REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 657 of 2006

BRITE PRINT (K) LTD……..…1ST PLAINTIFF

GEORGE MAINA KINGORI...……..……2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The plaintiffs brought this application under the provisions of **Order VI Rule 13 (1) (b) (c) & (d)** of the **Civil Procedure Rules** seeking an order of this court to have the defence filed by the defendant struck out and judgment be entered for the plaintiffs as prayed in their plaint. The plaintiffs further prayed for an order to have the case listed for formal proof. The plaintiffs contend that the defence filed by the defendant was scandalous, frivolous, vexatious and an abuse of the due process of the court. They urged the court to enter judgment against the defendant so that time may be saved and also to avoid unnecessary litigation. The application is supported by the annexed affidavits of the 2nd plaintiff, George Maina Kingori.

In brief, he deponed that he was advanced a sum of KShs.700,000/= by the defendant. He charged his parcel of land being LR. No. 209/38/51 as security. He deponed that he diligently repaid the said loan amount advanced until October, 2003 when he requested the defendant to allow him to sell the charged property to enable him pay off the debt owing and utilize the remainder to undertake construction of a building. The 2nd plaintiff swore that the defendant accepted his request. He advertised the charged property for sale. The sale could not be concluded due to the defendant's failure to release the title in respect of the charged property. The 2nd defendant contended that he was prejudiced by the defendant's failure to release the said title when the same was required to enable it to be transferred to the purchaser. He deponed that the defendant could not therefore have a defence or an explanation for its refusal to release the said title in respect of the charged property.

The application is opposed. The defendant filed grounds in opposition to the application. It contended that the application canvassed by the plaintiffs was fatally defective and an abuse of the process of court as the same was filed after another similar application dated the 19th April, 2007 had been irregularly withdrawn contrary to provisions of **Order XXIV** of the **Civil Procedure Rules**. The defendant stated that its application filed on the 9th November, 2007 should be given priority and heard first. The defendant further contended that the application was fatally defective for want of compliance with the provisions of **Order L Rule 15 (2)** of the **Civil Procedure Rules.**

At the hearing of the application, Mr. Ochich reiterated the contents of the plaintiffs' application and submitted that the defence filed by the defendant did not disclose any reasonable grounds but consisted of mere denials and should therefore be struck out. He submitted that the subject matter of the suit was a title to a property which was charged to the defendant. He maintained that the plaintiffs had repaid the amount which had been advanced to them. He urged the court to ignore the argument made by the defendant that the plaintiffs' application was incompetent on the basis of previous application which had allegedly been unprocedurally withdrawn. He urged the court to find the application meritorious.

Mr. Makori for the defendant opposed the application. He submitted that the present application was filed contrary to mandatory requirement of **Order XXIV Rules 1 & 2** of the **Civil Procedure Rules**. He explained that such withdrawal could only be made by consent of the parties. He submitted that the application was consequently incompetent and should be struck out. On the merits of the application, Mr. Makori submitted that the defendant had filed an application to amend its defence to reflect the fact the plaintiffs still owed it money. He maintained that it would be draconian for the court to strike out the defence before giving the defendant an opportunity to amend its defence. He urged the court to dismiss the application with costs.

I have carefully considered the rival submission made before me by counsel for the plaintiffs and counsel for the defendant. The issue for determination by this court is whether the plaintiff established a case to enable this court strike out the defence filed by the defendant. Before this court can strike out any pleadings, it must be satisfied that such pleadings plainly and obviously fails to disclose any reasonable cause of action or that the same has been deliberately filed to delay the just determination of the suit. In **DT Dobie & Co (Kenya) Limited –vs- Muchina [1982] KLR 1** at page 9 Madan J. A. held that:

"*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*"

In **Fremar Construction Co. Ltd –vs- Minakshi Navin Shah CA Civil Appeal No. 85 of 2002** (*Nairobi*) (*unreported*) the Court of Appeal held at page 7 of its judgment that:

"*This Court has stated many times before, and the learned Judge of the superior court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules, and exists inherently, for the court in the interests of justice to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process. A defence which is a sham should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit.*"

In the present application, it was the plaintiffs' contention that the defence filed by the defendant consistent of mere denials and was therefore a sham. The plaintiffs urged the court to strike out the defence filed by the defendant because in their view the same was meant to delay the expeditious determination of the suit. On its part, the defendant submitted that it should be given a chance to defend the suit because it intended to amend its defence to show that the plaintiffs still owed it money. It was the defendant's case that the plaintiffs' application was incompetent having been filed contrary to the law. The thrust of the plaintiffs' application was that the defence filed by the defendant did not address the weighty and substantial issues raised by the plaintiffs in its plaint.

I have looked at the statement of defence filed by the defendant. It is clear to this court that the same consists of mere denials. However, the defendant has filed an application seeking to amend its defence. It appears that the said defence was filed when the defendant was not sure whether it had the documents sought by the plaintiffs in its suit. It is apparent that the defendant later found the documents sought by the plaintiffs. The defendant further discovered that it was owed money by the plaintiffs. It intends to amend its defence to reflect this reality. This court will not shut out the defendant from the seat of justice by exercising its draconian jurisdiction of striking out pleadings unless it established that such pleadings are a sham and were filed purposely to frustrate the just determination of the suit. In the present case, the defendant persuaded me that it will have a good defence particularly after amending its pleadings to reflect its allegation that the plaintiffs still owed it money. In the affidavit in support of the plaintiffs' application, the 2nd plaintiff does not deny the plaintiffs owe money to the defendant. The plaintiffs' main complaint was that they were prevented from selling the suit property at an appropriate time and they would therefore be unjustly penalized by being charged interest by the defendant. In the circumstances of this case therefore, it is my opinion that this is not one of those cases where the defence can be struck out.

In concluding this ruling, I would like to address the issue which was raised as regard the propriety of the plaintiffs canvassing the present application in light of their withdrawal of a similar application which had earlier been filed and which was dated 19th April, 2007. I agree with the argument made by the defendant that a suit can only be withdrawn by written consent of the parties if such suit has been set down for hearing (see **Order XXIV Rules 1 & 2 of the Civil Procedure Rules**). However, in the present suit, the plaintiffs withdrew their application to strike out the defence filed by the defendant. I am of the humble opinion that the provisions of **Order XXIV Rules 1 & 2** of the **Civil Procedure Rules** only apply to withdrawal of suits and not to withdrawal of applications. The defendant's objection to the plaintiffs' application on that ground of incompetence is therefore misconceived. This court correctly determined the present application on its merits.

In the premises therefore, for the reasons stated above, the application by the plaintiffs is for dismissal. It is hereby dismissed with costs to the defendant.

DATED at **NAIROBI** this **5th** day of **MARCH, 2008.**

L. KIMARU

JUDGE