



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E110 OF 2018

HON. DR. PATRICK MWEU MUSIMBAPLAINTIFF/APPLICANT

VERSUS

H.E. DR. MUKHISA KITUYIDEFENDANT/RESPONDENT

RULING

1. Through the application dated 8th January 2019, the applicant seeks the following orders:

- a) That the respondent's statement of defence be struck out on grounds that it does not disclose a reasonable defence in law.*
- b) In the alternative, that the defence be struck out on the grounds that it may prejudice, embarrass or delay the fair trial of this action, or that it is otherwise an abuse of the process of court.*
- c) That judgment be entered for the applicant against the respondent for the sum of Ksh 35,000,000.00 together with interest at commercial rates from 19th June 2013 until payment in full.*
- d) The costs of this application and generally for this suit be awarded to the applicant.*

2. The application is supported by the applicant's affidavit sworn on 8th January 2019 and is premised on the grounds that the applicant's claim against the respondent is for a liquidated sum of Kshs. 35 million and that the respondent does not have a reasonable defence to the suit thereby rendering a full hearing of the suit frivolous, superfluous and an abuse of the court process.

3. The respondent opposed the application through the statement of grounds of opposition filed on 12th March 2019 in which he set out the following grounds:-

- 1. That the application is muddled up in contravention of the mandatory provisions of law and is thus fatally defective.*
- 2. That the pleadings ex facie raise triable issues amongst which is whether the money paid to the plaintiff was deposit for purchase of land or a loan.*
- 3. That the plaintiff's own pleadings disclose that the payment was for deposit for purchase of the defendant's property.*
- 4. That the dispute herein can only be determined on merit and in full trial and not peremptorily by way of an interlocutory application.*
- 5. That the application is an abuse of the court process to intimidate the defendant who is a global civil servant.*
- 6. That the application is for dismissal.*

4. Parties filed their respective written submissions to the application which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the striking out of the respondent's defence. Order 2 Rule 15 of the Civil Procedure Rules, under which the application is brought, stipulates 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 reasonable cause of action or defence in law; 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 the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

5. In the case of Samuel Mureithi Murioki & V Kamahuha Ltd [2018] eKLR, the court explained the requirements for evidence under Order 2 Rule 15 as follows:-

“In an application to strike out a pleading on the grounds that it is scandalous, frivolous and vexatious, the court looks at the pleadings themselves together with the affidavit evidence offered by the parties, as opposed to Order VI Rule 13(1) (a) where no evidence is offered and hence the need to exercise greater caution. Under Rule 13(1) (b).....the court has to look at the pleadings and the affidavit evidence and determine whether they are scandalous, frivolous and vexatious.”

6. Once a defence has been struck out under Order 2 Rule 15, the court then moves to enter judgment in favour of the applicant. This was the position adopted in Margaret Njeri Mbugua v Kirk Mveva Nyaga [2016] eKLR.

7. Courts have also taken the position that striking out of pleadings is a drastic remedy that should be resorted to only where a pleading is a complete sham. In Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR the Court of Appeal stated that:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“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.”

We may add that like Madan J.A, said, 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. “

8. In the instant case, the applicant’s case is that the defence does not disclose any triable defence save for the allegation that the sum of Kshs 35 million was not a loan but a deposit for the sale of land. The applicant argues that on the face of it, the claim that the payment was for the purchase of land cannot pass muster for want of compliance with the mandatory provisions of Order 7 Rule 5 of the Civil Procedure Rule and Section 3(3) of the Law of Contract Act the said provisions stipulate as follows:-

Order 7 Rule 5 of the Civil Procedure Rule

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial:

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

Section 3(3) Law of contract;-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract upon which the suit is founded

i. Is in writing.

ii. Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

9. I have perused the applicant's list of documents filed together with the plaint and I note that the bank transfer dated 19th June 2013 for kshs 35 million shows that indeed, the said amount was paid to the respondent's account held at Kenya Commercial Bank Limited Kipande House Branch. It was therefore not disputed that the sum of Kshs 35 million was paid by the applicant to the respondent.

10. The point of departure, however, is the purpose for such payment as while the applicant claims that the payment was in respect of a loan advanced to the respondent, the respondent maintained that the payment was a deposit for purchase of LR No. 194/34 Karen.

11. The respondent's case was that the applicant failed to complete the transfer transaction and thus forfeited the said deposit. In a nutshell, the respondent denied owing the applicant any amount of money. While relying on the provisions of Section 3(3) of the Law of Contract Act, the applicant denied the existence of any land sale agreement between him and the defendant/respondent. A perusal of the Bank Transfer document dated 19th June 2013 shows, under Remittance Information, that the payment was for purchase of price for LR No. 194/34.

12. From the above foregoing facts, I find that that the issue of whether the payment was in respect of a loan or for purchase of land does not take away the fact that the applicant parted with the tidy sum of Kshs. 35 million. It was therefore incumbent upon the respondent, if indeed he wanted this court to believe that he sold land to the applicant for which he was paid kshs 35 million, to present the land sale agreement as proof of such sale as is envisaged under Section 3(3) of the Law of Contract Act and in compliance with Order 7 Rule 5 of the Civil Procedure Rules.

13. My take is that the mere fact that the Bank Transfer document shows that the payment was for the purchase of land does not connote that any such sale actually took place. The respondent further alleged that the applicant did not complete the transaction and therefore forfeited the sum of Kshs 35 million deposit he had paid for the land. I find that if indeed there was such forfeiture, nothing would have been easier than for the respondent to avail to this court, a copy of the duly signed sale agreement containing such a clause.

14. I note that the respondent did not avail any documents to support his case and I find that this is a clear case of the respondent owing the applicant sum of Kshs. 35 million. In a nutshell, I find that the application dated 8th January 2019 is merited and I therefore allow it as prayed with costs to the plaintiff.

Dated, signed and delivered in open court at Nairobi this 11th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of

Miss Onyango for Dr. Ojiambo for applicant

No appearance for defendant

Court Assistant – Sylvia