



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 475 OF 2015

PRISTNE SERVICES LIMITED PLAINTIFF

VERSUS

EAST AFRICA PORTLAND COMPANY LIMITED DEFENDANT

RULING

1. The Application herein is a Notice of Motion dated 1st December 2015. It is brought under Section 1A (2), IB (1) (b) and (d), and Section 3 of the Civil Procedure Act and Order 2 Rule 15 (1) (b) and (c) of the Civil Procedure Rules. It is based on the grounds on the face of it and the Affidavit sworn by **JOSEPH KAMAU MUCHINA** in support.

2. The Application seeks for orders that:

- *The Defence filed herein be struck out and judgment be entered in favour of the Plaintiff as prayed for in the Plaint.*
- *The costs of this application be costs in the cause.*

3. The Applicant's case in a nutshell, is that the Defence filed herein is frivolous, vexatious, raises no triable issues, is meant to prejudice and delay the fair trial of the suit and is contrary to overriding objective of section 1A Civil Procedure Act.

4. The Applicant argued that, the Defendant has clearly admitted that there was a contract for the Plaintiff to pick and airlift a used complete Roller Machine from Norway to Athi River Kenya, as per the instruction letter dated 30th July 2013. That it was agreed that, upon successful delivery of the said machine, the Plaintiff would raise an invoice supported by receipts of expenditure. The plaintiff raised an invoice dated 20th September 2013 whereupon; the Defendants paid Kshs.3, 000,000 as part payment. However, for no good reasons, the Defendants have refused and/or neglected to pay the balance of Kshs.10, 410,543 hence this suit. The Applicant therefore submitted that, from the foregoing, it is clear that the Defendant has no Defence at all to this suit and the same was just filed to vex the Plaintiff.

5. The Application was opposed based on the Replying Affidavit sworn by **ROSELYNE OMINDE**. The Respondent admitted they indeed contracted the Applicants to pick, airlift and deliver a spare part, being a complete Roller Machine from Norway to Athi River Plant. However according to them the same was to be delivered on or before 9th August 2013 but it was delivered on the 21st September 2013, later than the agreed date. The responded told the Court that, the Defendant was to able to reimburse the actual charges and reimbursed Kshs.3, 103,267 supported by documents based on the invoice dated 21st

September 2009. That, the same was paid together with the commission and disbursements at the approved rates as tabulated under paragraph 8 of the Replying Affidavit, giving a total cost at Kshs.3,103,267.00. The Respondent argued that the sum of Kshs.10, 410,543 claimed by the Applicant in the stated invoice has no basis and they need to provide proof thereof based on the terms of the contract. That in the circumstances the Defence raises no triable issues and should be allowed to proceed to a full hearing. The Application should be dismissed with costs.

6. The Applicant filed a further Supporting Affidavit in which they deponed that, the only reason why the Plaintiff's claim has not paid is because, the invoice attached to support the claim for freight charges amounting to Kshs.10,277,275 originated from **PINNACLE GROUP (K) LTD** and not the Plaintiff herein. and that, the Plaintiff has now managed to trace one of the receipts that was issued upon payment of the freight charges amounting to Kshs.5,898,596, the same was paid to the Plaintiff's agents **PORT CONVEYORS LTD**. The Applicant deponed that, since the Plaintiff is not able to trace the receipt for the other amount, then the Plaintiff is ready to settle the claim at the supported sum of Kshs.5, 898,596 and if the Defendants acknowledges liability of the proved sum of Kshs.5, 898,596 then the suit will be settled, and there will be nothing to go for trial. That, they will forego the balance of the freight charges.

7. The parties filed written submission to dispose off this Application. The Applicants submitted that Article 159 of the Constitution of (K) 2010 and section 3A of Civil Procedure Act gives the Court power to determine cases in the shortest time possible. That, on making a decision in the Application herein, all that the Court need to consider is whether, the Defence raises any triable issues and in that case the Court needs to determine the meaning of a triable issue. The Applicant relied on the cases of :

- *Moi University –vs- Vishra Buildres Ltd CA No. 296 of 2004 (unreported)*
- *Souza Figue – redo & Co. –vs- Moorings Hotel (1959) EA 425*
- *Patel –vs- E.A Cargo Handling Services Ltd (1974) E.A.;*

In these cases, a triable issue was stated to be, which raises a prima facie defence and which should go for adjudication. The Applicant took the Court through the analysis of the content of Plaintiff and the Defence, and two issues for determination namely, the contract amount and whether there was breach in delivering the machine on 20th September 2013 instead of 09th August 2013 and concluded that they are no triable issue.

8. The Respondents identified two issues for determination herein namely, whether the Defence is frivolous, vexatious and raises no triable issues and whether the Application herein meets the threshold required to strike out the defence and enter summary Judgment. They invited the court to consider what constitutes frivolous pleadings as stated by Honourable Justice Ringera (Retired), in the case of **Mpaka Road Development Ltd –vs- Kana**. In that case it was stated that, **a pleading is frivolous if it lacks seriousness; and therefore if it is not serious, then it would be unsuitable in Court; or contains scandalous matter which is irrelevant to the action or defence.**

The Respondents also relied on the cases of **Taj Mall Limited –vs- Hellen Njambi Mbugua (2015) eKLR** and **D.T. Dobie & Co. (K) Ltd –vs- Muchina KLR (1982)**.

9. I have considered the entire Application, the supporting and opposing documents filed. I have equally considered the written submission and the authorities cited.

10. I shall, before I deal with the established law on striking out of pleadings deal with the law regarding the right to be heard. Article 50 of the Constitution of Kenya 2010, states that;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Article 48 of the Constitution of Kenya 2010, states that:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Sections 1A, 1B and 3A the Civil Procedure Act Cap 21 Laws of Kenya (Revised 2010), provides for principles that guide the Court in facilitating just, expeditious, proportionate and affordable resolution of the Civil Disputes.

Order 2 Rule 15 the Civil Procedure Rules 2010 deals with striking out of proceedings and grounds thereof. It provides that:

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

Case law has clearly established the following principles:

i. *Trivendi’s and Trivendi –v- Njeri Ngiru Civil Appeal No. 129 of 1984 (Nyarangi, Gachuhi and Apaloo JJA on 11 November 1988) LLR cak 6300.* Held that a pleading should only be struck out in clear cases and if the matters in the plaint are not clear, the Defendant should ask for particulars.

ii. *Kensan Insurance Brokers Ltd and Another –v- Kendida Assurance Company Ltd Civil Application No. 94 of 1997 (Omolo, Akiwumi and Lakha JJA on 21st May 1997)* held that “ Striking out is a strong summary remedy that must be granted in clearest cases with extreme caution”

iii. *Ngurumani Limited –v- Shompole Group Ranch and Others Civil Appeal No. 73 of 2004 (2007) 2 EA 353 (O’kubasu, Waki and Onyang – Otieno JJA on 9th March 2007)* Stated that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realisation that the court must not drive away any litigant however far his case may be from the seat of justice. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

iv. *Francis Kamande –vs- Vanguard Electrical Services Ltd Civil Appeal No. 152 of 1996; (1996) LLR 4914 (CAK) (Tunoi, Shah, and Pall JJA on 3rd April 1998)* held that no suit can be dismissed unless it is so hopeless and it is plainly obvious that it discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment.

v. *E A Foundry Works (K) Ltd –v- Kenya Railways Co-orporation Nairobi (Milimani) High Court Civil Case No. 82 of 2000 (Onyango Otieno, J on 7th April 2000)* held that, a mere denial by the Respondent cannot in Law be treated as a proper defence and where it is plain and obvious that no case is made, the defence is to be struck out.

vi. *Joseph Okumu Simiyu –v- Standard Chartered Bank (Hayanga J) HCCC No. 899 of 1994,* dealt with what constitutes a scandalous, frivolous, vexatious, and a pleading that tends to embarrass or delay a fair trial

11. Applying all these principles to the facts herein, I find that the parties have agreed that they entered into a contract for the Plaintiff to airlift a Roller Machine from Norway to the office the Defendant at Athi River. That was done. In my opinion two issues remain unresolved:

- ***The amount payable to the Applicant for services rendered.***
- ***The due date of delivery of the same and whether there was a delay.***

I however find without going into the merits of the case, the issue of delay, does not seem to be hotly contested. I say, so because, though delivery was late, the machine was accepted, and indeed there is no claim herein from the Defendant's for compensation of whatever kind for late delivery of the machine, It leaves the issue of the amount payable. This is though, in my opinion a straight forward issue. The terms of payment for services rendered are clearly stipulated in a letter dated 30th July 2013 and state as follows:

“we shall pay you commission at the company approved rate of zero point five (0.5) percent of the Cargo International Freight value. We shall also pay for disbursements at the approved rate of one point five (1.5) percent of the Cargo International Freight value, and reimburse actual expenses for Government of Kenya taxes, airfreight charges and port handling charges”.

I therefore don't understand the difficulties with the parties adhering to these terms and conditions. What seems to have happened is that, the Plaintiff raised an invoice for Kshs.13, 410,543.00 but could only support a claim of Kshs.3, 103,267. The reason apparently that seems to inform the non-payment of the balance is “un-accountability” as per paragraph 5 of the Defence, where the Plaintiff is put to strict proof of the claim. But how does the Plaintiff react to this challenge? The Plaintiff on page 4 of their submissions states that:

“it is the Plaintiff's submissions that if the contract amount is determined then the balance thereof will be a non-issue. Thus up to this stage the unsettled issue is the contract amount”

12. It's therefore clear from the above submission that, the Plaintiff admits that the balance of the contract amounts in an issue in dispute, which then renders it is a triable issue. As already stated, a defence that raises even one triable issue cannot be deemed to be hopeless and bound for striking out.

13. Be it as it were, I have also noted, that indeed, the Plaintiff have in their submission sought to amend the amount claimed in the Plaint from Kshs.10,410,543 to Kshs.5,898,596. Two issues arise. Can the pleadings be amended through written submission on application which has nothing to do with the amendment of pleadings? Secondly can the Court enter Judgment for an amount different from that in the Plaint without the requisite amendment? The Plaintiff has also clearly admitted that they are unable to trace other receipts to support their claim. How then can the Court strike out the Defence, and enter Judgment on a claim that is unsubstantiated and/or not proved. The Applicant may consider putting its house in order in relation to the exact amount they are claiming.

14. Having said so, may I make the following obiter remarks, I think this is a matter which the parties can negotiate and settle the accounts out of Court to save them of otherwise precious and valuable time and avoid the unnecessary costs associated with litigation. I believe is a suitable case for mediation. The Court will be willing to guide on that process.

15. The upshot of the fore going is that, the Application herein is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI ON THIS 1ST DAY OF JULY 2016.

G L NZIOKA

JUDGE

Ruling Read in open court in the presence of:

Mr. Kiiru for Mr. Njora for the Plaintiff/Applicant

Miss Kirimi for the Defendant/Respondent

Teresia – Court Clerk