



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

Civil Case 2914 of 1995

PAN AFRICAN BANK LIMITED..... PLAINTIFF

VERSUS

GULMAREBA LIMITED.....1ST DEFENDANT

SHAMAS CHARANIA..... 2ND DEFENDANT

MULTIPLE INDUSTRIES LIMITED.....3RD DEFENDANT

RULING

I have before me an application to strike out the suit as against the 2nd defendant. The application is expressed to be under Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. There are grounds for the application in the body of the application and in the supporting affidavit of the 2nd defendant sworn on 4.7.2005.

The application is opposed and there are grounds of opposition and a replying affidavit sworn by one Leah Aida Wambete the Liquidation Agent of the plaintiff sworn on 28.10.2005.

The application was canvassed before me on 28.7.2006 and 26.9.2006 by Mr. Nyachoti Learned counsel for the 2nd defendant and Mr. Gitonga Learned counsel for the plaintiff. Counsel for the 2nd defendant took me through the said affidavits and primarily contended that the guarantee upon which the plaintiff's claim was founded had been discharged pursuant to an agreement between the 2nd defendant and the plaintiff through its chairman. And further that even if the guarantee did exist despite the said agreement, the 2nd defendant had been released from the guarantee by breaches committed by the plaintiff. In the premises according to the 2nd defendant the suit is scandalous, frivolous, vexatious and an abuse of the process of the court as against the 2nd defendant and should be dismissed with costs.

Counsel for the plaintiff on his part contended that the agreement between the 2nd defendant and one Mohamed Aslam relied upon by the 2nd defendant to show the alleged discharge from the guarantee, was a personal agreement between the said Mohamed Aslam and the 2nd defendant and had no effect with regard to monies advanced by the plaintiff to the 1st defendant and did not discharge the 2nd defendant from the guarantee. Counsel further contended that the amended plaint and the affidavits filed in this application raise several issues that should go to trial. Counsel identified some of the issues as whether or not the agreement between the 2nd defendant and the said Aslam would bind the plaintiff and whether or not the guarantee given by the 2nd defendant had been discharged in view of the plaintiff's contention that the said guarantee was a continuing guarantee and also in the light of the fact that the 2nd defendant sold

shares to the said Mohamed Aslam to which sale the plaintiff was not a party. Counsel further took issue with the late presentation of this application when pleadings are closed and issues joined. In counsel's view, the issues between the plaintiff and the 2nd defendant can only be determined on evidence at a trial.

Both advocates placed reliance upon various authorities in support of the positions taken by their respective clients and I am grateful to them for their industry.

I have considered the application, the grounds thereof, the affidavits both in support and in opposition, the grounds of opposition and the annexures. I have also considered the able submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. Order VI Rule 13 subrule (1) (b) of the Civil Procedure Rules, gives the court discretion at any stage of the proceedings to strike out or amend any pleading on the ground that it is scandalous, frivolous and vexatious and subrule (1) (c) gives similar discretion if any pleading is likely to prejudice, embarrass or delay the fair trial of the action while subrule (1) (d) gives the court discretion to strike out or amend any pleading that is an abuse of the process of the court.

So, should the plaint be struck out as against the 2nd defendant on the ground that it is scandalous, frivolous or vexatious? As correctly appreciated by counsel for the 2nd defendant, a frivolous matter is one which is not serious and a vexatious one would tend to annoy. A scandalous pleading would be one that would not be admissible in evidence such as making an imputation on character when character is not in issue.

I have read the amended plaint sought to be struck out as against the 2nd defendant. I confess I have not detected any averment that can be said to be scandalous as I understand that term. There is no imputation on the character of the 2nd defendant. I cannot therefore strike out the plaint on the ground that it is scandalous. Is it frivolous or vexatious? Despite the detailed submission made by counsel for the 2nd defendant on this point, my reading of the plaint does not detect any averment that can be described as frivolous or vexatious. The affidavit evidence on record in my view disclose serious issues of Law with respect to the agreement between the 2nd defendant and the said Mohammed Aslam. The plaintiff's claim as against the 2nd defendant is based on a continuing guarantee. The 2nd defendant's position is that by an agreement made between him and the said Mohammed Aslam, he was discharged and released from the guarantee upon which the plaintiff's claim is based. The plaintiff's position is that that agreement was not entered into by the said Mohammed Aslam on behalf of the plaintiff. The issue that springs to mind is whether the said Mohamed Aslam as the then Chairman of the plaintiff could in Law commit the plaintiff in view of the well known Company Law position that a corporate entity has separate legal existence from its members and Board members acting in their personal capacity. The controversy with respect to the agreement between the said Mohammed Aslam and the 2nd defendant cannot in my view be resolved on the affidavit evidence on record.

The second limb of the 2nd defendant's argument with respect to the guarantee was that even if the guarantee may not have been discharged by the said agreement, the actions or omissions of the plaintiff have discharged the 2nd defendant from the guarantee. The plaintiff on the other hand argues that the guarantee executed by the 2nd defendant was a continuing guarantee that could not be discharged by the actions or omissions stated by the 2nd defendant. The controversy is in my view one of fact and Law each side giving the guarantee the interpretation that is favourable to it. In the circumstances I am of the view that the disputed averments of law and fact can only be resolved by the trial court after *viva voce* evidence. I cannot therefore strike out the plaint for being frivolous or vexatious.

Having found that I cannot strike out the plaint on the grounds that it is scandalous, frivolous or vexatious, it is obvious that I cannot also strike it out for being an abuse of the process of the court as I have found that there are issues of both Law and fact that will require viva voce evidence for a conclusive decision thereon. The issues identified herein are not the only issues that the parties are bound to frame. Their counsels are best placed to frame the same.

Finally, can the plaint be struck out as against the 2nd defendant on the ground that it may prejudice embarrass or delay the fair trial of the action? My findings above obviously suggest a negative answer. As Ringera J as he then was said in **Lynette B. Oyier and Others –vs – Savings and Loan Kenya Limited: HCCC No.891 of 1996 (UR)**:

“The function of the court in its jurisdiction of striking out pleadings under Order VI rule 13 of the Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed at the trial. That is the function of the trial court after hearing evidence and legal submissions. The function of the court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated

In Bullen and Leake’s Precedents of pleadings (12th Edition 1975) the learned editors in discussing the power to strike out a pleading which tends to prejudice embarrass or delay the fair trial of an action state

‘The power is designed to prevent pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties and to ensure, a trial on fair terms between the parties in order to obtain a decision which is the legitimate object of the action’.”

In the case at hand I cannot describe the plaint as drawn against the 2nd defendant as tending to embarrass prejudice or delay the fair trial of this action.

Before concluding this ruling, I have been rather concerned with the timing of this application. This suit was filed in 1995. The 2nd defendant has been a party right from inception of the suit. Yet it has taken him ten (10) years to determine that the plaint against him should be struck out under the provisions of Order VI Rule 13(1) (b), (c) and (d) of the Civil Procedure Rules. I am aware that a party is entitled to move the court at any stage of the proceedings. That notwithstanding, in my humble view a delay of 10 years to bring such an application where circumstances have remained the same would not excite the exercise of the court’s discretion in favour of the applicant. Indeed it should not be encouraged.

The upshot of this matter is that the 2nd defendant’s application has no merit and I dismiss it with costs to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2006.

F. AZANGALALA

JUDGE

26.10.2006

Read in the presence of: