



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CASE NO. 387 OF 2017

MWACHON HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

SAYANI INVESTMENTS LIMITED.....DEFENDANT

RULING

BACKGROUND OF APPLICATION

By an Application dated 5th September 2018 and filed on 6th September 2018, the Defendant sought for orders that: -

- 1. The Plaintiff herein be struck out.**
- 2. Costs of this Application.**

The Application was based on the following grounds: -

- 1. The Plaintiff discloses no reasonable cause of action as against the Defendant;**
- 2. The Defendant is a stranger to the Plaintiff and has never been a tenant in the suit property. That even the rental space allegedly occupied by the Plaintiff was until 25th September 2015 was let to Safety Banner Limited;**
- 3. That on 25th September 2015 fire broke out destroying Safety banners Limited's entire premises, equipment and furniture. Later, Safety Banners instituted a suit against The Defendant in Business Premises Rent Tribunal case number 730 of 2015 which is still pending before the tribunal;**
- 4. There is no nexus between Safety Banners and the Plaintiff. That even Judy Cherop Kibet, deponent of the Plaintiff's verifying Affidavit is also a stranger to the Defendant and is not a director of Safety Banners;**
- 5. Therefore, the Plaintiff has no legal or equitable interest over the suit property and as such has no reasonable cause of action against the Defendant;**
- 6. It is thus logical for the Plaintiff to be struck out.**

The Plaintiff responded to the Application by filing a Replying Affidavit sworn by **Judy Cherop Kibet** on 18th September 2018 and a Further Affidavit sworn by the said Judy Kibet on 19th February 2019.

In her Replying Affidavit, Judy Cherop Kibet states as follows:

- 1. That the Defendant's application lacks merit and is an abuse of the court and wastage of judicial time and should thus be dismissed with costs.**
- 2. That the Defendant has been served with a Hearing Notice of this suit twice and hence the Defendant's Application is an**

afterthought designed to delay the hearing of the main suit.

3. That the Plaintiff's suit is merited as it discloses a reasonable cause of action.
4. That the Respondent was the tenant of the Applicant and had been paying rent to the Defendant who has never declined payment.
5. That on 31st August 2012, a lease agreement was drawn, under instructions from the Defendant, in favour of the Plaintiff by the firm of Kisaka and Company Advocates and the said firm was paid Kshs. 45,000 by the Plaintiff.
6. That upon drawing the lease, the same was executed by the Plaintiff and thereafter transmitted to the Defendant for execution and Kisaka & Company Advocates for registration but the lease was never returned to the Plaintiff's advocates.
7. That Safety Banners had vacated the premises as at the time the lease was being drawn.
8. That the nature of the tenancy between the Defendant and Plaintiff was periodic and by law, is not required to be in writing.
9. That the Plaintiff took over the premises from Safety Banners.
10. That Safety Banners should be enjoined in the suit.

In the Further Affidavit dated 19th February 2019, **Judy Cherop Kibet** attached a copy of the business sale agreement between **Mwachon Holdings Limited** and **Safety Banners Limited** together with copies of payment receipts to the Defendant being counterfoils of cheque books issued under Mwachon Holdings Limited.

The Further Affidavit further states that the cause of action is well set from **paragraphs 1-6** of the Plaintiff under the rubric of the particulars of loss of business, malice & ill will on the part of the Defendant. Further, the tenancy relationship was quiet and peaceful until the Defendant started charging the land rates and rent.

DEFENDANT'S SUBMISSIONS

In support of its Application dated 5th September 2018, the Defendant filed Submissions dated 16th January 2019 on 17th January 2019.

It was the Defendant's submission that the issue for determination before this court is whether the Plaintiff should be struck out. The Defendant began by pointing out that at the time of filing its Defence dated 23rd October 2017, the Defendant raised that it would apply for the suit to be struck out and thus the Plaintiff's claim that its Application dated 5th September 2018 is an afterthought, is not merited.

The Defendant relied on **Order 2 Rule 15 of the Civil Procedure rules** to spell out the circumstances under which a pleading may be struck out. The said Rule provides;

“At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that-

- a. It discloses no reasonable cause of action or defence in law***
- b. It is scandalous, frivolous or vexatious***
- 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.”***

It was the Defendant's submission that this Application is premised on **Order 2 rule 15 (a)** that the Plaintiff should be struck out as it discloses no reasonable cause of action as against the Defendant. A cause of action has been defined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint as set out in ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR***. In addition, Black's Law dictionary, 2nd Edition defines a cause of action as:

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.”

It was their submission that the Plaintiff has failed to establish any right it has against the Defendant's property by failing to adduce proof in support of the allegation that the Plaintiff was the Defendant's tenant or a subtenant either through a lease or periodic tenancy. That even the purported lease agreement alluded to in its Replying Affidavit has not been attached for perusal and neither is it in their Bundle of Documents.

Further, all the receipts and invoices attached to both the Plaintiff's and Defendant's Bundle of Documents were issued to **Safety Banners Ltd**. That even the case before the **BPRT** was lodged by Safety Banners. The Defendant in support of its case filed its Bundle of Documents that contains the Lease to **Safety Banners Ltd** and receipts and invoices to Safety Banners Ltd. In addition, the Plaintiff has also

not demonstrated any nexus between it and Safety Banners. They are not agents or subtenant (which would be illegal as the Lease between the Defendant and Safety Banners forbids it) of Safety Banners. Moreover, **Judy Kibet** has no relations with the Defendant's tenant as she is not a director of Safety Banners. Therefore, without a doubt the Defendant's tenant as at 25th September 2015 was Safety Banners Ltd and as such, the Plaintiff has no legal or equitable interest over the suit premises.

Having established that there exists no contract between the Plaintiff and the Defendant; it was the Defendant's submission that the Plaintiff is barred by the principle of privity of contract in enforcing the orders sought. The Defendant relied on the case of **William Muthee Muthami v Bank of Baroda [2014] eKLR** where the Court of Appeal held:

"The nature of our civil process is that only a person who has incurred loss as a result of another's action can bring a claim for a legal or equitable remedy..."

They further relied on the case of **D.T. Dobie v Muchina (supra)** as cited authoritatively in **Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR** where the Court of Appeal held:

"Reasonable cause of action means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint... the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file..."

Having demonstrated that: the suit discloses no reasonable cause of action as against the Defendant, the Plaintiff is a stranger to the Defendant and that there exists no known legal or equitable interest in the Defendant's property by the Plaintiff, the Defendant prayed for their Application to be allowed as prayed.

PLAINTIFF'S SUBMISSIONS

The Plaintiff filed its Submissions dated 18th February 2019 on 19th February 2019 in opposition to the Defendant's Application dated 5th September 2018.

The Plaintiff submits that its suit discloses a reasonable cause of action as there existed a tenant-landlord relationship between the Plaintiff and the Defendant, the Plaintiff paid rent to the Defendant without rejection from the Defendant. Further, there exists a business sale agreement between the Plaintiff and Safety Banners and also the Defendant's advocates acknowledged having prepared a lease in favour of the Plaintiff.

It was thus their submission that issue for determination was whether or not the Plaintiff's suit discloses a reasonable cause of action.

The Plaintiff relied on Order 2 Rule 15 and on the case of **Drummond Jackson v BMA [970] 1 WLR 588 at page 696** to define "reasonable cause of action":

"No exact paraphrase can be given but I think "reasonable cause of action" means a cause of action with some chance of success when (as required paragraph (2) of the rule) only the allegations in the plaint are considered."

They further relied on the case of **Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** where the Court of Appeal held:

"The power of the court to strike out a pleading is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial judge was plainly wrong...striking out a pleading is a draconian act which may only be resorted to in plain cases..."

Further in **Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit No. 311 of 1013 [2014] eKLR** it was held 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 an action as against the Defendant..."

From the foregoing and on reliance of the above-mentioned case law, it was the Plaintiff's submission that there exists a reasonable cause of action against the Defendant and as such, the court should dismiss the Application dated 5th September 2018 with costs.

DETERMINATION

The Plaint filed on 20th September 2017 provides statement of claim as follows;

The Plaintiff was a tenant of the Defendant based on a Tenancy Agreement that allowed the Plaintiff to run a Restaurant business in the name and style of Funky Chicken and paid rent to the Defendant of Ksh 92,800/- a month.

It is deposed a fire broke out whose cause was/is not conclusively determined. Thereafter, despite Court orders from **Business Premises**

Tribunal BPRT 730B/2015 Safety Banners Ltd vs Sayani Investments Ltd and with the enforcement of **OCS Central Police Station**, the Defendant declined the Plaintiff access to the business premises. This resulted in loss of business, equipment and opportunity. Hence the Plaintiff claims declaration and damages.

From the above outline of the Plaintiff's statement of claim, there is a reasonable cause of action in form of breach of a Tenancy Agreement which is subject to proof by evidence. The claim subject to proof is not frivolous, vexatious or scandalous, it will not embarrass or prejudice the Defendant as there will be opportunity to establish their position through evidence. This claim is not an abuse of the Court process as it is

legal claim .

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. See case of Martin Muthama vs 2 Others [2018] eKLR

From the material placed before this Court, the Plaintiff discloses triable issues, there are issues of law and fact arising from the pleadings and therefore cannot be determined at this stage prematurely but at the hearing and determination of the suit.

The Application is dismissed with costs by the Applicant to the Respondent, and the matter be processed in the normal manner for hearing and determination.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH JUNE 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. KIPRONO HOLDING BRIEF MR. LAGAT FOR PLAINTIFF

MR. MUNYASIA HOLDING BRIEF MRS SUNA FOR RESPONDENT

COURT ASSISTANT- JASMINE