



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 92 OF 2018

ONE PAY LLC.....PLAINTIFF

-VERSUS-

ALY-KHAN MANSUR ABDULSATCHU.....1ST DEFENDANT

RICH ASSET MANAGEMENT LIMITED.....2ND DEFENDANT

RULING

1. In the Ruling I am considering two Notice of Motions, and one filed by the Plaintiff while the other is filed by the Defendants. Because both of those two applications are dated the same date, 28th May 2018, I will distinguish them by referring to the party who filed the same.

BACKGROUND

2. In the ruling I have avoided introducing the parties because there is controversy of the correct title of the Plaintiff, when the Plaintiff's name changed after the Plaintiff was amended. Since the said amendment is one of the issues. I will determine, in this ruling, let it suffice by me simply referring to the parties as Plaintiff or 1st and 2nd Defendants.

3. There is no doubt that before this case was instituted the parties had financial dealings with each. The exact terms of those dealing differ depending on which party is narrating them. I will however attempt to give a snapshot of each party's explanation, as deduced from their pleadings.

4. The Plaintiff has sued both Defendants seeking judgment for Euro 679, 3000 (before amendment of the Plaintiff) and Euro 473,714.51 (after the amendment of the Plaintiff).

5. The Plaintiff's case is that on being required to close its account at Capital Bank, based in Georgia, the 1st Defendant made representation to it to the effect that the 1st Defendant could assist the Plaintiff to open an account at Kenya Commercial Bank (KCB). The Plaintiff transferred USD 19,045.08 and EUR679,363.86 to KCB account numbers 120-5631836 and 1205631984. That the 1st Defendant being the sole signatory to the EUR bank account at KCB, irregularly and lawfully without authority transferred the sum of EUR 679,300 from the Plaintiff's account to the 2nd Defendant's account. The Plaintiff alleges that the 1st Defendant's action, in making that transfer was in breach of the mandate; was fraudulent; and misappropriated and/or embezzled. It is on that basis the Plaintiff seeks judgment against the Defendants.

6. The Defendants deny the Plaintiff's claim. The Defendants further state that at no time was the 1st Defendant a signatory of the EUR account with KCB and consequently that he did not transfer funds as pleaded by the Plaintiff.

7. It is the Defendants' case that the 1st Defendant conceptualized the idea of converting the 2nd Defendant into a Fund manager. In that regard in the year 2016 some of the Plaintiff's representatives, who were interested to invest in Kenya, sought to join the Defendants in such fund management business. Further to that end the Plaintiff paid EUR 679,364.00 as a non-refundable commitment fee and further undertook to inject USD 10 million into the business. That it is in that background the Plaintiff transferred EUR 679,364.00.

THE PLAINTIFF'S APPLICATION

8. The Plaintiff's application is brought under Order 2 Rule 15 of the Civil procedure Rules (the rules). The Plaintiff seeks the prayer that the Defendants' defence be struck out and judgment be entered for the Plaintiff against the Defendants for EUR 473,714.

9. The affidavit in support of the application is sworn by Saba Pogoso who describes himself as authorized signatory for account of the Plaintiff at JSC Capital Bank.” The deponent, in that affidavit, proceeded to repeat the facts set out above. That the Plaintiff, on closing its bank account in Georgia, and on the advice of the 1st Defendants, opened a bank account with KCB where the 1st Defendant was the sole signatory of that KCB account. That the 1st Defendant irregularly and unlawfully transferred EUR 679,300. That following demand the 2nd Defendant refunded EUR 205,585.49 and therefore the amount now due from the Defendants is EUR 473,714.51.

10. The deponent further deponed that the defence filed by the Defendants consist of the ‘blanket denials’ to the Plaintiff’s claim.

11. The Plaintiff in support of its application relies on bank statements of KCB bank account, funds transfer form and a screenshot of communication between 1st Defendant and the Plaintiff. The screenshot, referred herein, is what seems to be cell phone text message which reflects a message that:

‘Let’s start again.

I am not a thief.

I want to return

Your money.

Thanks’

12. The application was opposed by the Defendants through the Replying Affidavit of Aly Khan Mansur Abdulsatchu, the 1st Defendant. In that affidavit the Defendants repeat matters raised above. Further the Defendants deponed that the agreement to invest in Fund management business took place between the 1st Defendant, on his behalf and on behalf of the 2nd Defendant and with Gilbert Armenta on behalf of the Plaintiff.

ANALYSIS AND DETERMINATION OF PLAINTIFF APPLICATION

13. The Plaintiff has moved this Court under Order 2 Rule 15 (a) of the Rules. By its application it is seeking a finding that the Defendants defence discloses no reasonable defence to this cause. What the Plaintiff therefore seeks is the striking out of that defence. Since that is the prayer sought by Plaintiff it would be wise to begin by considering leading case in striking of pleadings. This is the case of **D.T DOBIE & COMPANY (KENYA) LTD. V. MUCHINA (1982) KLR** where Madan J.A stated:

“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 for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits ‘without discovery, without oral evidence tested by cross-examination in the ordinary way.’ (Sellers LJ (Supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

14. It is clear to me, with the above caution in mind, and even though the parties have tacitly invited the Court to embark on a trial on documents; that I should not usurp the trial Court’s discretion by dealing with the merit of the evidence presented before me.

15. The Plaintiff, in this claim, has pleaded that the 1st Defendant was fraudulent and misappropriated or embezzled the Plaintiffs fund. Those allegation are only against the 1st Defendant. That being so it is not clear how the defence of the 2nd Defendant, a limited liability company can be struck off without it being given an opportunity to defend itself.

16. Further the jurisprudence of striking pleading is that even where a party shows one triable issue it is sufficient to entitle them to defend/plead their case. The Defendants pleaded, and the Plaintiff did not reply to that defence, that the agreement with the Plaintiff was to invest into a fund management company and to that end the Plaintiff invested EUR 679,364.00, which was non-refundable.

17. That pleading in my view is not a mere denial. It raises triable issue which entitles the Defendants to defend this case. This is particularly because the Plaintiff claim is not wholly supported by the documents before Court. For example, and I need to be cautious I do not enter the trial Court’s arena, the Plaintiff pleaded that when it released the funds to the 1st Defendant it made him the sole signatory of the bank account and in that regard prepared all the documents. Those documents are not before Court.

18. It is in view of the above that I am unable to say, with certainty the cell phone text, reproduced above, was an admission by the 1st Defendant. It is also noted that the 1st Defendant denied sending the said text.

19. I make a finding that the Defendants have raised bona fide triable issues which ought to go to full trial. I therefore decline to grant the draconian order of striking the defence and entering judgment for the Plaintiff. The Plaintiff’s application is therefore dismissed and in my view the costs of that application must follow the event and be awarded to the Defendants.

ANALYSIS AND DETERMINATION OF DEFENDANTS APPLICATION

20. The Defendants' application is premised on Order 4 Rule 1 (4) of the Rules which provides:

“Where the Plaintiff is a corporation, the verifying affidavit

shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

21. The whole of Order 4 of the Rules deals with the filing of the Plaintiff and what should accompany a Plaintiff when it is filed. Under Order 4 Rule 1 (2) of the Rules it is provided that a Plaintiff, on being filed in Court, shall be accompanied by an affidavit verifying correctness of the averments in the Plaintiff. That requirement is the one referred to in Order 4 Rule 1 (4) of the Rules in respect to corporations.

22. The Defendants relying on the above rule pray, in their application, for striking out of the verifying affidavit sworn by Sopio Panaetova on 27th February 2018. That prayer is based on the grounds that that verifying affidavit is not sworn by an officer of the Plaintiff's company, as required by Law, that the deponent of that verifying affidavit was a former employee of the Plaintiff's former bank; that the deponent did not show the authority to swear the verifying affidavit; and that because the Plaintiff company is registered in Georgia it is important for the Court to confirm the Plaintiff authorized the filing of this case.

23. The application was opposed by the Plaintiff through affidavit of Saba Pogosov. He deponed that there is no legal requirement for the Plaintiff to file the resolution together with the Plaintiff. That pursuant to Article 159 of the constitution it is in the interest of Justice for the Court to allow the suit to proceed.

24. The Defendants' application faults the Plaintiff's verifying affidavit filed in support of the Plaintiff herein. Order 4 Rule 1 (1) (f) of the Rules provides that every Plaintiff shall be accompanied by a verifying affidavit confirming an averment as follows:

“An averment that there is no other suit pending, and that there have been previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaintiff.”

25. In the case of a corporation, such as the Plaintiff, that verifying affidavit must be sworn by an officer of the company duly authorized under seal.

26. In this case the Plaintiff was accompanied by a verifying affidavit of Sopio Panaetova. In the first paragraph of that affidavit that person stated:

‘That I am formerly employed by Capital Bank where the

Plaintiff had a bank accounts and I am fully aware of the transaction by the Plaintiff to swear this affidavit on its behalf’.

27. That deposition shows that the Plaintiff's verifying affidavit is wanting in compliance with the Rules. Order 4 Rule 1 (4) requires an officer of a corporation, who is authorized under seal to swear the verifying affidavit. The verifying affidavit in this case was sworn by a former banker of the Plaintiff. That affidavit does not meet the legal threshold of the Rules and it is hereby struck out.

28. That affidavit having been struck, I am minded, contrary to the Defendants' submission, to decline to strike out the Plaintiff. I am persuaded, in this regard, by the case MICROSOFT CORPORATION –V- MITSUMI COMPUTER GARAGE LTD & ANOTHER (2001) eKLR where Justice Ringera (as he then was) held:

“Rules of procedures are the hand maidens and not The mistress of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it.... Deviation from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue”.

29. I too find that justice in this case would best be served by sustaining this suit and not striking out the Plaintiff.

30. The Defendants' application will be allowed to the extent that the verifying affidavit will be struck out but the Plaintiff will be granted a time/period to file another verifying affidavit, which complies with the Rules.

AMENDED PLAINT

31. The Plaintiff filed the Plaintiff on 5th March 2018. The Defendants filed their defence on 3rd April 2018. The Plaintiff filed an amended Plaintiff on 2nd May 2018.

32. The Defendants made a plea in its submission and by affidavit evidence for the striking out of the Amended Plaintiff on two grounds, that it was filed out of time without leave and that its filing changed the name of the Plaintiff.

33. As stated before the Defendants filed their defence on 3rd April 2018. Order 7 Rule 1 of the Rules requires a Defendant to file a defence within fourteen days after entry of an appearance. Further it requires such a Defendant to serve the Plaintiff with that defence within fourteen days from the date of filing a defence and to file an affidavit of service to that effect.

34. The Defendant in this case did not file an affidavit of service to indicate when their defence was served on the Plaintiff. It is that affidavit that would have assisted this Court determine when the close of pleading was. Order 2 Rule 13 provide:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

35. In the absence of the Defendants’ affidavit of service evidencing service of their defence, I am unable to determine when the pleadings closed to determine if the Amended Plaintiff filed by the Plaintiff ran foul of Order 8 Rule 1 (1) of the Rules.

36. There is however validity in the issue raised by the Defendant that the Amended Plaintiff introduced another Plaintiff.

37. In the original Plaintiff the Plaintiff was “ONE PAY LIMITED’ when the Amended Plaintiff was filed on 2nd May 2018 it amended the Plaintiff to read “ONE PAY LLC’. It does not take much to notice that those are two different parties. One is limited liability and the other is LLC.

38. The Plaintiff, before Amending the Plaintiff, should have moved the Court, by application, under Order 1 Rule 10 for Court to permit it to substitute “ONE PAY LIMITED” for “ONE PAY LLC”

39. On that ground above, that is the Plaintiff substituted a party without leave of the Court, the Amended Plaintiff will be struck out.

40. In the end the following will be the orders of this Court:

- a) **The Plaintiff’s Notice of Motion dated 28th May 2018 and filed in Court on 29th May 2018 is hereby dismissed with costs.**
- b) **The Defendants Notice of Motion dated 28th May 2018 filed in Court on 5th June 2018 is allowed to the extent that the verifying affidavit of Sopia Panaetova of 27th February 2018 is hereby struck out. The Plaintiff shall within 21 days from today file another verifying affidavit.**
- c) **The Defendants are granted costs of its Notice of Motion filed on 5th June 2018.**
- d) **The Amended Plaintiff, filed on 2nd May 2018 without leave of the Court, is hereby struck out with costs to the Defendants.**

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

.....**FOR THE 2ND DEFENDANT**