



**Kinyanjui v Infpac Limited (Civil Case E315 of 2022)
[2024] KEHC 62 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 62 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E315 OF 2022
JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

JAMES KINYANJUI PLAINTIFF

AND

INFAC LIMITED DEFENDANT

RULING

1. Before this Honourable Court for determination is the Defendant's Notice of Motion application dated 5th December 2022 brought under Article 159(2)(b) of the *Constitution* of Kenya, 2010, Sections 1A(1) & (2), 1B and 3A of the *Civil Procedure Act*, CAP 21 Laws of Kenya, Order 2 Rule 15(1)(a), (b) and (d) of the *Civil Procedure Rules*.
2. The Defendant has moved the Court seeking an order to strike out the Plaintiff's plaint dated 1st August 2022. The grounds upon which the application is premised include that the plaint dated 1st August 2022 does not disclose a reasonable cause of action against the Defendant; that the Plaintiff has failed to prove that he obtained a loan on behalf of the Defendant and that the parties had an agreement to that effect, or that the Defendant ever received the loan as claimed.
3. The Defendant averred that none of the documents produced in support of the Plaintiff's claim substantiate his allegations therefore if this suit is allowed to proceed, he will be required to expend resources defending a frivolous and unsubstantiated claim, which is contrary to the principles of justice.
4. In opposition, the Plaintiff filed a replying affidavit sworn on 27th January 2023. In the said affidavit, the Plaintiff averred that the Notice of Motion application was incompetent and ought to be struck out for offending Order 51 Rule 4 of the Civil Procedure Rules as it was not accompanied by a mandatory affidavit.



5. The Plaintiff further averred that he had produced documents to substantiate his claim against the Defendant as evidenced in his list of documents dated 1st August 2022. That striking out a plaint is a drastic measure that should be exercised sparingly by the court as it amounts to removing him from the seat of justice unheard and that he should be allowed to prosecute his claim which raises triable issues.
6. The Plaintiff prayed to have the court dismiss the instant application as it lacks merit.

Analysis and Determination

7. Both the Plaintiff and Defendant canvassed their respective positions through written submissions which I have considered carefully alongside the pleadings. Subsequently, two issues emerge for determination by the court, to wit:-
 - i. “whether failure by the Applicant to file a supporting affidavit to the instant application renders it incompetent.”
 - ii. whether the plaint discloses a cause of action against the Defendant.
8. On the first issue of competence before the court I note that the Plaintiff’s submitted that the failure to have the supporting affidavit accompanying the instant application renders it defective therefore it ought to be struck out.
9. In its defence on the said question, the Defendant submitted that an application under Order 2 Rule 15 (2) of *Civil Procedure Rules* an Applicant only needs to set out concise grounds for seeking to strike out the Plaintiff’s claim. No evidence is required and therefore no need to attach a supporting affidavit to the Application.
10. Order 2 Rule 15(1) (a) and (2) of the *Civil Procedure Rules* states:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

 - (a) it discloses no reasonable cause of action or defence in law;

...

“(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”
11. In the Court of Appeal case of *Taj Villas Management Limited v Taj Mall Limited* [2018] eKLR it was held:-

“Where a party opts to make an application for striking out a pleading solely under Order 2 rule 15(1)(a), Order 2 rule 15(2) denies him the right to rely on any evidence. All that such a party is required to do is state concisely the grounds on which the application is founded.”
12. Guided by the provisions and authority above, I find that an application to strike out a pleading does not require to be accompanied by a supporting affidavit which would attach evidence. The Defendant who seeks to strike out the plaint filed herein, need only bring out the grounds upon which that prayer is sought in accordance with Order 2 Rule 15(1) (a) of the *Civil Procedure Act*. The court must look at the pleadings only to justify whether a cause of action has been established against the Defendant. I find therefore that the instant application has therefore been filed properly and is competent before the Court.



13. The second issue for determination is whether the plaint discloses a cause of action against the Defendant. The Defendant has adamantly maintained that the suit against does not disclose valid cause of action against it and that it constitutes an abuse of the court process.
14. The Plaintiff on his part averred that he has a cause of action against the Defendant and that the plaint as filed raises triable issues which should be allowed to be canvassed through a full hearing of the case. He also attached a list of documents upon which he seeks to rely on to prove his case.
15. Order 2 Rule 15(1)(a) of the *Civil Procedure Rules* states that:-

“at any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law...and may order the suit to be stayed or dismissed or judgement to be entered accordingly as the case may be.”
16. The question that the Court needs to determine in the instant suit is what therefore constitutes a reasonable cause of action? In the case of *D.T Dobie & Co.Limited v Joseph Mbaria Muchina & another* [1980] eKLR, it was held:-

“No exact paraphrase can be given but I think a reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the plaint are considered...A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...A cause of action is an act on the part of the Defendant which gives the Respondent his cause of complaint.”
17. I note that the Plaintiff instituted this suit against the Defendant vide a plaint dated 1st August 2022. In the plaint, the Plaintiff claimed the sum of Kshs.40,000,000/- from the Defendant being an amount due and owing from an advancement to the Defendant by RTGS.
18. The Plaintiff asserted that at the request of the Defendant, he received a sum of Kshs.45,000,000/- from Paramount Chief Estate Limited from which he advanced the sum of Kshs.40,000,000/- to the Defendant. That he was repaying the loan to the said company, Paramount Chief Estate Limited despite the fact that it was the Defendant who received it. Due to the foregoing claims, the Plaintiff filed the present suit seeking for judgement against the Defendant for the sum of Kshs.40,000,000/-
19. In urging the court to find that the suit raises a cause of action the Plaintiff/Respondent has urged the court to be guided in the decision in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya* (2017) eKLR where the court stated that; “A cause of action is a factual situation the existence of which entitles one person to obtain a remedy against another person”. The Plaintiff urged the court to be also guided by the decision in *GBM Kariuki vs. Nation Media Group Limited and 3 others*(2012) eKLR where the Court of Appeal observed that “the power to strike out pleadings must be sparingly and it can only be exercised in the clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit out to go to trial.”
20. I note that the Plaintiff in his plaint has sought for judgment for the sum of Kshs.40,000,000/-, which he alleges was obtained through a loan and that he continues to service the same despite the funds have been received by the Defendant. Flowing from the facts herein and guided by the courts rulings in the above two decisions I am persuaded that to dismiss the suit at this stage would occasion the Plaintiff a miscarriage of justice as the same would amount to locking him out of the seat of Justice. I am therefore persuaded that the application to strike out the plaint lacks merit and I shall dismiss the same and allow the suit to proceed to full trial.



21. Consequently, I hold that the application for striking out the plaint is dismissed with costs to the Plaintiff.

It is so ordered

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 11th DAY of JANUARY, 2024.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

- 1. No appearance for the Applicant.
- 2. Ms. Impano for the Respondent.
- 3. Amos - Court Assistant

