



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E002 OF 2020

PROFESSIONAL MARKETTING

SERVICES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

INFORMATION AND COMMUNICATIONS

TECHNOLOGY AUTHORITY (ICTA).....DEFENDANT/ RESPONDENT

RULING

1. Through application dated 25th July 2020, the applicant (Professional Marketing Services Limited) seeks the following orders;

1) The Defence filed by the Defendant on 17th February, 2020 and dated 10th February, 2020 be struck out for failing to disclose a defence in law.

2) Pursuant to the grant of prayer 1 herein, Judgment be entered for the Plaintiff as prayed in the Plaint.

3) The costs of the application be borne by the Defendant.

2. The application is brought pursuant to Order 2 Rule 15 (1) (a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is premised on the grounds that: -

1) The Defendant filed a defence on 17th February, 2020 and dated 10th February, 2020.

2) The Defence filed by the Defendant consists of blanket denials, is a sham and raises no bonafide triable issues.

3) The Defence filed is merely aimed at denying the Plaintiff herein judgment in a bid to delay payment to the Plaintiff.

4) The court has the power to strike out a defence where the said defence discloses no defence and/or triable issue and is a sham consisting of mere denials.

5) It is in the interest of justice that the application herein be allowed as prayed.

3. The respondent opposed the application through the replying affidavit of **Lydia Ndirangu** who states the defence refuted the existence of a contract between the plaintiff and the defendant. She states that the defendant, being a public body, is governed by the provisions of the Public Procurement and Assets Disposal Act and that the alleged debt owed to the plaintiff does not arise because the contract between the parties is disputed. She further denies the claim that goods were delivered to the 2nd defendant's premises. It is the defendant's case that the issues raised in the defence are triable and that the dismissal of the suit would highly prejudice the defendants.

4. The application was canvassed by written submissions in which the parties reiterated the positions taken in their pleadings.

5. I have carefully considered application, the response thereto, parties and the authorities that they submitted. The plaintiff seeks the striking out of the statement of defence on the basis that it discloses no reasonable defence in law.

6. Order 2 rule 15 of the Civil Procedure Rules stipulates as follows:

15. (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.

7. The Court of Appeal set out the principles governing the striking out of pleadings in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** as follows: -

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. “

8. The plaintiff contends that the defendants defence amounts to mere denials as opposed to providing substantive explanations of every allegation raised. The defendant, on the other hand, submits that the defence raises triable issues that include the denial of the existence of the contract as well as delivery of some goods.

9. In defining what amounts to triable issues, the Court of Appeal stated as follows in ***Job Kilach v. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR***

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue” A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

10. I have examined the pleadings filed herein and I am of the view that the issue of procurement and existence of the contract is a contentious issue that can only be unpacked at the hearing of the suit. It is trite **that striking out of pleadings should be done sparingly and in the same breath a party should be afforded a fair** and reasonable opportunity to defend its case. I am of the view that no party will be prejudiced if the suit proceeds to full trial. I find that the application dated 25th July 2020 is not merited and I therefore dismiss it with orders that the costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Maitai for Plaintiff.

No appearance for Attorney General.

Court Assistant: Sylvia