

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 271 of 2006

ELIAS NGUGI NG'ANG'A1ST PLAINTIFF

VERSUS

JOSEPH KIARIE MBUGUA 1ST DEFENDANT

FARMERS INDUSTRIES LIMITED2ND DEFENDANT

BWANJI LIMITED.....3RD DEFENDANT

J U D G M E N T

On 25.5.2006, the plaintiff filed a plaint in this suit and seeks against the defendants a liquidated claim of KShs.6,219,621.00 together with costs and interest. The plaintiff avers that the said sum comprise taxed costs for professional services rendered in High Court Civil Case No.55 of 2000 – Nairobi and the interest is claimed from the date of taxation which was done on 14.11.2003 vide High Court Miscellaneous Application No.492 of 2003 Nairobi.

On 20.7.2006 the defendants filed a joint defence. In paragraph 2, of the said defence it is pleaded that the sum claimed together with interest is not payable to the plaintiff as the said High Court Miscellaneous Application No.492 of 2003 at Nairobi is the subject of an Appeal in the Court of Appeal at Nairobi. In paragraph 3 it is averred that the plaintiff was paid all the money for professional fees demanded and therefore there is nothing owing to the plaintiff as per the oral agreement entered into between the plaintiff and the 1st defendant on behalf of the other defendants and in paragraph 4 the defendants aver that HCCC No.55 of 2000 is still pending and the defendants shall at the appropriate time counter-claim for general damages against the plaintiff for not attending court while still on record for the defendants whereof adverse orders were made by the High Court against the defendants thus prejudicing the defendants' case.

The plaintiff now moves this court by way of Chamber Summons dated 21.7.2006 for one primary order that the said defence filed on 20.7.2006 by the defendants be struck out and judgment be entered against the defendants in favour of the plaintiff as prayed for in the plaint. The application is expressed to be brought under the provisions of Order VI Rule 13 (b) (c) and (d) of the Civil Procedure Rules. The grounds for the application are: that the defence is a mere sham or scandalous, frivolous, vexatious and intended to delay the completion of this matter; that the defendants are truly indebted to the plaintiff to the tune of the taxed costs and accrued interest and that the defence is an abuse of the process of the court.

The application is supported by an affidavit sworn by the plaintiff on 26.7.2006. To the said affidavit are annexed a Certificate of Taxation dated 23.5.2005 and an incomplete record of a ruling on a reference against taxation in High Court Miscellaneous Application No.492 of 2003. It is however deponed in paragraph 8 of the said affidavit in support that a reference against the said taxation was dismissed on 4.11.2004.

The application is not resisted on the basis of any Grounds of Opposition or Replying Affidavit.

However, I allowed counsel for the defendants to respond to the submissions of counsel for the applicant on issues of Law. When he rose to respond, counsel submitted that the proceedings were instituted in the name of the wrong party since the proceedings in High Court Miscellaneous Application No.492 of 2003 were in the name of E. N. Nganga and Company Advocates. Counsel further reiterated that a Notice of Appeal had indeed been filed against the ruling on the defendant's reference.

I have considered the pleadings, this application, the supporting affidavit and the annexures thereto. I have also considered the submissions of learned counsels. Having done so, I take the following view of this matter. The plaintiff's claim against the defendants is founded on a certificate of taxation which has not been set aside or altered. Indeed a reference filed against the taxation was dismissed. The intended appeal against the order refusing the reference cannot in my view amount to a good ground of defence to the plaintiff's claim. It is also not a defence to state that the suit in which the costs were earned by the plaintiff is still pending. In my view if the defendants had any valid claim against the plaintiff they would have set up a counter-claim against the plaintiff. In any event the fact that the defendants may have a counter-claim against the plaintiff would not amount to a valid defence to the plaintiff's claim. Indeed, the orders sought herein by the plaintiff cannot be a bar to the defendant's mounting of their own claim against the plaintiff in a separate suit. What would have amounted to a valid ground of defence in my view is the defendant's averment in the statement of defence that the plaintiff has been paid all the money for professional fees demanded. But evidence of that payment should have been furnished in response to this application. Instead the defendants chose to file nothing in response. The submission of counsel for the defendants that the plaint has been filed in the name of the wrong party is in my view not serious at all. I am fortified in this view by the fact that the *locus standi* of the plaintiff to mount this claim is not challenged in the statement of defence.

In view of the defendants' failure to answer the claim made by the plaintiff in this application, the evidence contained in the plaintiff's supporting affidavit stands unchallenged and in the circumstances, I will accept it as representing the actual position regarding the claim. That evidence shows that the plaintiff rendered professional services to the defendants in Nairobi HCCC No.55 of 2000. The cost of those services were taxed in the sum of KShs.6,219,621.00 and the Taxing Master of this court issued a Certificate of Taxation to that effect. That Certificate has not been altered or set aside the Notice of Appeal notwithstanding. All these mean in my view that the respondents' defence is a sham and frivolous defence. And a defence which is a sham and frivolous one can vex the plaintiff and may prejudice embarrass and delay the fair trial of this action.

In the end although striking out a pleading is a drastic remedy to be exercised only in plain and obvious cases, I consider this to be such a case and accordingly order that the defendants' defence be and is hereby struck out with costs. I further order that judgment be and is hereby entered for the plaintiff as prayed in the plaint plus costs and interest as also prayed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2006.

F. AZANGALALA

JUDGE

27.10.2006

Read in the presence of: