REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO 21 OF 2014

MATHEW ADAMS KARAURI............PLAINTIFF

Versus

ZABLON MATHENGE ITEWA..........DEFENDANT

JUDGMENT

Striking out of defence

[1] The application dated 16th May 2018 is asking the court to strike out the defence filed on 14th October 2014 and to enter judgment for the plaintiff in the sum of Kshs. 1,045,000 and interest at court rates. The grounds as set out in the application, the supporting affidavit and the submissions filed pursuant to the order of court made on 26th July 2018 are:

a. That the defence does not raise any bona fide triable issue to warrant trial, and

b. That the defence is scandalous, frivolous and or vexatious and therefore an abuse of the process of the court.

[2] The plaintiff cited several cases including the case of **J.P.MACHIRA vs. WANGECHI MWANGI & ANO CA NO 179 OF 1997** and **BLAKE vs. ALBION LIFE ASS. SOCIETY,** in which the word ''scandalous'' for purposes of striking out pleadings was discussed**.** In light thereof, the plaintiff submitted that the defence is scandalous for the defendant denied owing the money claimed, yet he admitted the debt in his witness statement. The plaintiff also cited ample judicial decisions in which it was discussed when a pleading is vexatious, frivolous, prejudicial, embarrassment or delay to fair trial. I need not reproduce them as they are already cited in the submissions. According to them, the defence herein is a mere sham containing only generalized denials and should be struck out.

[3] The defendant filed submissions in which he adumbrated the contents of the replying affidavit. He deposed that he did not admit liability in the defence whatsoever. The payment of Kshs. 400,000 was as a result of an out of court negotiations which was entered into between the parties upon legal advice by the advocates on record. According to him, the part payment was made in good faith and should not be misconstrued. He thereafter proposed to pay a lesser instalment of like Kshs. 100,000 until payment in full but the plaintiff refused the offer. He submitted that the negotiations constituted a separate contract and was freely entered into. He should therefore be allowed to liquidate the decretal sum as prayed. He relied on the case of **NZAU vs. MBUNI DRYCLEARNERS [1998] eKLR**. He insisted that his defence raises bona fide triable issue. He also averred that his statement was intended to resolve this dispute amicably. He also banked on the fact that he has a constitutional right to be heard which tramps procedural law. He stated that striking out of pleading is an extreme act which should be a remedy of last resort. And this is not an obvious case where striking out should be granted. He insisted on the application being dismissed but he be allowed to liquidate the balance of the decretal sum in monthly instalments of Kshs. 100,000.

ANALYSIS AND DETERMINATION

Legal threshold on Striking out of defence

[4] As I have stated in the past:

> ***I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the***

Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away. [See **Saudi Arabia Airlines Corporation V Premium Petroleum Company Limited]**

[5] I will apply the above test. But before I do so, let me address one matter that has greatly perturbed the court; the averment by the defendant which gave me the impression that he insinuates that he has a right to be heard at all cost and whatever circumstances. The right to be heard is founded on the assumption that the party before the court is seeking a remedy. The right does not therefore aid a person whose genuine desire is to use the court process to injure the other party or impinge on rights of other person. Such is not the purpose of right to be heard. Good faith and legitimate expectation is therefore at the core foundation in asserting the right to be heard. That is why a person who seeks to delay another person's remedy will be met with the constitutional principle that justice denied is justice denied; and he will be stopped in his trucks from temporizing cases. Again, the Constitution loathes a person who injures another person's rights; it commands us not to infringe other people's rights. Now, is there any bona fide triable issue in the defence herein?

(6] I have perused the defence herein and it is full of mere denials. I have also looked at the statement filed by the defendant on 14t March 2017 and he has admitted the entire debt as pleaded. He has however tried to explain that the refund of the money was due to economic hardships he faced. He also acknowledges their long time friendship with the plaintiff and he still insists that they are good friends. I am dumbfounded; perhaps this is a new category of friendship but outside the known. That notwithstanding, it is highly pretentious for the plaintiff to insist in the face of clear admission of a debt that he has a *bona fide* triable issue to go for trial. The test is that a bona fide triable issue exists: I do not see any bona fide triable issue in this case. What does he want the court to determine? The arguments that he intends to pay in installments of Kshs. 100,000 per month are not triable issues for purposes of order 2 rule 15 of the Civil Procedure Rules. These are matters relevant to an application for payment of decretal sum in installments and that is ordinarily post judgment. The defendant is clearly bent at abusing court process and should be resisted by the court with sufficient force. Under order 2 rule 15(1) of the Civil Procedure Rules; a pleading may be struck out at any stage of the proceedings as long as the test provided therein is satisfied. With the admission of the entire debt herein, the defence is scandalous, vexatious, an abuse of court process and a delay of fir trial of the suit. It is appropriate to strike the defence at this stage. No one should use the court to injure another person's right to fair trial in the pretext that he also has a right to fair trial. Accordingly, I strike out the defence and enter judgment for the plaintiff in the sum of Kshs. 1,045,000, cost and interest. I note that the defendant has paid Kshs. 400,000. And, the Respondent seems to be keen on liquidating the decretal sum in installments. He may apply formally for that relief now that judgment has been entered. The plaintiff may also be magnanimous enough to consider the request to pay in installments especially given that parties claim to be friends.

Dated, signed and delivered in open court at Meru this 19th day of November 2018

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F. GIKONYO

JUDGE

In presence of

Karanja for Respondent

M/s Kiome for Mwongela for plaintiff

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F. GIKONYO

JUDGE