



S. Muteithia Kibira t/a Muteithia Kibira & Co Advocates v National Bank of Kenya Limited (Civil Suit E011 of 2021) [2023] KEHC 683 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E011 OF 2021
FN MUCHEMI, J
FEBRUARY 9, 2023**

BETWEEN

**S. MUTEITHIA KIBIRA T/A MUTEITHIA KIBIRA & CO
ADVOCATES PLAINTIFF**

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

Brief facts

1. This application for determination dated 21st February 2022 is brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 2 Rule 15(1) and Order 36 Rule 1 and 5 of the *Civil Procedure Rules*. It seeks for orders of summary judgment to be entered in favour of the plaintiff against the defendant. In the alternative, the applicant seeks for orders that the defendant's Statement of Defence dated 29th November 2021 be struck out and judgment be entered in favour of the plaintiff against the defendant.
2. The respondent opposed the application and by filing a Replying Affidavit dated 11th May 2022.

The Applicant's Case

3. It is the applicant's case that the respondent entered into an advocate client relationship with the applicant and vide a letter dated 18th June 2021, the respondent instructed the applicant to:-
 - a. Handle the sub-division process of the identified 150 acres from LR No. 10082 (IR. 16693) towards acquisition by the bank;
 - b. To obtain the consent of East African Development Bank (EADB) for the intended sub division, acquisition and release of title as required under the inter-lenders agreement dated 18th December 2014; and



- c. To act for National Bank of Kenya (NBK) to draft a deed of settlement between NBK and the borrower as above.
4. Pursuant to the instructions, the applicant carried out the assignment and reviewed the draft payment undertaking by East Africa Development Bank as requested by the respondent vide its letter dated 13th July 2020 as well as the review of the agreement between the respondent, the valuers and the borrowers. The applicant states that he subsequently raised a final fee note for the work done vide an itemised bill of costs and had several discussions and meetings on the payment of the fee note with the respondent but no payment has been forthcoming despite the respondent's various promises to pay.
5. Consequently, the applicant filed a Bill of Costs for taxation in Nyeri HC Misc Application No. E066 of 2021 but the respondent objected to the taxation on the grounds that there existed a retainer agreement between the applicant and the respondent. The Deputy Registrar declined to tax the bill of costs, upholding the respondent's objection and held that the court did not have jurisdiction to tax the bill of costs.
6. The applicant states that since the respondent failed to settle the bill, he filed the instant suit against the respondent vide a plaint and served the respondent. He further states that the respondent filed entered appearance vide its Memorandum of Appearance dated 12th November 2021 and filed a Statement of Defence dated 29th November 2021. In the respondent's statement of defence, the respondent admits that the bank duly gave the applicant instructions and that the work was duly done. The applicant further contends that the Statement of Defence discloses no triable issues, it contains mere denials and is a sham defence that ought to be rejected peremptorily.
7. The applicant avers that the respondent will not suffer any prejudice if the orders sought are grant as the claim is for the payment of legal services already rendered by the applicant which the respondent has duly admitted.

The Respondent's Case

8. The respondent states that the applicant filed his plaint without witness statements and bundle of documents to be relied upon and when the respondent asked for the copies of the said documents, the applicant filed the instant application to sanitize their failure to provide all the documents accompanying the plaint.
9. The respondent retained the applicant in its panel of advocates pursuant to a Service Level Agreement dated 3rd October 2013 and Terms and Conditions of Appointment to the Bank's Panel of Lawyers dated 4th October 2013. Clause (IV) (2) of the Terms and Conditions of Appointment imposed a condition to the effect that if legal fees was likely to exceed Kshs. 500,000/- the applicant would notify the respondent on receipt and prior to effecting instructions to enable parties agree on the basis of charging fees. Further Clause (IV) (4) of the Terms and Conditions of Appointment provided that legal fees payable would be agreed upon in writing before the commencement of the work.
10. The respondent avers that collectively, the letter of appointment, the Terms of Conditions of Appointment to the Bank's Panel of Lawyers and the Service Level Agreement duly accepted and executed by both parties constitutes a Retainer Agreement. The said retainer agreement provided that the advocate's legal fees shall be charged, negotiated and agreed pursuant to Section 45 (a) and (b) of the [Advocates Act](#).
11. The respondent states that it instructed the applicant vide a letter dated 17/06/2020 to facilitate the process of sub division process of LR No. 10082 (Benver Estates Limited) which instructions were duly



- acknowledged on 19/06/2020. The respondent contends that the legal work required by the applicant did not materialize and was never carried out because no approval was obtained by Central Bank of Kenya for the excision of 150 acres and the subdivision to 758 plots and the consent and concurrence of East Africa Development Bank which holds a charge ranking in parri-passu to the respondent's charge over the subject property was never attained.
12. The respondent states that it duly informed the applicant of the above reasons in its emails dated 27/07/2020 and 10/09/2020. As such, the respondent argues that since no work had been done by the applicant, there was no basis for discussions of any fees due and payable.
 13. The respondent further states that the Taxing Master in Nyeri High Court Misc. Application No. E066/2021 properly exercised her powers by striking out the applicant's bill of costs for want of jurisdiction under Section 45 (6) of the *Advocates Act*. Furthermore, the respondent states that it is not hiding behind the retainer agreement and states that since the applicant did not file a reference against the ruling dated 22/9/2021, this court cannot sit as an appeal to merit review the said ruling by assessing the payable legal fees. Moreover, the respondent states that this court does not have jurisdiction to assess the payable legal fees.
 14. The respondent states that its defence raises triable issues and therefore the instant application ought to be dismissed.
 15. The applicant filed a Further Affidavit dated 1st July 2022 and reiterates what he has deposed in his affidavit and adds that the respondent has raised procedural technicalities by stating that the applicant has not filed any witness statements and bundle of documents.
 16. The applicant further states that the respondent acknowledges that his firm carried out the work and that they negotiated the fees payable however the applicant lodged the present suit because the respondent failed to pay his fees. The applicant argues that fees is payable even when a conveyancing transaction is not concluded, because services were rendered to the respondent.
 17. The applicant states that taxation is no longer applicable and is therefore not a triable issue. The applicant avers that the respondent is estopped from hiding behind the Service Level Agreement to avoid paying the applicant his dues. As such, the applicant states that he is not asking the court to assess legal fees payable or appealing to the ruling of the taxing master but he is instead seeking to recover his fees for services rendered to the respondent as per the Advocates Remuneration Order. In any event, the applicant states that the existence of the Service Level Agreement does not mean that fees due for services rendered are not payable. In the absence of any fee agreement and or certificate of costs from taxation, the bill must be paid as invoiced.
 18. Parties agreed to canvass this application by way of written submissions.

The Applicant's Submissions

19. The applicant relies on the case of *Misort Africa Limited v Principal Secretary National Treasury and Planning and Another* [2020] eKLR and submits that the respondent's statement of defence does not raise any triable issues and therefore the court ought to enter summary judgment. The applicant further submits that the respondent admits that it gave the applicant instructions and the applicant did the work as instructed but the respondent only made a part payment. In addition to the admissions by the respondent, the applicant submits that the respondent has not raised any triable issues which would need to be further interrogated by the court because the respondent decided to waive its right to taxation which the *Advocates Act* and the applicant had afforded it and it cannot now purport to raise issues it ought to have raised during the taxation stage. Further, the respondent's late payment of



the applicant's discounted fees is not denied therefore, negotiations on fees agreement failed and since the bill cannot be taxed, the applicant states that the only issue is non-payment which is not denied as the discounted fees was paid way after the deadline had passed. The applicant further argues that the respondent cannot continue hiding behind the existence of a Service Level Agreement and in any event, a service level agreement does not mean that fees for services rendered are not payable. In the absence of any fee agreement and/or certificate of costs from taxation, the applicant contends that his fees must be paid as invoiced.

20. The applicant maintains that the defence is a sham and it is merely intended to delay justice and waste judicial time. The applicant refers to the cases of *Wakf Commission of Kenya v Hassan Maridadi Mohammed* [2017] eKLR; *Continental Butchery Limited v Nthiwa* [1978] KLR and *Harit Sheth t/a Harit Sheth Advocates v Sharma Charania* [2014] eKLR to support his contentions.
21. The applicant submits that the issue of witness statements and bundle of documents raised by the respondent is not a triable issue but a procedural technicality which is irrelevant in an application for summary judgment. The applicant further submits that the filing of witness statements and bundle of documents would only be relevant where it is anticipated that there will be a trial in the case. The applicant refers to the cases of *McLardy v Slateum* (1890) 24 QB 504; *Commercial Bank of Africa Ltd v David Njau Nduati* [2013] eKLR and *Mugambi v Gatururu* [1967] EA 196, 197 and submits that one may file for summary judgment without having filed the witness statements and bundle of documents. The applicant further contends that he has placed before the court sufficient material to enable the court decide on the application for summary judgment.

The Respondent's Submissions

22. The respondent relies on the cases of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 and *Misort Africa Limited v Principal Secretary National Treasury & Planning & Another* [2020] eKLR and submits that it has filed its defence which raises serious triable issues namely whether there is a binding and enforceable retainer agreement between the parties; whether the instructions issued to the applicant on 17/06/2020 were carried out in any manner and to what extent; whether at the time of withdrawal of instructions, the applicant had performed any work justifying payment of legal fees; whether the claimed sum of Kshs. 64,177,660.04/- is justified in the circumstances; whether the court can entertain a suit for legal fees where the Bill of Costs has been struck out for want of jurisdiction under Section 45(6) of the *Advocates Act* yet the applicant has not filed a reference; by entertaining the suit, whether the court will be reviewing or sitting as an appellate court against the Taxing Master's ruling by assessing fees payable to the advocate and whether the present suit is res judicata as it is based on the Bill of Costs dated 21/4/2021 which had already been adjudicated upon and disposed of.
23. The respondent submits that the issues raised go to the core of the dispute and ought to be ventilated through examination of evidence and witnesses. Moreover, the respondent submits that the court has to determine whether it is properly seized with the jurisdiction to hear and determine the dispute. Such a determination is not possible if this court were to allow the application to enter summary judgment. The respondent further relies on the cases of *D.T Dobie & Company (Kenya) LTD v Muchina* (1982) KLR and *Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited* [2013] eKLR and submits that striking out a defence is a drastic measure that should only be resorted to in the last instance and it is not in the interest of justice to drive away a litigant from the seat of justice.
24. Moreover, the respondent submits that the applicant has purported to argue the merits of its case instead of waiting to do the same at the appropriate stage during the hearing of the suit. The respondent further submits that the issues raised by the applicant will be properly addressed in a full hearing of the



main suit by examination of documents submitted and interrogation of witnesses. Without prejudice to the foregoing, the respondent seeks to address the issues as raised by the applicant.

25. The respondent reiterates what it has deposed in its affidavit and submits that pursuant to the Service Level Agreement and Terms and Conditions of Appointment to the Bank's Panel of Lawyers dated 4th October 2013, the applicant was bound to notify the bank if the instruction fees were likely to exceed Kshs. 500,000/- prior to effecting instructions to enable the parties agree on the basis of charging fees. The respondent maintains that it has a retainer agreement with the applicant which comprised of the letter of appointment, the Terms and Conditions of Appointment to the Bank's Panel of Lawyers and the Service Level Agreement.
26. The respondent instructed the applicant vide its letter dated 17th June 2020 to facilitate the process of sub-division process of LR No. 10082 (Benver Estates Limited) which instructions were duly acknowledged on 19/06/2020. The respondent submits that the legal work required of the applicant did not materialize and was never carried out due to lack of approval by the Central Bank of Kenya because, although the area was identified for the excision out of LR No. 10082 had been identified, the excision of 150 acres as well as the actual subdivision of 758 plots was never carried out and the consent and concurrence of the East Africa Development Bank was never attained as the bank holds a charge ranking parri-passu to the bank's charge over the subject property.
27. The respondent contends that it communicated the said reasons to the applicant through emails dated 27/7/2020 and 10/9/2020 as well as phone calls. The respondent further submits that at the time the sub division process collapsed, the applicant had only undertaken the following:-
 - a. Partially reviewed a pre-drafted proposed undertaking and guarantee between the respondent and East Africa Development Bank;
 - b. Partially reviewed a pre-drafted proposed tri-patriate contract between the respondent, Benver Estates and Crystal Valuers in conjunction with Gabby Consultants who were to undertake excision, sub-division, marketing and sale of the sub divided plots.
28. The respondent contends that contrary to the provisions of the retainer agreement, at no point did the applicant notify them that the fees chargeable would exceed Kshs. 500,000/- prior to execution of instructions and thus no written agreement on fees was reached. On 21/4/2021, the applicant forwarded a draft bill of costs dated 21/4/2021 demanding prompt payment of Kshs. 64,177,166.04/- as legal fees for the aborted transaction. The respondent contends that it did not entertain the said colossal bill and the applicant proceeded to file the bill of costs in Nyeri High Court Misc. Application No. E066/2021 on 19/7/2021.
29. The respondent states that it responded to the bill of costs and submitted that the court did not have the jurisdiction to tax a matter governed by a retainer agreement. The Taxing Master upheld the parties' retainer agreement and struck out the applicant's bill of costs holding that she did not have jurisdiction over the matter as there was a retainer agreement in place.
30. The respondent argues that following the said ruling, the applicant has never filed a reference against the decision of the Taxing Master and thus this honourable court cannot sit as an appellate court to review the said ruling on its merits by assessing the payable legal fees. In any event, the respondent argues that the High Court has no jurisdiction to determine fees payable to advocates. Consequently, the respondent contends that the matter is res judicata as the issues herein have already been determined and this court is without jurisdiction as a result.



The Law

Whether the application is merited.

31. The law on summary judgment has been elaborated in *Postal Corporation of Kenya v Inamdar & 2 Others* [2004] 1 KLR 359 where the Court of Appeal stated:-

However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV Rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this court's decision in the case of *Continental Butchery Limited v Samson Musila Ndura* Civil Appeal No. 35 of 1997 where this Court stated:-

With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary judgment provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.

32. Similarly in *Moi University v Vishva Builders Limited* CA No. 296 of 2004 (unreported), the court held:-

The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs. 185,305,011.30/-. We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76 Duffus P said:-

In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.

33. In view of the foregoing, summary judgment is a drastic remedy which may be granted in the clearest of cases in which there is no bona fide defence to the plaintiff's claim. In the instant case, the applicant seeks summary judgment to be entered in his favour for Kshs. 64,177,660.04/- for legal services that it carried out for the respondent. The applicant further submits that the respondent has admitted that it gave him instructions and that he worked as instructed. As such, the applicant submits that the respondent's defence contains admissions and thus raises no triable issues. The respondent argues that its defence raises triable issues which go to the core of the dispute and they ought to be ventilated through examination of evidence and witnesses.



34. So, what amounts to a triable issue? The Court of Appeal in the case of *Kenya Trade Combine Ltd v Shab* Civil Appeal No. 193 of 1999, stated as follows:-

In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues, which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.

35. Similarly in the case of *Olympic Escort International Co. Ltd & 2 Others v Parminder Singh Sandhu* (2009) eKLR, the Court of Appeal held as follows:-

It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.

36. Furthermore, a triable issue is said to exist if there is a dispute in facts, which dispute can only be resolved after ventilation in a full hearing. In the case of *Giciem Construction Company v Amalgamated Trade & Services* LLR No. 103 (CAK) where the court stated:-

As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bone fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.

37. Upon perusal of the statement of defence dated 29th November 2021 and noted that it raises triable issues on law and of fact. These issues include:-

- a. Whether there is a binding an enforceable retainer agreement between the applicant and the respondent;
- b. Whether the instructions given to the applicant on 17/06/2020 were carried out and to what extent to determine entitlement of payment of legal fees;
- c. Whether the claimed sum of Kshs. 64,177,660.04/- is justified.

38. Further, to that, the respondent has raised issues of law, which call for the court to determine whether it has jurisdiction to entertain this matter. These issues in my view, ought to be determined through evidence of the parties in a hearing. It would therefore, not be correct to say that the statement of defence dated 29th November 2021 does not raise triable issues. As such, it is appropriate that the parties herein be given a chance to ventilate their case. The applicant in my view has not convinced this court that this is a clear – cut case for summary judgment to be considered.

39. The applicant prayed in the alternative that the statement of defence dated 29th November 2019 be struck out. The principles which guide the court in exercising discretion in striking out pleadings have been stated in *D.T Dobie & Co. (Kenya) Ltd v Muchina & Another* [1982] KLR 1. The court would not strike a pleading if it discloses an arguable case or raises a triable issue. Madan JA (as he then was) stated as follows in the said case:-

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 of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually solely reserved for the judge at the trial as



the court itself is not 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 that it can be injected with real life by amendment, it ought to be allowed to go forward for a court of injustice ought not to act in darkness without the full facts of the case before it.”

40. Similarly, in *The Cooperative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No. 54 of 1999 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.

41. This court is alive to the fact that the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases. A balance must be struck between the principle and the policy consideration that a plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR.
42. As discussed earlier, the statement of defence dated 29th December 2021 cannot be said to be a sham. Neither is it scandalous, vexatious or likely to delay the expeditious disposal of the suit. In my view, the applicant has not made out a case for striking out the defence.
43. I reach a conclusion that the applicant has failed to make a case for summary judgement thus rendering this application unsuccessful.
44. This application is hereby dismissed for lack of merit.
45. The costs of this application shall abide in the suit.
46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 9TH DAY OF FEBRUARY, 2023

