REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 344 OF 2011

1. GEORGE KURATI. NDONGO.....1ST PLAINTIFF/APPLICANT

2. MUNGAI NDOGO.....2ND PLAINTIFF/APPLICANT

VERSUS

1. ATHMAN MUSTAFA MOHAMMED .....1ST DEFENDANT/RESPONDENT

T/A VANGA EXPRESS

2. ALUIYA OMARI AHMED T/A.....2ND DEFENDANT/RESPONDENT

VANGA EXPRESS

RULING

1. By an application dated 31st October 2013 the plaintiffs sought that the defendants defence dated 1st August 2012 and filed on the 6th May 2012 be struck out and judgment be entered against the defendants as prayed in the plaint. The application is premised on the provisions of **Order 2 Rule 15 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**.

The grounds for the application are stated on the face of the application that the defence is a general and mere denial of the plaintiffs' claim and that there is an express admission of the claim by the claim by the first Defendant whereas the second defendant guaranteed payment. The application is supported by an affidavit sworn on the 31st October 2013 by the first plaintiff.

2. The respondents vehemently oppose the application. By a Notice of Preliminary Objection dated 16th April 2014, the defendants stated that this court has no jurisdiction to hear this case.

A replying affidavit was also filed on the 7th April 2014. It was sworn by the first Defendant/respondent. It is deponed that the defendants defence as filed is not a sham nor frivolous as the sum of Kshs. 6,000,000/= claimed is disputed and that the motor vehicles subject of the suit were never delivered and actual amount is not certain and as such the balance of the purchase price could not be paid.

3. The matter of jurisdiction was resolved on the 3rd October 2014 when Justice L. N. Waithaka, J being an Environment and Land Judge declared that the case falls under the jurisdiction of the High Court.

4. The court has considered the plaintiff's statement of claim vide their Amended plaint filed on the 26th September 2013.

It is stated that by an agreement dated 6th March 2006, the first defendant agreed to supply the plaintiff' with two units of Mercedes Benz vehicles at a consideration of Kshs.6,000,000/=, that the plaintiff's paid the sum of Kshs.6,000,000/= being the full purchase price of the vehicles. It is further stated that the two vehicles were never supplied and by a written undertaking dated 22nd November 2006, the first defendant agreed to refund the said sum and the second defendant being wife to the first defendant guaranteed the said payment and issued postdated cheques for the total sum of Kshs.6,000,000/= which cheques were not paid. They prayed for judgment for the said sum of Kshs.6,000,000/= with interest and costs.

5. In their joint defence dated 1st August 2012, the first defendant admitted entering into the sale agreement dated 6th March 2006 for the supply of the two vehicles but denies having received the Kshs.6,000,000/= from the plaintiffs. The second defendant stated that she is a stranger to the agreement and could therefore not guarantee payment as she was not a party to the agreement. She denied ever guaranteeing such payment.

The first defendant stated that the performance of the agreement was frustrated by technicalities in importation as the plaintiff failed to pay the said agreed price to facilitate the importation and registration of the vehicles.

6. I took the liberty to state the plaintiff's claim as well as the defendants defence with a view to interrogating whatever or not the defence raises issues that ought to go for trial.

In the case **Kenindia Assurance Co. Ltd -vs- Commercial Bank of Africa & 2 Others (2006) 2 KLR,** it was held that summary judgment was a procedure to be resorted to in the clearest of cases and if a defendant shows a *bonafide* triable issue, he must be allowed to defend without conditions, and that defence ought not succeed.

In the same breath, in the case **Elijah Sikona & George Periken Narok** on behalf of **Trusted Society of Human Rights Alliance -vs- Mara Conservancy and 5 Others Civil case No. 37 of 2013 (2014) e KLR,** it was held that striking out any pleading is a jurisdiction which must be exercised sparingly and in very clear and obvious cases.

7. For the court to exercise its discretion in striking out a pleading and or summarily determining a case, it ought to exercise caution while considering all the facts without embarking upon the trial and coming to the conclusion that the pleading discloses no reasonable cause of action or other wise being an abuse of the court process.

In **Transcend Media Group Ltd -vs- IEBC (2015) e KLR** the Court held that:

> ***"If a pleading raises a triable issue hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go for trial. However, if the suit is without substance or is groundless or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognise as legitimate use of court process, the court will not allow its process to be used as a forum for such ventures."***

8. The principles to be considered by a court in striking out pleadings were set out in the case **D.T. Dobie** and **Co. (Kenya) Ltd -vs- Muchina (1982) e KLR by Madan JA:** as follows(in summary)

> ***(a) the court should not strike out a suit if there is a cause of action with some chance of success.***
>
> ***(b) The power to strike out a suit should only be used in plaint and obvious cases and with extreme caution.***
>
> ***(c) The power should only be used in cases which are clear and beyond doubt.***

(d) the court should not engage in a minute and protracted examination of documents and facts, and

(e) if a suit shows a semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward.

Applying the above principles in the present case, can it be said that the plaintiff's suit is so clear and without any doubt as against the defendants that their defence is a sham and raises no trial issue to warrant the suit going for full trial?

9. This court, upon examination of the statement of claim and the defence to the same is of the opinion that there are issues that are not clear. The first defendant for instance states that he did not receive the payment of Kshs.6,000,000/= from the plaintiffs, that the performance of the contract was frustrated by the none payment of the purchase price by the plaintiff.

On the part of the second defendant, it is stated that she is a stranger to the agreement and could not have guaranteed a debt she was not party to. There are issues that the applicants states as disputed. Even from the applicants own submission, there are disputed issues that ought to be proved by evidence. That evidence can only be taken in during a full trial. It is the court's view that where there are obvious disputed facts as is in this case, the case ought to go for full trial for each party to be able to state its side of the case by tendering evidence.

10. At this interlocutory stage, the court cannot go into full examination of documents to ascertain the truth or otherwise of the same. That would be jumping the gun as such evidence ought only be had during a full trial.

As stated in the D.T. Dobie case above, the court at this stage should not engage in a minute and protracted examination of documents and facts. The court has seen post dated cheques issued by the second defendant. But there is an explanation why they were not paid. That explanation can only be tendered to the court during full hearing.

11. The law is settled that if a defence raises even one *bona fide* trial issue, the defendant must be allowed to defend.

Order 2 Rule 15(1) of the Civil Procedure Rules provides:

"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."

12. I have come to the conclusion the defendants statement of defence as filed raises *prima facie* triable issues. Those triable issues should not necessarily succeed but they are *bona fide* in my view. They are not just mere denials as sated by the applicants. They raise weighty issues that the court ought to interrogate and determine after hearing both parties.

For those reasons, I find no merit in the plaintiff's application dated 31st October 2013. It is dismissed with costs.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE