



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY COURT

CIVIL CASE NO. 478 OF 2016

PUMWANI SERVICE ATATION LIMITED.....1ST PLAINTIFF/RESPONDENT

FALCON OIL LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFEDNANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application (herein “the application”) dated 3rd April 2018, brought under the provisions of; Section 3A, of the Civil procedure Act, (Cap 21) Laws of Kenya, order 2 Rule 15 (1) (b) & (d), and all other enabling provisions of the law. It is based on the grounds on the face of it and an affidavit dated 3rd April 2018, sworn by Nancy Naswa, the Remedial Analyst, in the Credit Remedial Collections and Recovery department of the Defendant.

2. The Applicant is seeking for orders that the suit herein be struck out and the costs of this application be provided for.

3. The background facts of the matter are that, the Plaintiffs who are customers of the Defendant were granted Tawaruq credit facility by the Defendant vides a letter of offer dated 14th June 2013, for the purpose of the Defendant taking-over their various credit facilities at the Gulf African Bank. By way of a letter of offer dated 30th April 2014, the Defendant extended credit facilities to the 2nd Plaintiff, in the form of a diminishing Musharakah facility, in the sum of Kshs. 72,500,000.00 for the purposes of purchasing ten (10) apartments. Further, by way of another letter of offer dated 30th April 2014, the Defendant extended credit to the 2nd Plaintiff; a Murahaba Finance Facility, in the sum of USD. 2,041,000.00, to finance working capital.

4. The said facilities were duly secured by way of registered charges on several residential apartments and plots of land owned by the Plaintiffs and by way of corporate guarantees from the 1st Respondent and a separate company by the name Ense Limited. The 1st Plaintiff’s directors also offered personal guarantees.

5. Subsequently, the 2nd Respondent defaulted on the settlement of monthly installments as agreed on, resulting in arrears of Kshs.60,032,414.00 and USD. 880,886.70 as at 23rd November 2015, whereupon the Defendant notified the Plaintiffs on several occasions to regularize the account but the request was not honoured.

6. As a result, the Defendant issued the relevant statutory notices to exercise its statutory power of sale, to recover the debt outstanding. However before the sale, the Respondents, filed an application seeking injunctive orders, but the order was not granted, instead, the court on the 29th of November 2016, directed them deposit Ksh.30, 000,000.00, with the Defendant as a pre-condition to stop the impending sale.

7. It is avers that to date, the Plaintiffs have not fully complied with the said orders but have continued to make repayments to the applicant in an effort to reduce the outstanding loan amounts, while negotiating for more time to be granted to them to fully comply. That from the documentation attached to the supporting affidavit, it is clear that the Plaintiffs have admitted owing the amount claimed. Therefore the continued existence of this suit, in light of the admission of debt and further considering the fact that the Respondents are actively servicing the debt, is clearly an abuse of the court process, as there is no dispute to be determined by the court.

8. Further that although the firm of; Messrs Igeria & Ngugi Advocates, reached out to the Plaintiffs to have the suit withdrawn, the Plaintiffs declined the request and have left suit pending without being actively prosecuted. It is therefore evident that the Plaintiffs have no further claim as against the Defendant and the suit ought to be struck off.

9. However the Plaintiffs filed a replying affidavit dated 5th July 2018, sworn by Adan Maalin Mursal, a director of its companies, in opposition to the Application. He avers that, the 2nd Plaintiff was offered and accepted the subject banking facilities as aforesaid. That on or about 23rd September 2013, the 1st Plaintiff offered its properties as security to secure the financial accommodation for a maximum sum of; Kenya Shillings one hundred and Ninety Million (Kshs. 190,000,000), only together with other lawful and agreed charges.

10. However, subsequently, the Defendant loaded on the 2nd Plaintiff's account unlawfully charges and/or interest, without any valid legal basis. Further the Defendant demanded to be paid a fresh sum of Kenya Shillings One Hundred and Sixty Four Million, One Hundred and Ninety Seven Thousand (Kshs. 164,197,000) contrary to the terms of the Musharakah agreement and/or the contract between the parties which was premised on Islamic diminishing Musharakah facility.

11. That, the 2nd Plaintiff has paid the amount of; Kenya shillings Thirty Million (Kshs. 30,000,000) as ordered by court in an effort to redeem its property and are still interested in prosecuting the matter in an effort to protect their redemptory right over the property. That indeed, the Defendant is aware of the arrangement to redeem the property, therefore the Defendant cannot claim that its right will be prejudiced if the suit is not struck out.

12. The Plaintiffs argued that, the law requires the court to decide a matter under the guide of defined legal principles and exercise its judicial discretion before striking out the suit.

13. That, the Defendant is not truly an Islamic bank operating under Islamic financial laws, as enshrined in the Islamic law. Therefore it has exploited and continues to exploit the Plaintiffs on the pretext of providing Islamic financial products based on Islamic principles at the expense and detriment of the Plaintiffs. Finally, the Plaintiffs argued that they have an arguable case which should be given a chance in court.

14. The parties disposed of the application vide filing of submissions. The Applicant reiterated the facts in the supporting affidavit and argued that in light of the same, the filing of the suit is scandalous, frivolous and/or vexatious, and was done with the sole intent of prejudicing the Applicant and delaying the administration of justice. Therefore its continued pendency is an abuse of the court process.

15. The Applicant relied on the case of; ***Dev Surinder Kumar Bij v Agility Logistics Limited civil suit no. 311 of 2013[2014] eKLR*** where it was held, **inter alia**, that:-

“For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable action as against the Defendant.”

16. **The case of; *Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499, was also cited*** where it was held that a pleading is scandalous if it states;

(i) matters which are indecent; or

(ii) matters that are offensive; or

(iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or

(iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or

(v) matters that charge the opposite party with bad faith or misconduct against him or anyone else;

(vi) matters that contain degrading charges; or

(vii) matters that are necessary but otherwise accompanied by unnecessary details.

17. The Defendant submitted that, the word “scandalous” for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules, is not limited to indecent, offensive and improper act, but denial of a well-known fact can also be rightly described as scandalous, as stated in the case of; ***J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.***

18. The Defendant further submitted that, as stated in ***Bullen & Leake and Jacobs Precedents of Pleading (1^{2th} Edn.) at 145***, a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Therefore, a matter is said to be vexatious when;

(i) it has no foundation; or

(ii) it has no chance of succeeding; or

(iii) the pleading is brought merely for purposes of annoyance; or

(iv)) it is brought so that the party's pleading should have some fanciful advantage; or

(v) Where it can really lead to no possible good. (See Willis Vs. Earl Beauchamp (1886) 11 PD 59)

19. The Applicant invited the court to be guided by the decision in D. T. Dobie & Co (Kenya) Ltd v Muchina(1982) KLR 1, where the Court of Appeal pointed out that, the power to strike out a pleading is a discretionary one but it ought to be applied very sparingly and exercisable in very plain cases.

20. That the said case laid down the following principles;

- a). *The Court should not strike out a suit, if there is a cause of action with some chance of success.*
- b). *The power should only be used in plain and obvious cases and with extreme caution.*
- c). *The power should only be used in cases which are clear and beyond all doubt.*
- d). *The Court should not engage in a minute and protracted examination of documents and facts.*
- e). *If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward."*

26. However, the Plaintiffs reiterated that, the Defendant has violated the contractual terms as deposed to herein. The case of; Yaya Towers Limited –vs- Trade Bank Limited (in Liquidation) Civil Appeal No. 35 of 2000. was cited where the Court of Appeal held that:-

"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 plaintiffs' 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 if 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... If the Defendant assumes the burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon Affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the Defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the Defendant in the particulars delivered of such allegation, it would not be possible for the Plaintiff to prove any request made by the Defendant and without this the essential ingredient of the cause of action cannot be proved and the Plaintiff is bound to fail... No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment"

21. The Plaintiffs also relied on the case of; Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance – vs- Mara Conservancy & 5 Others Civil Case No. 37 of 2013 [2014] eKLR where Anyara Emukule J. stated;

"There are well established principles which guide the Court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The Court ought to act 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.

A caused of action is "a factual situation the existence of which entitles one person to obtain a remedy against another person" Letang –vs- Cooper [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures."

22. The Court of Appeal case of; DT Dobie & Company (Kenya) Ltd –vs- Muchina (supra) and the principles laid therein and stated herein was also cites where Madam JA (as he then was) adopted the finding of, Sellers LJ in Wenlock –vs- Moloney [1965] 1 WLR 1238 and stated:-

"This summary jurisdiction of the Court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power"

23. That, Danckwerts LJ , in the same case stated that:-

"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."

24. Finally, the Plaintiffs relied on the case of; *Crescent Construction Co. Ltd –vs- Delphis Bank Ltd Civil Appeal 146 of 2011 [2007] eKLR* where the Court of Appeal observed that:

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

25. The Defendant in response to the Plaintiffs submissions, argued that, although the Plaintiffs deny indebtedness claiming that the Defendant loaded unlawfully charges onto the 2nd Respondent’s account without any legal basis and contrary to the law and that the sum of Kshs. 30,000,000 as ordered by court, is settled but the evidence attached the Replying Affidavit as annexure “AMM-1” proves the contrary. The repayment though made, failed to comply with the dictates of the Honourable court’s order dated 30th November 2016, requiring to have been made on or before 4th December 2016.

26. That the Plaintiff in an attempt to steal a match on the Defendant now purport to change tact and base their suit on the unsubstantiated allegations that the latter’s demands are contrary to the Islamic law governing the Musharakah Agreement between the parties.

27. The Defendant dismissed the argument that it not an Islamic Bank and practicing the relevant legal principles relating to Islamic lending as baseless and submitted that this argument does not raise a valid ground for determination by the court, for the simple reason that the same is not captured as a course of action in the original pleadings filed by the Plaintiffs. Thus a mere afterthought, unsubstantiated and raised with the sole intent of embarrassing the Defendant and misleading the court into unnecessarily addressing itself on issues that have not been raised in the pleadings filed before the court..

28. The Defendant submitted that the Plaintiffs cannot, on one hand actively pay the debt and engage in settlement discussions while, on the other hand, have the suit pending in court unprosecuted and left as a weapon to forestall any prejudicial move by the Defendant. Therefore such actions cannot and should not be tolerated by the Honorable court and the suit therefore ought to be struck out, with costs to the Applicant.

29. I have considered the Application in total and the arguments and the submissions advanced and I find note it is premised on Order 2 rule 15(1)(b) and (d) of the Civil Procedure Rules that provides 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).....

(b) it is scandalous, frivolous or vexatious; or

(c).....

(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.”

30. Thus it is incumbent upon the Defendant/Applicant to show prima facie that the case herein is scandalous, frivolous or vexatious or otherwise an abuse of the court process. The parties have submitted on the legal principles that guide the striking of a suit on these grounds. That is settled law and I shall be guided by the same.

31. In the instant case what the Defendant is basically arguing is that, the Respondents have admitted the debt and have made part payments in settlement of the debt. The Application is keen to entry of judgment on admission. However, for judgment to be entered on admission, the admission must be plain and clear in the pleadings.

32. I have gone through the contents of the Plaintiff and I find under paragraph 15 thereof the Plaintiffs plead as follows:-

“Despite as aforesaid and blatant breach of the covenants and agreements contained in the said charge, the defendant has acted and continued to act maliciously and in utmost bad faith towards the Plaintiffs by refusing to release the title documents with the sole intention clogging the 1st Plaintiff’s right of redemption and in this regard the defendant did the following:-

(a) Clogged and or fettered the plaintiff’s right of redemption;

(b) Failing to release the title documents in respect of the plaintiff’s properties;

(c) Acting in breach of the duty of care owed to the plaintiffs;

(d) Acting illegally and contrary to law incomplete breach of its obligations under the law and agreement with the plaintiffs;

(e) Failing to issue and serve the mandatory notice under Sections 90(1), (2) and 96(2) of the Land Act 2012.

33. The Plaintiff pleads further at paragraph 17 of the plaint as follows;-

“the Respondents do not owe the sum of Kenya shillings one hundred and sixty four million one hundred and ninety seven thousand (Kshs. 164,197,000) as alleged or at all. From the Defendant’s own Bank statement, the amount reads the sum of Kenya shillings fifty four million four hundred and forty five thousand and forty nine cents (Kshs. 54,445,408.49) and after the payment of the proceeds of sale of LR No. Nakuru/Municipality Block 12/99 of Kenya shillings thirty million (30,000,000) the said debt will substantially reduce and further if the Defendant released the titles as requested and after the sale of the same, the Defendant’s debt will be cleared in full.”

34. Finally, the Plaintiffs pleads under paragraph 27, that the Defendant is acting illegally and contrary to the law and agreement with them and states that the particulars of illegality and breach include;

(a) Failing to issue a statutory notice of sale under Sections 90(1), (2) and 96(2) of the Land Act 2012;

(b) Contrary to the terms of the contract executed between the Plaintiffs and the Defendant, the product offered by the Defendant to the Plaintiffs was not Islamic product as the defendant had deceived the Plaintiffs into believing that the products offered by the Defendant was Islamic;

(c) Unlawfully loading onto the 2nd Plaintiff’s account and lumped together a debt guaranteed by Ense Limited which is separate and distinct from this without any valid legal basis and contrary to the law and thereby clogging and fettering the 1st Plaintiff’s right to redemption of its properties;

(d) Failing to comply with the mandatory provisions of Section 90(1) and (2) of the Land Act 2012, to serve the Statutory Notice and hence the Defendant has infringed on the Plaintiffs rights over the charged properties.

35. It is evident from the Plaint that several issues have been raised that will call for evidence to be adduced. Therefore there is no admission of the debt in the plaint. The Plaintiffs may be serving the debt and engaged in negotiation to settle the same but that does not disentitle them of the right to be heard on the issues raised. Furthermore, the payment of Kshs. 30,000,000 was made pursuant to a court order issued on 29th November 2016 as a condition for stay of the impeding, however late it may have been made.

36. The legal principles cited here on the power of the court to strike out a pleading, clearly state that the striking out of a pleading is a draconian act that should be used as a last resort. A litigant should not be deterred from approaching the seat of justice. The provisions of Article 48 of the Constitution of Kenya are supportive of the same.

37. In the given circumstances, I find no good reasons advanced to grant the payers sought for in the subject Application I therefore dismiss it with orders that, the costs thereof to abide the outcome of the suit.

38. Those then are the orders of the court.

Dated, delivered and signed in an open court this 3rd day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Ouma for Mr. Lakicha for the Plaintiffs/Respondents

Ms. Kiiru for the Defendant/Applicant

DennisCourt assistant