



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 173 OF 2019

LUCY WAMBUI YINDAPLAINTIFF

VERSUS

MUMIFLORA LIMITED TRADING AS BARAKA ROSESDEFENDANT

RULING

1. The plaintiff herein, who describes herself as a female adult of sound mind, sued the defendant, a limited liability company that she describes as a family company carrying a business in the horticultural industry, through a plaint dated 18th July 2019 seeking orders for the payment of Kshs 32,124,986 together with interests and costs of the suit.
2. A summary of the plaintiff's case is that she is shareholder in the defendant company wherein she previously worked as the Managing Director and that on or about November and December 2017 she advanced the money that is the subject matter of this claim, to the defendant to enable it meet its operational costs. Her claim is that the defendant acknowledges the debt but has failed to settle it thereby precipitating the instant suit.
3. Concurrently with the plaint, the plaintiff also filed an application under Order 13 Rule 2 of the Civil Procedure Rules for summary judgment, on admission for the sum of Kshs 32,124,986.
4. The application is premised on the grounds that:
 - a. **The plaintiff advanced monies to the defendant in the sum of Kshs 32,124,986/=.**
 - b. **The plaintiff advanced the monies to the defendant on the understanding that the monies would be repaid after the defendant's high season in February, 2018.**
 - c. **The defendant failed to make payment of the monies advanced to the plaintiff.**
 - d. **The defendant has admitted its indebtedness to the plaintiff in the sum of Kshs 32,124,986/=.**
 - e. **It is fair and just that judgment be entered against the defendant as prayed in the plaint on account of the admission.**
5. In her affidavit in support of the application the plaintiff avers that the defendant is truly indebted to her for the sum of Kshs 32,124,986/= which debt the defendant admitted in writing through various correspondence that she attached as annexures to the said affidavit.
6. On its part, the defendant denied the plaintiff's claim through the statement of defence dated 16th August 2019 wherein it also states that the plaintiff's suit is *sub-judice* owing to the existence of another suit over the same subject matter before another court.
7. The defendant opposed the plaintiff's application for summary judgment through the replying affidavit of its Director **Ms Njeri Waruguru Mahihu** who accuses the plaintiff of a series of misdeeds to wit;
 - a. Contravention of the shareholders and Co-operation Agreement signed on 20th January 2015.

- b. Contravention of various Articles of defendant.
- c. Mischief and corruption by exceeding the bank mandates.
- d. Presiding over losses experienced by the defendant in 2017.
- e. Creating disharmony in the family business.
- f. Dismissing company employees without regard to due process.
- g. Abuse of office.

8. Concurrently with the statement of defence, the defendant also filed an application dated 16th August 2019 seeking orders for stay of proceedings in this suit pending the determination of Nairobi ELRC No. 451 of 2019 (hereinafter “**the ELRC case**”) on the grounds that the parties in this suit are the same as the parties in the ELRC case and that the reliefs sought in the two suits are the same.

9. The plaintiff opposed the defendant’s said application through the grounds of opposition dated 18th September 2019 wherein she lists the following grounds:-

- 1. Nairobi ELRC cause 451 of 2019 – Lucy Wambui Yinda versus Mumiflora Limited trading as Baraka Roses – is a separate claim by the plaintiff against the defendant in respect of her employment with the defendant.**
- 2. The plaintiff has lodged such claim in the Employment and Labour Relations Court which has exclusive jurisdiction to hear and determine employment disputes under Article 162(2) of the Constitution.**
- 3. Under Section 12 of the Employment and Labour Relations Court the jurisdiction of the Employment and Labour Relations Court is limited to matters arising from an employment relationship.**
- 4. The plaintiff’s claim before this honourable court is strictly commercial claim for recovery of monies by the plaintiff to the defendant in her capacity as a shareholder of the defendant.**
- 5. The plaintiff’s claim against the defendant herein is admitted.**
- 6. The application lacks merit and should be dismissed with costs.**

10. The plaintiff also filed a replying affidavit in response to the defendant’s application wherein she states that the ELRC case is strictly related to the termination of her employment as the defendant’s Managing Director while the instant suit is for the recovery of money that she advanced to the defendant. She further states that this court lacks the jurisdiction to determine the employment dispute.

11. Parties canvassed both the applications dated 18th July 2019 and 16th August 2019 by way of written submissions which I have carefully considered. This ruling is therefore in respect to the two applications.

Application dated 16th August 2019

(Stay of proceedings).

12. Ringera J. persuasively stated as follows in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* ;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

13. *Halsbury’s Law of England, 4th Edition. Vol. 37* page 330 and 332, states as follows on the threshold for stay of proceedings:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

14. My understanding of the above texts is that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation as it impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. It is for the above reasons that the test for stay of proceeding is high and stringent.

15. In seeking the orders for stay of these proceedings, the defendant invoked the *sub-judice* rule, and argued that owing to the existence of the ELRC case between the same parties herein, the plaintiff is precluded from instituting this case. On her part, the plaintiff argued that the filing of the suits before the ELRC and this court was necessitated by the constitutional requirement that vests courts with specific jurisdiction based on the nature of the suits.

16. *Sub-judice* rule, is captured under Section 6 of the Civil Procedure Act as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

17. It is worth noting that the Constitution of Kenya 2010 established the specialized courts, to wit, the employment and labour court and the environment and land court and vested the said courts with exclusive jurisdiction in labour and land matters respectively. In this regard, **Article 162 (2)** of the *Constitution* provides that;

18. Pursuant to **Article 162 (2)** of the Constitution, Parliament enacted the Industrial Court Act No. 20 of 2011, which repealed the Labour Institutions Act and the Employment Act, 2007, and replaced the Industrial Court as established under that Act with the Employment and Labour Relations Court (ELRC).

19. In so far as the ELRC’s jurisdiction was concerned, **section 4 (1)** of the *Industrial Court Act 2011* stipulates that;

“In pursuance of Article 162 (2) (a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya

(2) The court shall be a superior court of record with the status of the High Court.

(3) The court shall have and shall exercise jurisdiction throughout Kenya”.

Section 12 (1) goes on to state as follows::

“The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes, referred to it in accordance with Article 162 (2) of the constitution and the provision of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including all the other matters specified in the Act.”

20. In the present case, while it is not in dispute that the parties in this suit and the ELRC case are the same, I note that the subject matter in ELRC case relates mainly to the termination of the plaintiff’s employment as the defendant’s Managing Director among other employment related claims while the claim in the present case is in respect of a debt arising from monies that the plaintiff advanced to the defendant. My finding is that this court lacks the jurisdiction to deal with the employment related aspect of the dispute and conversely, the ELRC is not vested with the jurisdiction to handle the instant case which is purely a commercial dispute over a debt.

21. Needless to say, this court must bear in mind the principles governing its mandate/jurisdiction in matters placed before it. In the case of *Samuel Kamau Macharia v KCB & 2 others*, Civil Application No. 2 of 2011 the Supreme Court expressed itself thus;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

22. My finding is that even though the Constitution provides that that the High Court has unlimited jurisdiction to hear all civil and criminal matters, the same Constitution clearly stipulates that the jurisdiction to hear employment disputes is not exclusive to the court. From the above foregoing and owing to the different jurisdictions under which the plaintiff’s claims against the defendant fall, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying this matter. I am not satisfied that the defendant has demonstrated that there is any justification in staying these

proceedings as besides the aspect of jurisdiction, the subject matter in this case is not substantially the same as the subject matter in the ELRC case so as to warrant the granting of orders of stay of proceedings.

23. I therefore find that the application dated 16th August 2019 is devoid of merit and I therefore dismiss it with no orders as to costs.

Application dated 12th July 2019.

Summary judgment

24. In the case of *Isaac Awuondo v Surgipharm Ltd & Another* Civil Appeal No. 134 of 2003 [2011] eKLR the Court emphasized that summary judgement is a drastic remedy which may be granted in clearest of cases in which there is no *bona fide* defence to the plaintiff's claim.

25. In *Moi University v Vishva Builders Limited* - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“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 Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.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 – see *H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89*. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75* at P. 76 Duffus P. said:-6

“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.”

26. And also in *Postal Corporation of Kenya v Inamdar & 2 Others* [2004] 1 KLR 359 at p. 365 the Court said:-

“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 one 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 vs. 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 procedure 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”.

27. What this court is called upon to determine is whether the application for summary judgment meets the threshold set in the above cited cases and whether the defence set up by the defendant herein raises triable issue(s). A preliminary finding of triable issues made at an interlocutory stage does not guarantee that the respondent will succeed after trial. The courts and the law have set very stringent measures to ensure every litigant is given an opportunity to ventilate their case. See *Isaac Awuondo v Surgipharm Limited & Another* (supra).

28. Applying the above principles to the present case, I note that the defendant admitted owing the plaintiff the debt in question. A perusal of the annexures attached to the plaintiff's affidavit particularly the defendant's letter dated 22nd February 2019 shows that the defendant has all along been aware of its indebtedness to the plaintiff and even offered to settle it through monthly payments of Kshs 1 million per month. At paragraph 3 of the said letter the defendant states as follows:

“The Kshs 32,124,986.00 loan shall be paid back to you beginning end of February 2019 at the rate of Kshs 1,000,000/= per month as long as funds are available until the whole debt is settled.”

29. Having regard to the above foregoing, I am satisfied that the application dated 12th July 2019 meets the threshold for the granting of summary judgment on admission and I therefore allow it as prayed.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 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:

Kenyariri for Defendant

Miss Wataka for Plaintiff

C/A & DR Hon.Wanyama

W. A. OKWANY

JUDGE