



Solvochem East Africa Limited v Comform Foam Investment Limited (Civil Case E009 of 2023) [2024] KEHC 4704 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E009 OF 2023
SN MUTUKU, J
APRIL 9, 2024**

BETWEEN

SOLVOCHEM EAST AFRICA LIMITED PLAINTIFF

AND

COMFORM FOAM INVESTMENT LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 15th September 2023 (the Application), the Defendant herein has approached this Court basing his application on Articles 10, 48 and 50 of *the Constitution*, Section 1A and 1B of the *Civil Procedure Act* and Order 2 Rule 15 of the Civil Procedure Rules as well as all other enabling provisions of the law, seeking the following orders:
 - i. Spent.
 - ii. That this Honourable Court be pleased to strike out this suit/Plaint dated 17th January 2023 for it does not disclose any reasonable cause of action against the Defendant and for being frivolous, vexatious and an abuse of the process of the court.
 - iii. The costs of the suit be awarded to the Defendant.
 - iv. Any other relief that this Honourable Court will be pleased to issue in the circumstances.
2. The Application is supported by the grounds found on the face of it and in the Supporting Affidavit sworn by Vinod Kumar, who has described himself as the sole Director of the Defendant, on 15th September 2023.
3. The grounds in support can be summarized that the Plaintiff's claim is an abuse of the process of the court and a waste of time for reasons that the Plaintiff dated 17th January 2023 is based wholly on Proforma invoices issued to the Defendant and a draft Guarantee and Security agreement that is not legally binding on either party; that the Plaintiff does not have a reasonable cause of action as against



the Defendant, is frivolous and is aimed at vexing, harassing and blackmailing the Defendant to settle the matter and that the initial agreement between the parties was frustrated by the Plaintiff who refused to promptly make the requested supplies to the Defendant necessitating the Defendant to look to alternative solutions fearful of suffering losses.

4. The Application is opposed by the Plaintiff through a Replying Affidavit of Mitul Raninga, who has described himself as the Finance Manager of the Plaintiff, sworn on 14th November 2023.
5. The Plaintiff takes the view that it has a cause of action and that its claim is based on, inter alia, breach of contract; that a contract existed between the parties after the proforma invoice was executed thereby accepting the offer which formed the contract; that the Defendant further executed the Guarantee and Security Agreement and that pursuant to the said agreement the products were imported in Kenya and were awaiting delivery upon payment. The Plaintiff has asked this court to dismiss the application with costs.
6. This application was canvassed through written submissions.

Defendant's submissions

7. The Defendant has identified two issues for determination, namely:
 - i. Whether the Suit/Plaint should be dismissed for failure to disclose a reasonable cause of action and for being frivolous, vexatious and an abuse of the court process.
 - ii. Who should bear the cost of this litigation.
8. The Defendant has submitted that the claim by the Plaintiff is founded entirely on a draft agreement and a proforma invoice which are not binding. The Defendant relied on *Mamta Peeush Mahajan (suing on behalf of the estate of the late Peeush Premlal Mahajan) v. Yashwant Kumari Mahajan* (sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan [2017] cited in *Reville Independent LLC v, Anotech International (UK) Ltd* [2016] EWCA Civ 443 (Elias, Underhill LJ & Cranston J) which held that:

“.. a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicated this, albeit a court will not reach this conclusion lightly.”
9. The Defendant further submitted that a contract can be accepted by the conduct of the parties (see *Brodgen v Metropolitan Railway Company* [1876-77] L.R 2 App Cas 666 where it was held that there was a contract which came into existence after the coal was supplied and received but not earlier).
10. It was submitted that the draft guarantee and security agreement did not have the requisite elements to form a contract as a contract can only be formed in the presence of offer, acceptance, and consideration and secondly, the Defendant did not pay monies prior to the crystallization of their transaction which signaled that the deal was off. The Defendant relied on *United Millers Limited v. Nairobi Java House Limited* (2019) eKLR where the Court stated that:

“23. I am in agreement with the Defendant that where there is an ambiguity in a contract, the contract should be construed or interpreted against the party who drew it.”



11. The Defendant relied on Order 2 Rule 15 of the Civil Procedure Rules that empower the Court to strike out pleadings at any stage where they, inter alia, disclose no reasonable cause of action or defence or is frivolous, scandalous and vexatious. The Defendant relied on *DT Dobie & Co (K) Ltd v Muchina* [1982] KLR where the Court defined the term “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”
12. It was submitted that the suit is frivolous and vexatious as defined in *Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited* [2019] eKLR and stated that this suit has no substance and is made in bad faith and has no foundation.
13. On whom should bear the cost of this litigation, it was submitted that costs follow event and that it would only be fair for this Honourable Court to award costs to the Defendant. I am sure counsel for the Defendant mixed issues up on paragraphs 26 and 27 of the submissions.

Plaintiff's submissions

14. The Plaintiff has identified three issues for determination as follows:
 - i. Whether the Plaint should be dismissed for failure to disclose a cause of action and for being frivolous, vexatious and an abuse of the court?
 - ii. Whether the Plaint raises triable issues?
 - iii. Who should bear costs of the instant application?
15. The Plaintiff has submitted that the Plaint raised a reasonable cause of action and that the principles that guide a court in the exercise of its discretion when considering an application under Order 2 Rule 15 have been enunciated in several authorities. The Plaintiff cited *DT Dobie* case that has been cited by the Defendant where the court expressed itself as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits or the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way... 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 as 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.....”
16. The Plaintiff reiterated its stand that there was a contract between it and the Defendant because the latter signed the proforma invoices thereby accepting the offer. It relied on *Savichem Africa Limited v General Printers Limited* [2019] eKLR where it was held that:
 - “15. A valid contract requires an offer, acceptance, and consideration. In this case there was offer and acceptance signified by the parties’ execution of the



proforma invoice. In this finding, I get support from the case of Fuelex Kenya Limited v Seed Group Limited (2000) eKLR where the court stated:

‘In the end, I find that the transaction commenced by the issuance of the proforma invoice....and supported by subsequent loading instructions and the relevant ex-warehouse export forms clearly establishes a valid contract for the supply of petroleum product at an agreed price of U.S Dollar.’”

17. It was submitted that the Defendant failed to pay and collect the products as agreed between the parties thus breaching the terms of the agreement between the parties, which resulted in breach of contract and that a breach of contract is a valid cause of action in law.
18. It was submitted that the Plaintiff raises triable issues. The Plaintiff relied on Spinners & Spinners Limited v. Kimilili Wholesalers (K) Limited [2021] eKLR where it was held that:

“Where there is even a single triable issue, the matter ought to go to full hearing, and I hold that it would be unfair to condemn the defendant without hearing its side of the story...”

“...whereas these triable issues need not succeed, it is also important to note that as long as a pleading raises a triable issue even if at the end of the day it may not succeed, then the suit ought to go to trial....”
19. It was submitted that the Defendant is abusing the process of the court for reasons that the application was brought as an after thought after the court directed parties to comply with pretrial directions which the parties have; that the Defendant has delved into the merits of the case by analyzing the evidence produced by the Plaintiff which is an issue to be determined by the trial court.
20. The Plaintiff has asked this court to dismiss the application with costs for reasons that the Plaintiff disclosed reasonable cause of action which can be adjudicated by this court; that the claim raised triable issues that can only be determined through trial and that the Defendant is abusing the process of the court.

Analysis and determination

21. I have considered this matter and understood the issues being raised by the Defendant in its application under determination. This court is being asked by the Defendant to strike out the Plaintiff for it does not disclose a reasonable cause of action, is frivolous, vexatious and an abuse of the court process. The Plaintiff holds a different view, that its claim raises a reasonable cause of action, raises triable issues and is not frivolous, vexatious or an abuse of the court.
22. Striking out pleadings is provided for under Order 2 Rule 15(1) of the Civil Procedure Rules. It provides that:
 - (1) 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; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or



- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

23. The jurisdiction to strike out pleadings under the above provisions is discretionary. This discretion must be exercised judicially. Where pleadings raise a triable issue, even if it is one triable issue, then the plaintiff or defendant, as the case may be, the party must be given a chance to prosecute its case. The triable issue is not necessarily one that the party would ultimately succeed on. The triable issue need only to be bona fide (see *Postal Corporation of Kenya v I.T Inamdar & 2 Others* [2004] 1 KLR 359 and *Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu & Another* [2009] eKLR).

24. I have considered the issues raised in this application. I hold the view that it would be drastic to strike out the Plaint at this stage of the trial without giving both parties, and more so the Plaintiff, its day in court. I find support in the Court of Appeal decision in *The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) where the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

25. Further, the same Court in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) expressed itself as follows:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

26. Similarly, in *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, which both parties have relied on here, the Court (Madan, JA) stated 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 as 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.”

27. It is my considered view that it is only after the parties have adduced evidence, have been cross-examined and the court has evaluated that evidence, that it can be stated with certainty that there was or there was no binding contract between them. I find no prejudice to any party in so finding. The Defendant will only have to wait a bit longer for the case to be heard and determined.



28. Consequently, after due consideration of all the issues raised here, the submissions of the parties and the authorities relied on, I do not agree with the Defendant that this suit ought to be dismissed. I therefore decline to allow this application, dismiss the same and order the Defendant to pay the costs of this application.

29. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF APRIL 2024.

S. N. MUTUKU

JUDGE

