REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. E010 OF 2018

KASSIM MOHAMUD MOHAMED.....1ST PLAINTIFF

HASSAN MOHAMUD MOHAMED.....2ND PLAINTIFF

-VERSUS-

MOHAMED KORIYOW MOHAMED.....DEFENDANT

RULING

The Plaintiffs approached the court through a notice of motion dated 23rd July 2018 praying for orders that;

a. The Defendant's statement of Defence and counter claim dated 28th May 2018 be struck out with costs.

b. Summary judgment be entered in favour of the Plaintiff's against the Defendant

The application was based on the grounds that;

a. The Plaintiffs entered into an agreement with the Defendant for the purchase of land known as Mombasa County, Mazeras Plots No.1128 to 1131 comprising of 80.4acres and not Title No.CR 68089 for Plot No MN/VI/1133 as alleged in the counterclaim;

b. The suit herein was filed against the Defendant on 26th April 2018 seeking to be reimbursed Kshs 24,024,500/-;

c. The Defendant acknowledges that he owes the Plaintiffs and the agreement between the two parties was that the Plaintiffs should hand over the original title; CR 68089 for Plot No MN/VI/1133 to the Defendant and consequently resign from the two companies which the Defendant has control over;

d. The said original title CR 68089 for Plot No MN/VI/1133 is not in possession of the Plaintiffs;

e. Despite the Debt Acknowledgment and Repayment Agreement between the parties, the Defendant neglected to repay the Plaintiffs and settle the debt of kshs 23,194,000on or before 31st December 2016 in 8 equal monthly installments beginning 30th May 2016 on condition that the Plaintiffs could resign from Tosha CFS and Magam Developers Company Ltd.

The Application was supported by an affidavit of the 1st Plaintiff where he stated that the Plaintiffs incurred a further Kshs 700,000 for processing the title and another Kshs 130,500 for land hence totaling to **Kshs 24,024,500/-.**

In further affidavits filed on 6th February 2019, the Plaintiffs who stated that they could not resign from a non-existent company. They realized that the alleged companies had not been registered by the Defendants, which matter they had reported at the Central Police Station.

REPLYING AFFIDAVIT

In a reply to the above application, the Defendant filed an affidavit dated 5th November 2018 stating that, he had filed a counterclaim that demonstrated the Plaintiffs were out to double benefit as they were holding the original title mentioned herein which they had been given to them to get financing.

On 15th January 2018, in response to the letter written by the Plaintiffs advocates demanding payment of the amount claimed requested the return the original title to the Defendant for purposes of registration and acquisition of a purchaser.

The Defendant further stated that the defence and counterclaim had triable issues as it sought to interpret the Plaintiffs breach of clause 4 of the Debt Acknowledgment and Repayment Agreement.

DEFENDANT'S SUBMISSIONS

In the Defendant's submissions dated 26th March 2019, he relied on the case ***Civil Appeal No. 217 of 2015,Kivanga Estates Ltd vs National Bank Ltd*** where the Court of Appeal held that,

> ***"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.***
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> ***Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;***
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> ***"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)* ***it discloses no reasonable cause of action or defence in law;***
>
> *b)* ***it is scandalous, frivolous or vexatious; or***
>
> *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....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*** *(Our emphasis).*

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilize this procedure, hence the use of the word "may". ***Order 2 rule 15*** *which retains word for word*."

In arguing that the defence raises triable issues, the Defendant outlined the issues to be;

1. Whether the Plaintiff's are indeed in possession of the original title of the subject matter herein which therefore renders the Agreement dated 25th April void.

2. Whether the Plaintiffs complied with clause 4 of the Agreement herein requiring them to resign from the two companies;

The Defendant relied on the case of **Kenya Power & Lighting Co. Ltd vs Alliance Media Ltd, Civil suit No. 285 of 2012**, where the court quoted the case of ***Moi University v Vishva Builders Limited -Civil Appeal No. 296 of 2004*** *and stated as follows:-*

> ***"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 Plaint 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:-***
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> > ***"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…."***

PLAINTIFF'S SUBMISSIONS

The Plaintiffs relied on **Order 2 Rule 15** and submitted that the defence does not disclose any cause of action as it merely consists of denials, where the Defendant has not produced any evidence showing that he indeed handed over the original title of the property herein, neither has he produced documents to show that the two companies are registered and that the Plaintiffs are directors.

The Plaintiffs relied on the case of ***Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015]eKLR*** where the court held that;

> ***"on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who has filed a defence which is a sham for the purpose only of temporizing on the case as long as possible…."***

The Plaintiff also submitted that the Defendant had acknowledged his indebtness to the Plaintiffs hence relying on the case of ***National Bank of Kenya vs Daniel Opande Asnani [2002]eKLR*** where the court held that;

> ***" The law is now settled and that is that the admission upon which a court of law will act to strike out a defence and enter judgment must be clear and unambiguous. The same admission need not be in the pleadings only. It cannot be discerned in any other way…….. I am satisfied that the debt herein had been admitted……. I do allow the application."***

DETERMINATION

The court has considered the application and submissions made by the parties. Its analysis is as follows;

The case of ***DT DOBIE & COMPANY (KENYA) LTD –VS- MUCHINA (1982) KLR*** espoused principle where Madan J.A (as he then was) adopted the findings of Sellers L. J. in ***Wanlock –vs- Moloney (1965) 1 WLR 1238*** where the learned Judge had this to say, while setting out principles to be considered by a court in striking out a pleading:

> ***"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 trail judge and to produce a trail 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"***

Further and in the same case**, Danckerts L J** detailed**:**

> ***"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"***

On the one hand, the Plaintiff/Applicant points out that the Defendant's Defense does disclose and defense and Counterclaim any cause of action as the Defendant acknowledged his indebtedness to the Plaintiff. The indebtedness was acknowledged vide the Debt Acknowledgment and Repayment Agreement of 25th April 2016 which cancelled all pre-exiting agreements, partnerships and other arrangements, provided the debt is herein settled. Indeed, he issued bad cheques; **Cheque Numbers 000039, 000040, 000041,000042, 000043 and 000044** all of First Community Bank, Kimathi Street, in pretext of repayment of the debt. Copies of the cheques are annexed to the Application/suit filed on 25th April 2018.There is also the letter dated 31st May 2016 from the Defendant's advocate admitting the debt and undertakes to repay 1st and 2nd installments.

The Defendant on the other hand deponed vide annexed Witness Statements filed on 26th March 2019 and claimed that Hassan Mohamed Abdi and Aden Hussein Mahad witnessed the Defendant hand over the Original Certificate Title number **CR68089 for Plot MN/VI/1133** to both Plaintiffs.

This court was about to determine the instant application and its attention was drawn to the Arbitration Clause 8 of the Agreement of 27th August 2015 between the parties with regard to Mombasa Municipality Plots 1128-1131 comprising of 80.4 acres. Clause 8 prescribes that any dispute between the parties touching upon the construction of this Agreement or on rights and liabilities of parties. This Court has to down its tools and allow parties to ventilate the dispute before the Arbitrator. The Debt acknowledgment and Repayment Agreement of 25th April 2016 would only supersede any agreements, partnerships or other arrangements pre-existing this Agreement and would be cancelled, provided the debt herein was/is settled. From the above circumstances the debt remains due and owing, hence the pre-existing agreement, partnership or other arrangements as they are not cancelled and one of these Agreements stipulates that parties chose arbitration as their choice of forum for dispute resolution.

DISPOSITION

1. **The matter is hereby referred to arbitration**

2. **Parties to agree on the appointment of an arbitrator**

3. **Upon default of the appointment of an arbitrator within 14 days, an arbitrator to be appointed by the Chartered Institute of Arbitrators on application by party/parties.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 4TH OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MUSUMBI FOR THE APPLICANT

MR. WAKOKO H/B MR. WABALE FOR THE RESPONDENT

MS JASMINE – COURT ASSISTANT