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

Civil Case 90 of 2004

JAYANTILALA JIWABHAI PATEL…….. PLAINTIFF

VERSUS

M. J. VEKARIA ELECTRIC LIMITED……..…..…DEFENDANT

RULING

This is an application by the Plaintiff to strike out the amended defence and counter claim filed and served herein by the Defendant pursuant to a consent order of 30th October 2006 and as a result for judgment to be entered for the Plaintiff in the sum prayed for in the plaint dated 13th February 2004. The application is expressed to be brought under Order VI rule 13(b)(c) and (d) and 14 of Civil Procedure Rules and Section 3A of Civil Procedure Act.

The grounds for this application are set out on the face of the application. In summary the grounds are that the amended defence and counter claim both as annexed to the application to amend and as filed in court on 31st October 2006, were not signed as required under Order VI rule 14 of Civil Procedure Rules. Further that the filing of the Amended Defence and counterclaim replaced the earlier Defence and counter claim and therefore the Defendant had no defence on record. The application is opposed. The Respondent's Advocate filed a replying affidavit in which he depones that as per the consent order, the Draft Amended Defence was to be deemed to be duly filed upon payment of requisite fees and that the court fees were paid on 10th November 2006, when the amended defence and counterclaim was filed. The Application was canvassed before me by Mr. Nyachoti for the Plaintiff/Applicant and Mr. Ibrahim for the Respondent. Mr. Nyachoti's submission were to the effect that the parties entered a consent order on 30th October 2006 allowing the Defendants application dated 4th October 2006 to amend it's defence and counter claim. It is Mr. Nyachoti's submission that as per the consent order the draft amended defence was deemed to be duly filed and served and in the circumstances the Draft amended defence annexed to the Defendant's application was deemed to be filed as of 30th October 2006. The Draft Amended defence was however unsigned. Mr. Nyachoti's submission was that the Amended Defence filed by the Defendant on 31st October 2006 was a nullity for two reasons; one, since there already was an Amended Defence on record, and secondly for reason that the latter was unsigned. Mr. Nyachoti submitted further that the Amended Defence filed by the Defendant upon receipt of the current application as a nullity as filing it blatantly flouted the process and that it was intended to preempt this application.

Mr. Ibrahim on the other hand contended that the consent entered by the parties gave leave to the Defendant to amend its defence and that the Amended Defence could only be deemed to be duly filed upon payment of the requisite fees. Mr. Ibrahim submitted that the draft Amended Defence could not therefore be deemed to be the Amended Defence as no fees had been paid on 30th October 2006 when it

was filed. Mr. Ibrahim further submitted that the Amended Defence on record on 31st October 2006 could also not be deemed to be duly filed as the same was provided to the registry for purposes only of assessing court fees. Mr. Ibrahim pointed to calculations made by the court registry on the copy of the Amended Defence as proof of this. Mr. Ibrahim submitted that the Amended Defence filed on 10th November 2006 is the one which can be regarded as the filed Amended Defence as it was the only one for which court filling fees were paid. The issues which emerge from the submissions by counsel are:-

One what were the terms of the consent order?

Two which of the Amended Defence and counter claim on record was filed in compliance to the consent order and whether it was a valid one.

Three whether judgment should be entered in favour of the Plaintiff on grounds:-

a) There is no defence on record; and or

b) If there is a defence it is scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of the Court.

No submissions were made for or against the latter but since the application invoked Order VI rule 13 (b) (c) and (d) suggests that relief was also sought on the basis the defence could not be sustainable on the merits under the said rule. It is necessary at this stage to set out a brief background of the case.

This suit was commenced on 16th February 2004 when the Plaintiff filed his plaint. It is a claim in money with interest for contractual services rendered and for damages for breach of contract.

The Defendant filed its defence and counter claim on 22nd March 2004 denying the allegations in the plaint and in particular denying it owes any sums of money to the Plaintiff. In the alternative the Defendant pleaded a counterclaim and set off for excess monies paid as VAT and further for prorata cost for telephone and secretarial services rendered to the Plaintiff and financial loss suffered by the Defendant.

The Plaintiff did file a Reply to the Defence and counter claim on 16th April 2004 to which the Defendant replied on 14th May 2004.

The parties thereafter promptly filed their list of documents and also a statement of agreed issues. It is after all these events that the Defendant applied to amend its defence and counterclaim culminating with the instant application. Upon filing the application to amend the defence on 5th October 2006, the parties entered into a consent order before **Kasango, J** on 30th October 2006 in the following terms.

a) The defendant is hereby granted leave to amend its defence as per annexed draft defence.

b) The annexed draft defence be deemed as duly filed and served upon payment of requisite fees.

c) Plaintiff be at liberty to reply to amended defence within 7 days.

d) Costs of chamber summons dated 4th October 2006 be to the Plaintiff.

That was the consent agreement of the parties which bring me to my first observation that the consent order set out by the Plaintiff in the application, in the grounds on the face of his chamber summons application as paragraph (c)(ii) is incomplete as it ended prematurely going by the consent order entered in court. The difference between the two is that as far as the Plaintiff understood it, the consent order deemed the Draft Amended Defence and counter claim annexed to the application as dully filed and served. However, the consent order on record had a condition pegged to that part of the consent which is that the annexed amended defence and counterclaim would be deemed to be duly filed and served upon

payment of requisite fees. (Emphasis are mine). The Plaintiff had the wrong impression of the consent order which fundamentally affects the parties arguments. The Draft Amended Defence could not be deemed to be duly filed and served until the requisite court fees for filing it were duly paid.

I note from the filling fees receipt that the amount of Kshs.475/= paid by the Defendant when filing this application on 5th October 2006 was the costs of the fees for the application itself and that those costs did not include the court fees for filing of the amended defence. In other words the amended defence annexed to the application was not paid for and therefore could not be deemed to have been dully filed on 30th October 2006.

I see from the record that the Defendant did file an Amended defence and counter claim on 31st October 2006. The Defendant also paid for its filing fees of Kshs.75/= and the receipt is annexed to it dated the same day. There is nothing in the rules that stops a Defendant from filing a fresh amended defence after leave is granted by the court to amend the pleading in addition of the one annexed to the application. Infact Mr. Nyachoti did not raise that issue at all in his submission. This brings me to my second observation which is that Mr. Ibrahim's explanation that no Amended Defence was filed on 31st October 2006 as no fees was paid for it to court is incorrect. There was a filing and a payment of requisite fee on 31st October 2006 and therefore the Defendant's Amended Defence and counter claim as filed and paid for is the one stamped by the court as received on 31st October 2006. This defence was also in my opinion the one filed in compliance to the consent order of 30th October 2006 and not the one annexed to the application for seeking leave to amend as Mr. Nyachoti argued. The question is whether the one filed on 10th November 2006 as Mr. Ibrahim argued was properly on record. I will get to that point later. The next issue is whether the Amended Defence filed on 31st October 2006 was a valid defence. As already stated the Amended statement of defence filed on 31st October 2006 was not signed. Mr. Nyachoti relied on the Court of Appeal case of **SHAH & ANOTHER** vs **INVESTMENTS MORTGAGES LIMITED [2001]** KLR 190 to support his contention that an unsigned defence is invalid. In that case**, Omolo, Bosire** and **O'Kubasu JJA** held thus:-

1) The object of the legislator in requiring that a plaint be signed either by counsel or the party suing or filing any other pleading is to make the party take ownership and responsibility for the contents of the plaint or pleading.

2) If a plaint is not to be signed as required by Order VI rule 14, then there would not be any use for the law to require that the plaint should contain an averment that there are not and has not been any court proceedings between the parties on the same subject matter and to be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in it (Order VII rule 1(e) and rule 2)."

Mr. Ibrahim on the other hand has sought to distinguish the Shah's case, Supra, with the instant case on grounds the pleading in issue in the cited case was the original plaint and that in the suit there were two plaints, one signed and one unsigned. I agree with Mr. Ibrahim that Shah's case, Supra, does not fit the facts of the instant case and is therefore distinguishable from this case.

Mr. Nyachoti also relied on the High Court case of MUTUKU & OTHERS vs UNITED INSURANCE CO. LTD [2002] KLR 250 to support his contention that in law an unsigned pleading is not valid and should be struck out and further that an amended defence replaces the previous one. In Mutuku's case, Supra, Ringera, J as he then was held thus:-

1) An unsigned pleading cannot be valid in law. It is the signature of an appropriate person which authenticates a pleading and an unauthenticated document is not a pleading of anybody. It is a nullity.

2) Where a pleading has been amended and the same has been struck out, the party affected has simply no valid pleading left on record.

3) The effect of an amended defence is to supersede and replace the original defence.

4) The further amended defence was a nullity as it purported to amend the amended defence which was a nullity.

Mr. Ibrahim sought to distinguish Mutuku case, Supra with instant one by arguing that the cited case went further to determine the application to strike out defence on basis Order VI rule 13. Counsel submitted that Mr. Nyachoti made no submission in support of Order VI rule 13 even though cited. Mr. Ibrahim has on his part relied on two High Court decisions to propagate two points, one that where a party files an unsigned pleading, parties reverts back to the original pleading; and

Two that powers to strike out a pleading are discretionary and that a court should work at sustaining a suit.

For the first preposition Mr. Ibrahim relied on the MILIMANI HIGH COURT CIVIL CASE NO. 91 OF 1998 FIDELITY COMMERCIAL BANK VS WORLDIN TOURS & TRAVEL LTD. & ANOTHER by Ibrahim, J where he states:-

"Should the court now dismiss the Plaintiff's suit or can the Plaintiff rely on the Original Plaint as a valid Pleading? I have considered the submissions of Counsel and the ratio deciddendi in the cited case of Regina Kavenya Mutuku.

I think that strictly the facts of the said case are distinguishable from those in this case.

This provisions strenghthens the striking out of the so-called "Amended" albeit on a different ground. The Plaintiff herein having filed an unsigned pleading never amended the plaint and/or complied with the order for leave. In law it did nothing and the said order ceased to have any effect.

To this court, the pleadings and record then reverted to the original position, the status quo ante. The original Plaint is still on record, and was never set aside or struck out by the filing of the so called Amended Plaint as submiited by the Plaintiff's Counsel. The Plaintiff is entitled to rely on the said original Plaint whatever it is worth, considering the attempted departure and attempted raising of new grounds of claim which appear inconsistent with the said original and now only plaint by the Plaintiff in the same suit."

Nyachoti was a different view. Learned counsel submitted that the cited case was different from the instant case in that in the latter, parties entered a consent to validate a pleading. I will get back to this later. The second case that Mr. Ibrahim relied on is the case of GEORGE P. B. OGENDO VS JAMES NADASA & OTHERS KAKAMEGA HCCC NO. 91 OF 2002 in which G. B. M. Kariuki, J observed thus:-

"It is necessary in determining the application to examine first how the power conferred on the court by Rule 13(1) should be exercised and secondly the principles that should be considered and applied before the court invokes and exercises that power to strike out. It was in D. T. Dobie & Co. (K) Ltd. Vs Muchina (1982) KLR 1 that the Court of Appeal in an obiter dicta by Madan JA, as he then was, expressed the view that "the power to strike out should be exercised only after the court has considered all facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge." He further stated that "the court should aim at sustaining rather than terminating a suit." He expressed the view that " a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment and that as long as a suit can be injected with life by amendment, it should not be struck out." These views apply mutates mutandis to the striking of a pleading. It goes without saying that Rule 13(1) (supra) is drastic and implies summary procedure. It is for that reason that the policy of the court is that only "in plaint and obvious cases should recourse be had to it." If any emphasis was required see the judgment of (Solomon L J in Nole vs Fielden (1966)2 B633 at p.643-651 in which he held that the summary remedy under this rule should be invoked in plain and obvious cases where, in the case of striking out of a suit, it is one which cannot succeed or is unarguable or in striking out generally, a pleading is found to be clearly an abuse of the process of the court.

It is important to also point out that the power conferred on the court by Rule 13(1) (supra) is discretionary and it has been held that it should be exercised where the case is beyond doubt (see Lindsay L. J in Kellaway vs Bury (1982) 66 L. T. 599 at page 602. Before exercising it, the court must be satisfied that the defences raised are not arguable (see waters vs Sunday Pictorial Newspapers (1961) I. W.L.R 967; (1961) 1 AAL ER 758 CA). In Nagle vs Felder, Dankwerts and Solomon LJJ held that the summary remedy under the English equivalent of our Rule 13(1) in Order VI is only to be implied in plain and obvious cases where the defence or the action cannot succeed or is in some way an abuse of the process of the court or the case is unarguable. That then seems to be stance taken by the courts in relation to Rule 13(1) of Order VI."

My Nyachoti submitted that Ogendo case, Supra, was not applicable. I agree with him that the Ogendo case addressed the issue of striking out pleadings for reasons set out under Order VI rule 13(1) of Civil Procedure Rules. There was no issue of any pleading flouting the provisions of Order VI rule 14 of Civil Procedure Rules as in this case. I have no quarrel with observations made by Kariuki, J in his judgment concerning striking out of pleadings. The decision set out the principles that should be applied in considering an application made under the said rule. The instant case involves that same rule and in addition the application herein relies also on Order VI rule 14 of Civil Procedure Rules.

Going back to the issues before me the Amended Defence and counter claim filed by the Defendant on 31st October 2006 was invalid for reason it was unsigned. As observed by the Court of Appeal in Shah's case, Supra, and by this Court in Mutuku case, Supra, an unsigned pleading is no pleading not only for flouting the rules under the Civil Procedure Rules but also for the fact that the party filing it takes no ownership or responsibility for its contents therefore reducing the pleading to a mere piece of paper. That is the position of the Defendant's Amended Defence filed on 31st October 2006. The issue does not however end there. Unlike all the cases cited by counsels, in the instant case, the Defendant filed a duly signed Amended Defence on 12th November 2006. Mr. Ibrahim has urged the court to find that that Amended Defence was valid and should be accepted as it was filed within 14 days from date the court granted the Defendant leave to amend his pleading. Nyachoti drew the court's attention to Ringera, J's observations at page 254 of the Mutuku case, Supra, where the learned Judge, as he then was observed:-

"The next matter for consideration is whether the Defendant's amended defence having been struck out, the Defendant can rely on the original defence as a valid pleading.

I confess that is not an easy point in the circumstances of this matter. I think the answer turns on whether or not a party whose amended pleading has been struck out is entitled to rely on the original pleadings on record. The advocates did not address me on this point. And I am afraid there is no rule to the point. The nearest guidance is in Order VI rule 1(6) which is to the effect that where a party has pleaded to a pleading which is subsequently amended and served on him without leave of the Court before the closure of pleadings, he shall be taken to rely on his original pleading in answer to the amended one if he has not amended the same. That rule is obviously in applicable where, as here, the party has been served with a pleading amended pursuant to the order of the court and has actually filed his own amended pleading thereto. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record. The effect of an amended defence in my judgment is to supersede and replace the original defence with the amended one for the purpose of determining what facts are admitted or traversed, as the case may be, and therefore what issues are joined for trial. But that is of course subject to the rule that the amended pleading relates back in point of time to the date of the filing of the original one. Having taken that view of the matter, I find that the defendant has no valid defence on record. In the premises, it would be idle of me to enter into any consideration of whether or not any of the matters raised in the invalid defence by the defendant raises any bona fide triable issues."

In the Mutuku case, the Defendant filed an unsigned amended Defence and later filed a further amended defence to amend the unsigned one. The judge held that the amended defence was a nullity as it was not authenticated by signing and in the premises it could not have been amended thus the further amended defence was also a nullity.

Ringera, J found that since upon service of the amended defence the Plaintiff has filed an amended plaint, the striking out of the amended defence left the Defendant with no pleading on record as the amended defence had replaced the original pleading in the instant case I think the situation is a little different. Order VI A rule 6 of Civil Procedure Rules provides thus:-

"*Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.*"

The order of **Kasango, J** granting leave to the Defendant to file an amended defence did not specify the time within which the Defendant was to amend his defence. The Defendant should have filed his defence within the period specified in the rules which is 14 days. The 14 days did not end until the 12th November 2006 which means that the Amended defence filed on 12th November 2006 was filed within time. My view is that since the Plaintiff had filed no pleadings in answer to the Amended Defence filed before 12th November 2006 the effect is that the striking out of the amended defence filed on 31st October 2006 will leave the Defendant with the subsequent amended defence filed on 12th November 2006. The Defendant could not revert back to the original pleading as that had been replaced by the amended defence on record. I think that as long as the Defendant filed his amended defence within the time stipulated under the rules, in advance of any specified period by the court, the pleading so filed could not be ignored. Since the decision is strike out a pleading is discretionary and being satisfied that no prejudice is suffered by the Plaintiff which cannot be compensatable by an award in damages; further there being on rule preventing the filing of a valid pleading to replace an invalid one as long as the same is filed within time. I am of the view that the Defendants Amended Defence filed on 12th November, 2006 should not be struck out.

I will dismiss the Plaintiff's application but order the Defendant to pay thrown away costs and costs of this application.

Dated at Nairobi this 21st day of September 2007.

LESIIT, J.

JUDGE

Read, Signed and Delivered in the presence of:-

N/A for application

Ibrahim for Respondent

LESIIT, J.

JUDGE