REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 38 OF 2015

MUMIAS SUGAR COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

DANTE'S PEAK LIMITED.....1ST DEFENDANT/RESPONDENT

DUBAI BANK KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

PETER KEBATI.....3RD DEFENDANT/RESPONDENT

CHRIS CHEPKOIT.....4TH DEFENDANT/APPLICANT

EMILY OTIENO.....5TH DEFENDANT/APPLICANT

PAUL MURGOR.....6TH DEFENDANT/APPLICANT

RULING

1. This ruling relates notice of motion applications, filed by the 4th, 5th and 6th defendants (herein "the applicants"), dated 30th August 2016 and 9th November 2015, respectively under the provisions of; Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap 21) of the Laws of Kenya, Order 1 Rules 9, 10(2), Order 2 Rule 15(1(a) (b) and (d) and (2) of the Civil Procedure Rules 2010, and all other enabling provisions of the law.

2. The applicants are seeking for orders that, the plaint dated 30th January 2015 and filed on 2nd February 2015, and/or amended plaint dated 11th April 2016, be struck out on the ground that it does not disclose any reasonable cause of action against them. That it is scandalous, frivolous or vexatious and otherwise an abuse of the process of the court and the costs of the application and/or the entire suit be borne by the plaintiff.

3. The 1st applications are supported by the grounds on the face thereof and affidavits sworn by the applicants. They aver that they are former employees of the plaintiff, having been employed as; finance director, company secretary and commercial director respectively.

4. The 4th applicant averred that, he is the former finance director of the plaintiff's company with effect from 1st July 2013, having tendered his resignation vide a letter dated 26th June, 2013. The said letter intimated that, his last working day would be 31st July, 2013. That as the former finance director, his role was limited to maintaining the books of accounts and to manage the daily operations within the finance department. Thus the selling of any sugar, which is the crux of the instant suit, was not within his docket. It was the role of a completely different department within the plaintiff's company. It was not therefore possible for him to engage or speak to any customers in regard to imported sugar as alleged.

5. He argued that the plaintiff in his suit is seeking for a plethora of orders, but they are specifically and primarily directed against the 1st and 2nd defendants and not him. That the amended plaint dated 11th April 2016, fails to disclose a reasonable cause of action as against him. The issues raised therein are frivolous and vexatious with no basis whatsoever and are merely raised for the sole purpose of annoyance as they have no chance of succeeding.

6. The 4th applicant argued that the pleadings are plainly and obviously incurably bad and beyond any curative remedy of amendment. The suit is unsustainable and the court should not hesitate to exercise its discretion to strike out the amended plaint dated 11th April 2016 as against him with costs, in the interest of justice.

7. The 5th applicant avers that she joined the plaintiff's company in September 1998, as a legal officer and rose through the ranks become the company secretary then Legal Affairs' director. Her responsibilities and duties involved working closely with the board of directors (herein "the board"), including coordinating the board's agenda in liaison with the chairman and the various chairpersons of board committees, circulating notices and board papers for meetings, recording the minutes of the meetings and generally presenting all minutes to the board members for approval and adoption. That all resolutions concerning the running of the plaintiff were passed by the board and were implemented within the policy directions.

8. She argued that she discharged her duties and responsibilities diligently and within the mandate given to her as an employee and secretary to the board. At no particular time did she willingly or otherwise collude or conspire with anybody to defraud the plaintiff as alleged. Further the allegations of fraud leveled against her in the plaint, as well as the witness statement are without basis and in bad faith, as no evidence has been availed and/or full details of the alleged transaction to support the allegations.

9. That she has been improperly joined in the suit with the aim to harass, prejudice and embarrass her after she sued the plaintiff for wrongful termination in the suit; ELRC Petition No. 249/2014, Kisumu. The Plaintiff is seeking access to the account of the 2nd defendant, to which she is not a custodian nor has control over. Further she is well aware that the 2nd defendant is under Receivership, hence this claim has been instituted in the wrong forum.

10. The 6th applicant similarly averred that, he is a former employee of the plaintiff, having served in various capacities and rose to the rank of; to a commercial director at the time of exit. He also averred that the plaint does not have any reasonable cause of action against him. That in fact, he has been mentioned only in paragraph 29 of the plaint. He was not a member of the plaintiff's board and was therefore not involved in any decision making process.

11. That he discharged all his duties and responsibilities diligently and professionally and it is on this basis that the company allowed him to serve in various capacities to its success. That all transactions that he undertook regarding the importation of 10,000 tons of sugar were in line with approval of the board as per the minutes dated 6th February 2013. He was on leave from 11th December 2012 to 8th January 2013, when the tendering of the sugar importers was done and therefore was not privy to the tender evaluation process.

12. He too, denied the allegation of fraud levelled against him in the plaint as well as the plaintiff's witness statement, terming them as lacking any basis and brought in bad faith. He joined issues with the 5th applicant on filing the claim in the wrong forum and averred that he had no access to the 2nd defendants account. He argued that the suit' aim is to prejudice, harass, embarrass him and cause him unnecessary anxiety and expenses.

13. However, the plaintiff filed grounds of opposition dated 22nd January 2016, in response to 5th and 6th applicants' applications and averred that, the same are fatally defective, as they offend the mandatory provisions of Order 2 Rule 15(2) of the Civil Procedure Rules 2010 (herein "the rules") and in that, in that the 5th applicant has attached thereto affidavits introducing evidence contrary to the rules.

14. The plaintiff argued that the plaint clearly raises a cause of action against the applicants, which cause, is disputed by the applicants in their filed defences wherein they put the plaintiff to strict proof, with respect to the averments in its plaint, thus denoting there are triable issues. The plaintiff further argued that the applications by the 5th and 6th applicants are an abuse of the court process frivolous and vexatious having been filed after the application to amend the plaint.

15. The plaintiff also filed a replying affidavit dated 25th October 2016, sworn by Ronald Joseph Lubya, from the Legal Services of the Company in response to the 4th applicant's application. He reiterated the averments in the grounds of opposition and Plaint.

16. The parties disposed of the applications by filing submissions which I have considered herein. The 4th applicant submitted that, it is trite law, that summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can only be application in plain, clear and obvious cases. Reference was placed on the holding by Madan J. (as he then was) in *D.T. Dobie & Company (Kenya) Limited vs Muchina, (1982) KLR 1*, where he stated that: -

> *"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof 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 discovery tested by cross examination in the ordinary way."*

17. Thus the court will exercise its jurisdiction to strike out a pleading where the pleading is demurrable and/or something worse than demurrable. That, a pleading ought to be struck out if it is shown to be completely bad to the extent that not even an amendment can save it. Therefore, the summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the fact of it "obviously unsustainable. The case of; *Francis Kamande vs Vanguard Electrical Services Limited, Civil Appeal No. 152 of 1996 (1998) eKLR* was relied on. However, it was submitted that, an amendment to the amended plaint will not breathe life into the same.

18. The 4th Applicant acknowledged, it is trite law that, when an application for striking out a pleading is filed under; Order 2, Rule 15(a) of the Civil Procedure Rules, 2010, on the ground that, a pleading discloses no reasonable cause of action or defence, no evidence is admissible, as the Application is determined on the basis of an examination of only the pleadings as filed.

19. The case of; *Yaya Towers Limited vs Trade Bank Limited (In liquidation), CA No. 35 of 2000 (2000) KLR 527*, was cited, where, Lakha JA (as he then was) held that in such an application, the court is invited to strike out the claim *in limine* on the ground that, it is bound to fail even if all such allegations are proved. Thus the court's function is limited to a scrutiny of the plaint. The court tests the particulars which have been given of each averment to see whether they support it and examines the averments to see whether they are sufficient to establish the cause of action. As such it is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.

20. That if the application is made under; Order VI, Rule 13(1)(b) or (c) or (d) of the Civil Procedure Rules, 2010 or the inherent jurisdiction of court on the ground that the claim is "frivolous" or is an abuse of the process of the court then, evidence is admissible to show that this is the case. The case of;*General (Rtd) JK Mulinge vs Lakestar Insurance Company Limited, Nairobi HCCC No. 1275 of 2001, LLR No. 1197 (CCK)*

21. The 4th applicant argued that his application is premised not only on the provisions of; Order 2 rule 15 (1)(a) but also under (b) and (d). He denied the allegation that the a pplication is scandalous, frivolous or vexatious. He relied on the case of; J*oseph Okumu Simiyu vs Standard Chartered Bank, LLR No. 1132(HCK),* where it was held that, a pleading is frivolous if it has no substance; or it is fanciful; or where a party is trifling with the court; or when to put up a defence would be wasting the court's time; or when it is not capable of reasoned argument. Moreover, a matter is said to be vexatious when it has no foundation; or it has no chance of succeeding; or the pleading, or a defence is brought merely for the purposes of annoyance. The case of; *Mpaka Road Development Company Limited vs Abdul Gafur Kana t/a Anil Kapuri Pan Coffee House, Nairobi (Milimani) HCCC No. 318 of 2000, (2001) 2 EA 468*, was also cited.

22. The 4th applicant submitted that the plaintiff has failed to demonstrate any nexus between him and the alleged fraud and that the plaintiff's gravamen is merely based upon the mere fact that, he was its finance director at the time.

23. The 5th and 6th applicants submitted that, the principle of corporate legal personality holds that, directors should not be held accountable where, they have discharged their mandate in good faith, in accordance with the law and the articles of association of the company, which spell out the manner of engagement of the director in relation with the operations of the company and in relation with the board in general, save for the specific exceptions provided in law.

24. The applicants relied on the cases of; *Litein Tea Factory Company Limited & Another vs Davis Kiplangat Mutai & 5 Others (2015) eKLR*, and *Post Bank Credit Limited (in liquidation) vs Nyamangu Holdings Limited (2015) eKLR* to emphasis the legal personality of a company and argue that, the directors and other officers of a company are only personally liable for all those acts ultra vires the company.

25. The 6th applicant argued that, the claim is for a refund of money that, was deposited in the escrow account opened with Dubai Bank Limited, hence not against him. Therefore, his joinder is inappropriate and ill-advised. He relied on the Code of Civil Procedure Mulla 12th Edition, at page 498 provides that: -

> *"Under the present rule, all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where if separate suits were brought against such persons, any common question of law or fact would arise, though the causes of action against the defendants may be different. A plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject to the discretion of the court to strike out one or more of the defendants on the analogy of; O. 1, r 2, if it thinks it right to do so."*

26. The text further states at page 542 that: -

> *" the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants. If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action, and is technically multifarious.*

27. The applicants reiterated that, the pleadings herein are an abuse of the court process and relied on the case of; *Trust Bank Limited vs Amin & Company Limited & Another (2000) KLR 164, AT 165,* where Onyango-Otieno J (as he then was), observed that; a pleading which is an abuse of the process of the court means a pleading which is a misuse of the court machinery or process, Further that: -

> *"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 or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action"*

28. Finally, the case of; *Beinosi vs Wiyley (1973) SA 721 (SCA)* was cited where it was held that; an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.

29. At the close of the arguments and submissions by the parties, the 4th applicant raised the following issue for determination: -

> *a) whether the application offends the provisions of; Order 2, Rule 15(2) of the Civil Procedure Rules, 2010;*
>
> *b) whether the Honourable court should exercise its jurisdiction to strike out the plaintiff's amended plaint dated 11th April 2016;*

c) whether the amended plaint dated 11th april 2016, discloses no reasonable cause of action as against the 4th defendant;

d) whether the amended plaint dated 11th April 2016, is scandalous, frivolous or/and vexatious; and

e) *whether the statement of defence dated 10th July, 2014, is an abuse of the process of the court.*

30. The 5th and 6th applicants on their part invited the court to determine the following issues: -

a) whether the plaint does not disclose a cause of action against them;

b) whether the claim is an abuse of the court process;

whether the plaint is frivolous, vexatious and scandalous as against them.

31. I have considered the arguments advanced on the issues raised for determination, in the light of the pleadings and the evidence on record and on the issue of the competence of the applications, I find that the application dated 30th August 2016, filed by the firm of; Ahmednassir Abdkadir &Company Advocates, is brought inter alia; under Order 2, Rule 15(a), (b) and (d) of the Civil Procedure Rules, 2010 and supported by the affidavit of the even date, sworn by the applicant. Whereas, the application dated 9th November 2015, filed by the firm of, Mumma & Kanjama Advocates is premised on the provisions of; Order 2 Rule 15 (a) and (2) of the Civil Procedure Rules. It is filed on behalf of the 5th applicant. It is not clear whether it was also filed on behalf of the 6th applicant as it is not expressly stated as such. Yet the submissions filed by the said law firm are filed on behalf of both the 5th and 6th applicants. In the interest of justice, I shall treat the application dated 9th November 2015, as relating to both the 5thand 6th applicants.

32. Be that as it were, the subject provisions of; Order 13 of the Civil Procedure Rules, provides as follows: -

"(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 cause of action or defence; or

(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 court and may order the suit to be stayed or dismissed or judgment to be entered

(2) No evidence shall be admissible on an application under sub-rule (1)(a) but the application shall state concisely the grounds on which it is made"

33. In that regard as correctly submitted by the 4th applicant, an application brought under Order 2, Rule 15(a), of the Civil Procedure Rules, 2010, does not require evidence. Therefore, the Affidavit sworn by the 5th applicant in support of that application dated 9th November 2015, is improper and cannot be considered. However, the affidavit can only be struck out which I hereby do, but the application remain.

34. To the contrary an application brought under Order 2, Rule 15 (b) and (d) of the Civil Procedure Rules, 2010 can be supported by factual evidence, therefore, the 4th applicant's affidavit in support of his application is properly on record and the application is competent.

35. I further note the parties herein have submitted and quoted several legal authorities on striking out of pleadings, which I concur with and therefore I will rely on them and not reinstate them.

36. However, *Dankwerts L.J stated in the case of; Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 5Z06, 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."

37. In the same vein the Court of Appeal in ***Blue Shield Insurance Company Ltd vs. Joseph MboyaOguttu [2009] eKLR*** **,held that "***the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."* It is thus noteworthy from the outset that striking out a pleading is a draconian remedy.

38. I have considered the matter herein and without delving into the merits thereof I find that, all the applicants admit that they are former employees of the plaintiff. It is evident that they have been sued by the plaintiff on allegation that, they discharged their respective roles and/or responsibilities in relation to the subject matter herein without the authority and knowledge of the plaintiff's board and to the detriment of the plaintiff.

39. A perusal of plaint dated 30th January 2015 allegedly amended on 11th April, 2016, reveals in a nutshell, the plaintiff alleges the 3rd to

6th defendants presented to board a Sugar Purchase Agreement to purchase sugar from open market, subsequently, they selected, negotiated with the 1st defendant to supply the sugar and executed the contract with the 1st defendant without the approval of the board.

40. Further the 4th defendant entered into a contract with the 2nd defendant to open an escrow account number 81163308, in the names of the plaintiff and the 1st defendant without the authority and approval of the board, executed the account opening forms and/or fraudulently mislead the board to endorse the forms.

41. It is further averred that the 3rd to 5th defendants, failed to ensure taxable duty payable on the sugar was paid and colluded to mislead the board on the importation process. That they executed further fresh contracts with the 1st defendant without the board's knowledge.

42. However, the applicants have filed their respective defences denying these allegations. The 4th defendant vide statement of defense dated 8th April,2015, avers that the board's meeting held on 6th February 2013, approved importation of sugar vide minute number (d)(i) to (iv). That he submitted four bid for the board's approval which was granted in the said meeting. Further, the opening of the account was approved by the Board vide minutes at clause 4 (b)(vi).

43. That a sum of Kshs 104,720,763.50 paid to Kenya Revenue Authority was claimed as in put Value Added Tax to the plaintiff. He denied executing the alleged fresh contracts executed after his resignation vides a letter dated 26th June, 2013 and accepted on 23rd July 2013.

44. The 5th and 6th defendants filed their defence dated 15th May, 2015, wherein the 5th defendant states that the decision to import sugar was made by the board. Further the board did not seek for her advise for approval of the 1st defendant and neither did she witness the contract between the plaintiff and the 2nd defendant. She denied knowledge of opening the account and the alleged loss to the plaintiff. The 6th defendant reiterated that only one paragraph in the plaint refers to him and denied all the allegations leveled against him.

45. It is therefore clear from these pleadings that the plaintiff blames the applicants for discharging their duties without direction, knowledge and or approval of the board and /or the plaintiff but the defendant/applicants argue otherwise. In that case I find that it is necessary that the matter be heard on merit, so that the court can determine on evidence which party is telling the truth and/or what really transpired.

46. Similarly, it is noteworthy that the applicants held very senior position in the plaintiff's company and by virtue of this suit; their personal reputation is already at stake. It will be in the interest of justice to determine this matter on merit to inter alia deal with that issue.

47. As observed by Lord Nicholls in *Reynolds v. Times Newspapers Ltd [1999] 4 All ER 609:*

> *"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation."*

48. Be that as it may, it is equally conceded that striking out a pleading is a draconian remedy and in addition every person has a constitutional right to be heard. If the court strikes out the suit against the applicants at this stage and evidence reveals otherwise, the plaintiff will be prejudiced, if the plaintiff fails to prove its case the applicants will have cleared their names and can be compensated in costs.

49. In that case, until otherwise proved, the plaintiff's case against the applicants cannot be said to be frivolous, scandalous, vexatious, an abuse of the court process nor fails to disclose a reasonable cause of action.

50. The other raised relates to mis-joinder of the applicants in this matter. In that regard I find that; Order 1 Rule 1 of the Civil Procedure Rules provides as follows: -

> *"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."*

51. This provision mentions two grounds upon which a party may be joined in a suit, first, the party must have a right to claim a relief, either arising out of the same act or same transaction or arising out of a series of acts or transactions upon which the suit rests. Second, if a separate suit is filed, there would exist a common question of law or fact. The two conditions must be read together and not in priority of the first over the second.

52. The pleadings herein relate to mainly the alleged transactions of importation of sugar by the plaintiff, where it is alleged that each applicant played a role resulting in the alleged loss to the plaintiff. I have already held that the matter be heard on merit.

53. I further note that the prayers sought for are against the defendants jointly and severally. In that case, it cannot be determined at this stage that the applicants have been wrongfully joined in the matter. Even then, none of the two application cite mis-joinder in the body of the applications, as a ground to strike out the plaintiff's suit.

54. The upshot thereof is that the applications dated 30th August 2015 and 9th November 2015 are dismissed with orders that the costs shall abide the outcome of the main suit.

55. It is so ordered

Dated, signed and delivered in an open court on this 4th day of November 2019, at Nairobi.

GRACE L NZIOKA

JUDGE

In the presence of;

Ms. Anyango for Dr. Khaminwa for the Plaintiff

Mrs. Okira for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

Mr. Tebino for the 4th Defendant

Mr. Simiyu for the 5th and 6th Defendants

Dennis----------Court Assistant.