious. Whether it lack seriousness and is annoying. In considering the above question the court is ceased of the fact that its jurisdiction in so far as this application is concerned, is not about the merit or otherwise of the claim.

Guided by the 2 authorities quoted above the court is of the view that the case is not unarguable on the face of it, it is not annoying and indeed raises issues for consideration.

Having come to the above conclusion the court cannot therefore make the drastic action sought by the defendant and dismissed the defendant's application with costs.

Dated and delivered at Nairobi this 14th day of May, 2009.

ALI- ARONI

JUDGE