



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. E 125 OF 2019

HUYTON INC.....1ST PLAINTIFF

AGRICOM INTERNATIONAL SA.....2ND PLAINTIFF

AGRIMPEX COMPANY LIMITED.....3RD PLAINTIFF

-VERSUS-

BELAYNEH KINDIE & IMPORT & EXPORT.....DEFENDANT

RULING

APPLICATION

The Applicant through a Notice of Motion Application dated 10th December 2019 sought following orders:

- a) This court be pleased to order that the Plaintiff's pleadings be struck out and the suit dismissed
- b) The costs of this Application and the suit be incurred by the Plaintiffs/Respondents

The Application is premised upon Sections 1A, 1B, 3A of the CPA & Order 2 Rule 15 CPR, 2010, and all other enabling provisions of the law.

The Notice of Motion application is based on the following grounds as per the supporting affidavit of BELAYNEH KINDIE MEKONNEN.

- a. The pleadings disclose no reasonable cause of action as the claim in the Plaintiff's suit is the same claim which had already been exhaustively considered and dispensed with finality in favor of the Defendant by the Court in *HCCC No. 9 of 2018 Huyton Inc and 2 Others vs Belayneh Kindie and Import and Export & Another*
- b. That there was not term in the consent order stipulating a penalty for exceeding the one-day payment stipulation. However it was an express term of the consent order that upon payment of the sum of USD 1,900,730.75 the dispute relating to the M.V. Aquila shipment and the joint venture agreement dated 14th July 2017 between the 1st Plaintiff and the Defendant and related supplementary contracts shall automatically be marked as finally settled and further upon filing of the consent both the Application for Injunction and the main suit shall automatically be vacated by the Plaintiffs and the Plaintiffs shall have no further claim against the Defendant.
- c. That it was not a term of the consent order that based on the one day payment stipulation the Plaintiffs would enter into a separate contract with a third party for purchase of 10,000 metric tonnes of sesame seeds at USD 1250/-
- d. It was also not a term of the consent order that funds for the payment by the Defendant to the Plaintiffs of the sum of USD 1,900,730.75 will be utilized by the Plaintiffs to meet their obligations under the aforesaid separate contract with a third party

e. That neither the Court nor the Defendant had knowledge and notice of the aforesaid separate contract between the Plaintiffs and the third party when the consent order was issued.

f. That the Plaintiffs entered into a separate contract with the third party on 17th January 2018 before settlement agreement with the Defendant had been reached and way before consent order had been issued.

g. The plaintiffs accepted payment from the Defendant of the agreed settlement amount indicated in the consent order and are therefore prevented from making additional claims for payment against the Defendant.

h. That the pleadings are scandalous, frivolous and vexatious as the Plaintiffs did not take or initiate any legal action for contempt of court against the Defendant for alleged delay during the twelve (12) days period prior to receipt of funds by the Plaintiffs and the Plaintiffs have not explained in their pleadings why it took them over sixteen days from the date of receipt of funds and from the time they knew of the price increase of goods to make demand against the Defendant.

i. At no time during the twelve day period prior to receipt of funds by the Plaintiffs did the Plaintiffs inform the Defendant that they had unilaterally entered into a separate contract with a third party.

j. The Plaintiffs have concealed and/or failed to disclose to this Court the fact that when payment was received by the Plaintiffs, the Plaintiff's advocate confirmed to the Defendant's Advocate that the former would be confirming to the court during the hearing of 9th March, 2018 that the matter had been fully settled

k. The pleadings are an abuse of the process of court as the Plaintiffs make their claim with unclean hands as they failed to comply with the terms of the consent order by failing to issue instructions to grain bulk handlers limited for the release of the remaining consignment of maize upon receipt of funds as required.

l. The Plaintiff's suit is misplaced, incurably defective, null and void for the reason that they have not suffered any loss and damage as buying the sesame seeds at a higher price than expected is not sufficient of itself to prove loss suffered.

m. The Plaintiff's suit is an afterthought by the Plaintiffs in an attempt to unjustifiably obtain from the Defendant the approximate difference between the initial claim in the previous suit and the agreed settlement amount in the consent order.

RESPONDENT'S REPLYING AFFIDAVIT

The Respondent filed Replying Affidavit on 12th March 2020 that the application to strike out the Plaintiff should not be granted as Plaintiff's pleadings disclose no reasonable cause action in law or that pleadings are scandalous, frivolous, or vexatious or may prejudice, embarrass or delay fair trial or is an abuse of Court process

It is a constitutional right under **Article 159 of COK 2010** that substantive justice overrides technicalities.

DEFENDANT/APPLICANT'S SUBMISSIONS

The Applicant through counsel relied on a number of precedents in the submissions;

1. **Kivanga Estates Limited v National Bank of Kenya Limited [2017]eKLR;**
2. **Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu[2009] Eklr;**
3. **Dorine Akula v APA Insurance Company Ltd [2016]eKLR** High Court cited the decision of **KCB v Suntra Investment Bank Ltd (2015)eKLR**, which dealt with the issue of striking out pleadings due to the same being an abuse of the court process.

Counsel submitted that the Plaintiffs breached clause 3 of the consent order as their instructions to Grain Bulk Handlers Limited to release the balance of maize in their silos remains outstanding to-date, therefore the Plaintiffs cannot claim a remedy for breach of consent Order by the Defendant and at the same time they also breached the said Consent order.

Counsel submitted further that the Plaintiffs were not forced to incur the additional cost by the delay in receiving payment as claimed since they freely and voluntarily executed the addendum amending the price terms with the third party. That the Plaintiffs did not suffer loss as a result of the purported breach by the Defendant but they suffered loss, if any, as a result of their poor business judgment.

PLAINTIFFS/ RESPONDENTS' SUBMISSIONS

The Respondents submitted that the courts discretionary power to strike out a pleading under **Order 2 rule 15 of CPR 2010** the subject of judicial discourse, should only be exercised in the clearest of cases, where it is warranted. The Respondent relied on **D.T. Dobie & Company Kenya Limited V Joseph Mbaru Muchina & Another [1980]eKLR** and the Court of Appeal case of **Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019]eKLR** where the decision in **The Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** was restated as follows;

“ 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 court process of the court. A court may only strike out pleadings where they disclose no semblance of a cause of action or Defence cannot be said to fall into that category and had the trial judge considered fully all the matters alluded to, he would not have come to the same conclusion."

The Plaintiffs submitted that the current Plaintiff is a claim for breach of the terms of the Consent Order. That is a clear and separate cause of action from the claim in **HCCC. No. 9 of 2018**. Counsel submits that it is an issue for determination by this court whether the Defendant is in breach of the Consent Order, and if so, what remedies are available to the Plaintiff because of the said breach.

ISSUES

After a careful consideration of the pleadings and the parties' rival submissions, there is only one issue that arises for determination at this stage.

a) Whether the Plaintiff's pleadings should be struck of and dismissed at this stage?

ANALYSIS

a) Whether the Plaintiff's pleadings should be struck of and suit dismissed at this stage?

The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in ***D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1***, are 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. The rationale for this is due to a realization that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgment seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad." (emphasis supplied)

Order 2 rule 15 of the Civil Procedure Rules. Sub rule (1) of the said provision provides that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law, it is scandalous, frivolous or vexatious, it may prejudice, embarrass or delay the fair trial of the action; or 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.

In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or Defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

See also ***Mercy Nduta Mwangi t/Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR*** and

The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999

The Applicant submitted that the Respondents' Plaintiff and pleadings disclose no reasonable cause of action and is so weak and beyond redemption and incurable by an amendment. Counsel gave the reason for this to be that the even though Defendant did not pay the Plaintiffs after one day of the consent order, Defendant still paid the amount after twelve (12) days, and did not breach the consent order. This is because what was important at the end of the day was/is the payment, of the agreed sum to settle the matter. Counsel indicated that the third party contract was entered before the consent order, was entered into; from the Plaintiff's bundle of documents at page 146, the Contract was entered in on **17th January, 2018** while at page 144 the Consent Order is dated **2nd February, 2018**. The Court finds the Plaintiffs could not enter into such a contract relying on the Consent Order which by the time they entered into the contract the said Consent Order was non-existent.

The Plaintiffs argued that the Defendant breached the Consent Order thus causing them loss due to increased expense of goods in the contract. They argued that the cause of action in **HCCC No. 9 of 2018** is different from the cause of action in the present suit. The Defendant argued that the consent did not give any conditions for payment of the decretal sum except that the matter was settled. The success of the third party contract was not pegged to the Consent Order. The Consent order in its 2nd Paragraph provides;

"the 1st Defendant (the Applicant herein) shall immediately and within 1 day from the filing of the consent herein pay a sum of USD 1,900,730.75 to the Plaintiffs through the 2nd Plaintiff's Agricom International SA account with USB Switzerland AG, IBAN: CH43 0024 8500 0360N, SWIFT: UBSWCHZH80A, in full and final settlement of the dispute herein relating to the M.V Aquila shipment and the Joint Venture Agreement dated 14th July 2017 between the 1st Plaintiff and the 1st Defendant and

related supplementary contracts.”

This paragraph of the Consent Order does not mention any contract between the Plaintiff and a third party. Be that as it may, these are issues for hearing and determination at *inter partes* hearing.

In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000* the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant 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...”

Secondly, *HCCC 9 of 2018* was between the Plaintiffs *Huyton Inc, Agricom Intl SA & Agrimpex Co Ltd vs Belayneh Kindie & Import & Export & Grain Bulk Handlers Ltd.* The Plaintiffs sought USD 2,796,350.82 against 1st Defendant among other orders. Accordingly, to the court record, the Trial Court delivered Ruling on 19th December 2018 in the presence of Mr Kahura for Applicant & Mr Kamata for Defendants. The Applicant’s Counsel intimated that the Ruling was not availed to them. The Court record shows that Ruling was delivered on 19th December 2018 and Parties/Counsel sought the copies of the Ruling. It is only the Registry that can confirm what became of the Court Ruling as the Trial Court delivered Ruling to the Parties/Counsel. This Court cannot intervene at this stage, 2 years later, the parties ought to have raised the issue at the time with Trial Court and Registry. I noted that parties through Counsel did not contest the fact that the Trial Court read the Ruling to parties Counsel as shown on the court record.

Thereafter the Plaintiffs and Defendant reached an agreement in the above-mentioned suit and filed Consent for the Defendant to pay the Plaintiffs sum of USD 1,900,730.75 in settlement of the suit in 1 day and the suit would be marked fully and finally settled upon compliance. I note the alleged Consent is also not filed in **HCCC 9 of 2018** nor are there court proceedings to confirm that it was adopted as an order of the Court.

The Defendants paid the amount 12 days later. The present suit **HCCC E125 of 2019**, the same Plaintiffs against the same Defendants filed suit on the basis of the alleged breach of 1 term of the Consent. The dispute arose on the fact that the Plaintiffs on the understanding the Defendant would pay the amount agreed within 1 day entered into a contract with a 3rd Party defendant on the Defendant’s compliance with Consent terms.

As a result of Defendant’s breach of Consent Order to pay the USD 1,900,730.75 within 1 day as agreed in the Consent and not after 12 days, the Plaintiffs delayed in making down payment in the contract with 3rd Party who cancelled the contract and the Plaintiffs lost the contract.

At the same time; the Plaintiff deponed that the 3rd party increased the price of sesame and occasioned an addendum to Plaintiff’s contract with 3rd Party and included new contract price. The Plaintiffs now claim USD 1,000,000 from the Defendants.

The Court finds;

This is a different and new suit from the one heard and determined and/or settled in **HCC9 of 2018** which claim arose from a contract between parties whereas in the instant case the claim arose from the Consent that settled dispute in **HCC9 of 2018**.

The Court did not see any court proceedings that the Consent filed was adopted as an order of the Court in **HCCC 9 of 2018** save for what is deponed by parties in their pleadings and have annexed copy of the Consent. Thus, this Court cannot at this stage make an informed decision on the issue of striking out the Plaintiff’s pleadings in this case or not.

The Court notes with concern that in **HCCC 9 of 2018**, the Trial Court delivered Ruling on 19th December 2018 which is missing from the Court record. How did parties through Counsel thereafter enter into a Consent that is also missing from the Court record and there is no endorsement/adoption of the Consent by the Court as an order of the Court?

The Plaintiffs in the instant suit allege that the Defendants were privy to the contract the Plaintiffs entered into with the 3rd Party that was dependent on settlement of their dispute by payment within 1 day of filing Consent of USD 1,900,730.75. The Respondents oppose this fact they were not privy to the existence of the Plaintiffs contract with 3rd Party

The Respondents asserted that the payment of USD 1,900,730.75 was in full and final settlement of the matter. If they paid after 1 day ,12 days later, the Plaintiffs accepted payment and did not object or refuse/return the funds. The Respondents then filed suit against them yet there was no contractual agreement on penalty for late payment and the matter was settled.

The Court finds it unclear and uncertain whether Respondents’ late payment occasioned loss of contract with 3rd Party altogether or renegotiated contract at a higher price. This is because the Plaintiff deponed on the one hand they lost the contract with the 3rd Party and on the other hand, the price of the commodity was increased and they suffered loss.

All these issues can only be canvassed and ventilated at hearing of the suit by the Trial Court. Due to scanty information at this stage, this Court would not dismiss the Plaintiff as maybe during trial the evidence may confirm either breach of Consent, now contract or not. Whether

the Plaintiff suffered loss or lost contract with 3rd Party, whether the Respondent knew of the 3rd party contract etc.

Each party is entitled by virtue of **Article 22, 48 & 50 COK 2010** to file suit/institute proceedings to enforce claim or right through access to justice and each party is accorded a fair hearing.

DISPOSITION

- 1. The application to strike out the Plaint at this stage under Order 1 Rule 15 of CPR 2010 is denied/dismissed.**
- 2. The matter be heard and determined on merit after close of pleadings and case management before any Court within Commercial & Tax Division.**
- 3. Each party bears own costs**

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND DECEMBER 2020 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KAHURA H/B MR. MUTHURI FOR THE RESPONDENT

MR. KIMATA FOR THE APPLICANT – ABSENT

COURT ASSISTANT: TUPET