



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 21 OF 2019

MICRO-CITY COMPUTERS LIMITED.....PLAINTIFF

VERSUS

MOMBASA TRADE CENTRE LIMITED.....DEFENDANT

RULING

1. This is a Ruling in respect of the **Notice of Motion** herein dated **10th June, 2020** and brought under **Order 2 Rule 15(1)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, by the Defendant/Applicant.

2. In the application, the Applicant prays that the **Plaint** dated **5th April, 2019** be struck out as it discloses no reasonable cause of action as against the Defendant and otherwise an abuse of the Court process. The application further seeks that costs for the entire suit be provided for.

2. The **Motion** is premised on the grounds set out in the face of it as supported by an Affidavit sworn by **ANTHONY JILANI** on **10th June, 2020**, that:-

a) The Defendant pursuant to a lease executed on the 20th November, 2015, let out unit Go7 to the Plaintiff for a term of 6 years with effect from 1st may, 2015 and pursuant to a letter of offer for lease dated 20th January, 2017 the Plaintiff accepted a lease for a term of 6 years with effect from 1st March, 2017 over the unit GO 1B which amount of rentals were stated in the lease and the letter of offer for lease.

b) Pursuant to the lease and letter of offer for lease the rentals were payable quarterly in advance on the 5th day of the first month of each beginning quarter (sic) which the Plaintiff irregularly discharged.

c) The Plaintiff severally defaulted in the payment of rent rendering it necessary for the Defendant to commence distress processes for the recovery of the rent for the period running from 1st April, 2018 and ending on the 31st March, 2019 in respect to the two units in the sums Kshs.2,889,461.75 and Kshs.1,306,286.10 respectively.

d) The Plaintiff herein is frivolous and vexatious and is otherwise an abuse of the court process.

e) That it is in the interest of justice that the Plaintiff as filed be struck out with costs.

The Response

3. The Plaintiff/Respondent filed a **Replying Affidavit** sworn by **Paul Okola Ananga** on **21st October, 2020** where he avers that the application dated **10th June, 2020** is incompatible in so far as the Defendant/Applicant has adduced evidence contrary to the provision of **Order 2 Rule 15 (2)** of the **Civil Procedure Rules**. He states that the suit as filed on **5th April, 2019** is based on a legitimate dispute as to the exact amount of rent recoverable under the lease signed between the parties, which issue is for trial.

4. The Plaintiff/Respondent contends that the dismissal of interlocutory applications does not diminish the importance of a trial and that this court has not made a definitive decision on the live issue of the amount recoverable as rent. Further, it is his contention that the payment of Kshs.1,000,000.00/= before the filing of the suit, was in fulfillment of an area that he was aware of in respect of **G07**. He attached copies of letters and bank deposits slips marked as **"P.A.O. -1"** as evidence thereof.

5. Lastly, the Respondent states that this Application is misconceived and informed by a misapprehension of the true facts of the case and ought to be dismissed.

Directions of the Court

6. The parties were directed by the court to dispose of the application by written submissions. The Applicant filed its submissions on the **10th November, 2020** while the Respondent filed submissions on the **14th December, 2020**. Parties opted to rely on their written submissions as filed in their entirety.

Analysis and Determination

7. I have considered all the pleadings, written submissions by both parties and the law with regard to the issues raised by the parties. In my view the main issue that arise for determination is whether the **Plaint** dated **5th April, 2019** does not raise a reasonable cause of action as against the Defendant/Applicant.

8. The power of a Court to strike out pleadings is meant to be exercised sparingly and with caution because it has not had the benefit of being fully informed on the merits of the case through discovery and oral evidence as was the finding in the case of **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982) KLR 1 at P. 9**, where it was stated as follows:

“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.”

9. The Court is thus urged to exercise caution and its discretion with utmost care in regard to applications for striking out a pleading, as one party may view the doors of justice as being slammed shut before they are given an opportunity to be heard. This was as the finding in the case of **Crescent Construction Co Ltd ..V.. Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated: -

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

10. From the holding in the above-cited case, the overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised.

11. I have scrutinized the whole **Plaint** and established that the Plaintiff has sought inter alia an order for taking of accounts and a permanent injunction restraining the Defendant either by themselves, their agents and/or employees from interfering with the Plaintiff's quiet possession.

11. The Plaintiff's case is that the Defendant through auctioneers has distressed for rent in the sum of Kshs.2,899,461.75 and Kshs.1,306,286.10 respectively for two premises. He claims that he requires a proper account of the rent as paid to the Defendant. Further, the Plaintiff's case is that the Defendant has been harassing him using Auctioneers for rent which he believes is not due or owing. The issues that arise then are that the Plaintiff is disputing the rent and the amount payable to the Defendant. In my view, these are triable issues which can only be determined at trial.

12. In the case of **Dorine Akula ..V.. Apa Insurance Company Ltd [2016] Eklr**, the Court stated: -

“...it is trite that the power to strike out is not Mandatory but only permissive. It is to be exercised having considered the circumstances relating to the offending pleading...”

13. The two (2) **Rulings** as delivered by this Honourable Court on **25th November, 2019** and **3rd February, 2020** respectively at interlocutory stages do not negate the fact that the **Plaint** raises triable issues. Finding the Plaintiff to be in arrears does not answer the question as to the correctness of the amounts as contested, which is an issue that court will only be able to resolve after it listens to the contesting parties.

14. The upshot of the foregoing is that the Defendant's application dated **10th June, 2020** be and is dismissed.

15. Costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY