REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 304 OF 2014

TRANSCEND MEDIA GROUP LIMITED……………………………PLAINTIFF

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC)………………………….DEFENDANT

R U L I N G

The plaintiff, Transcend Media Group Limited vide a Notice of motion dated 24/7/2014 brought under the provisions of **Order 2 rules 15 and Order 51 (1) of the Civil Procedure rules, sections 1A, 1B and 3A of the Civil Procedure Act** and all other enabling laws is seeking to strike out the defence filed by the defendant Independent Electoral and Boundaries Commission (IEBC)'s on 14/7/2014. The plaintiff is also urging this court to enter judgment against the defendant in the sum of Ksh 198,787,892.40.

The plaintiff's application is premised on the grounds on the face of the application and as further stated in the supporting affidavit and further affidavit sworn by Anthony Gacheca**,** the Managing Director of the plaintiff company.

Mr. Gacheca deposes among others that the plaintiff won a tender from the United Nations Development Programme (UNDP) for the provisions of certain media services in the name of *"media campaign"* in the print and electronic media on behalf of the defendant Constitutional Commission responsible for elections in Kenya in connection with the last general elections held in Kenya on 4/3/2013.

The plaintiff alleges that it executed the agreement dated 7/2/2013 with the UNDP which agreement provided the basic terms and conditions. The purpose of the contract was to enable the defendant to carry out successful general elections to avoid the post election violence that was witnessed after the controversial general election held in December 2007. It is further deposed that the UNDP intended to sensitize the public through a comprehensive media campaign strategy to prepare the public appropriately to take part by enhancing understanding, ownership and participation of Kenyans in the campaign exercise.

According to the plaintiff/applicant, It was clear from the contract that all costs were to be met by the UNDP in the manner provided by the contract. The said media campaign consisted of inter alia, providing advertising and media bookings for the defendant/respondent in prominent print and electronic media during the electioneering period in the run-up to 4/3/2013 general elections at a price of Ksh 224,576,926.00.

The defendant is then alleged to have informed the plaintiff that various politicians, political parties and Media Houses and the general public at large had raised numerous complaints with the defendant alleging that their people and Media Houses had been sidelined from the said program and therefore there was need to expand the programme over and above the UNDP contract at the defendant's cost for the campaign to be successful.

On 15/2/2013 the defendant is alleged to have procured the services from the plaintiff to advertise or cause to be advertised all polling stations in the country in the Nation and The Standard Newspapers. That the plaintiff negotiated the cost of such advertisement with the said Media Houses from the initial sum of Ksh 124,728,000.00 to Ksh 106,728,000.00. The final amount was made up of The Nation Newspaper comprising 199 full coloured pages at Ksh 50,000,000.00, The Standard Newspaper comprising 199 full colour pages at Ksh 42,000,000.00 and value added Tax of Ksh 14,728,000.00.

That the defendant's manager of Communications and Corporate Affairs, Mrs Tabitha Mutemi is then said to have signed and accepted the relevant orders and invoices after the plaintiff had provided the services. That the defendant also by a letter dated 18/2/2013 duly signed by the Chief Executive Officer of the defendant/respondent and partly by oral instructions and representations, directly contracted the applicant to carry out the revised media plan for the said media campaign and to undertake extra productions and buying of guaranteed spots in order to address the emerging information needs, including the comprehensive publication of polling stations in the country and the presidential results.

It is further alleged that the defendant represented to the plaintiff that the revised media plan would increase frequency on radio and revised media plan. The said revised media plan meant incurring additional costs in the sum of 69,083,374.00.

On 15/3/2013 after the successful holding of the general elections on the 4/3/2013, the defendant allegedly procured media services from the plaintiff/applicant for the advertisement in all Media Houses all the presidential results from all the polling stations in the country at an agreed total price Ksh 22,984,515.00. The order and tax invoice on behalf of the respondent in the sum of 22,984,515 were allegedly signed by Mrs Tabitha Mutemi. That according to the defendant, the total sum incurred in the additional advertisement over the UNDP contract was Ksh 198,787,892.40.

The plaintiff claims that the UNDP paid the plaintiff a total sum of Ksh 224,576,926.00 in the manner provided for in the contract and therefore the plaintiff has no claim against UNDP. On the other hand, it is alleged that the defendant has refused, failed and /or neglected to pay to the plaintiff/applicant the total sum of Ksh 198,787,892.40 despite numerous demands by the plaintiff. The plaintiff further claims that in the performance of the IEBC contract, the plaintiff/applicant expended its own funds of Ksh 69,083,378.00 as the defendant had intimated to the plaintiff/ applicant that the additional funds to service the IEBC contract were readily available.

As a result of the defendant's action, the plaintiff claims that it has suffered substantial loss in profits and working capital, financial anxiety and embarrassment and financial hardship due to inability to meet its creditors' dues.

The application is opposed by the defendant/respondent through the replying affidavit sworn by **Moses Kipkogei,** a Senior Legal Officer in the Directorate of Legal and Public Affairs of the defendant who deposes that the application does not meet the criteria for striking out a statement of defense or entry of summary judgment. The deponent also denies that the defendant was privy or party to the agreement dated 7/2/2013 made between the UNDP and the plaintiff. Further, that the doctrine of privy of contract militates against the defendant's alleged liability of contract to which it is not a party or specific signatory.

Mr. Kipkogei also deposes that there were several collaborations and cooperation endeavors and arrangements between the UNDP and other International Organizations who focused on the defendant all which were intended to strengthen democracy in Kenya by facilitating the defendant in carrying out credible, accurate, verifiable and fair elections. That therefore the role ascribed to the defendant under

paragraph 7 of the plaint did not create any legal or contractual obligation under the said contract. The defendant further contends that it had no capacity or legal authority to enter into a contract by implication or otherwise in violation of Public Procurement and Disposal Act, 2005 since all the contracts entered into by it are required to be in writing and subject to a competitive procurement process.

The defendant further asserts that as a Constitutional Commission and a Public Entity under Kenyan law, it has, by virtue of the **Public Procurement and Disposal Act 2005** no capacity to give oral instructions or representations and therefore never gave instructions to the plaintiff as alleged in the plaint.

The defendant's further contention is that the beliefs by the plaintiff that the letter dated 18/2/2013 created a contract between and the plaintiff is erroneous as the same cannot be construed as a contract which is enforceable against the defendant by reasons of the provisions of the Public Procurement and Disposal Act 2005.

Mr. Kipkogei deposed that the defendant's operations are always done in good faith and has never exhibited *mala fides* towards the plaintiff. That the defendant nevertheless is entitled to defend any misconceived claim by the plaintiff and therefore raised several bona fide triable issues through its defence which is on record. It is also stated that although the plaintiff has made demands for payment, the demands could not be met since the plaintiff's claim is misconceived and devoid of sound legal grounding and it is an abuse of the court process.

Submissions

The application was canvassed by way of written submissions which were duly filed and exchanged, with the respective parties' advocates making skeletal oral submissions on 2/12/2014 highlighting salient features of the submissions.

The plaintiff submitted that it is in order to bring the suit against the defendant based on its letter dated 18/2/2013 because the letter was signed by the defendant as envisaged by the provisions of **Section 3(1) of the Law of Contract Act, Cap 23 Law of Kenya.** That the net effect of the IEBC contract was to incur further or additional cost over and above those covered by the UNDP contract. The plaintiff submitted that the defendant was not privy to the UNDP contract but it was a beneficiary thereof, having asked for the services not initially included in the UNDP contract and that the services having been rendered simultaneous woith UNDP contract. That the defendant was actively involved in the execution of the UNDP contract by way of giving necessary instructions, approving the designs, layouts, media coverage and generally developing an effective election media campaign strategy for 2013 elections and ultimately giving approval to UNDP to pay the various invoices raised by the plaintiff under the UNDP contract.

The plaintiff submitted that the defendant is liable to pay to the plaintiff/applicant the sum of Ksh 198,786,893.40 that it incurred as result of contracting the plaintiff to carry out revised and additional work under the UNDP contract. The plaintiff argued that it did not solicit for the additional or revised work forming the IEBC contract. That through the letter dated 18/2/2013; the defendant contracted the plaintiff to provide the additional or revised services. That the plaintiff accepted the said offer believing the same to be in good faith and it performed the contract and committed the defendant/respondent to pay and the defendant has not disputed that the services were offered. That the defendant is estopped and completely precluded from denying liability or in any way avoiding to pay debts.

The plaintiff further submitted that the defendant had the capacity to vary or review the UNDP contract. The plaintiff stated that the defendant was in a better position to decide what it wanted, whether it was covered in the UNDP contract or it was to be reviewed. The plaintiff further submitted that the rates that were applied were actually those provided in the UNDP contract. The plaintiff further argued that having benefited from the services that were rendered by the plaintiff it is not open to the defendant/respondent to allege that at the time of awarding the IEBC contract to the plaintiff, it had no capacity to contract or that the contract was illegal as there was offer and acceptance as well as performance of the contract.

The plaintiff also stated that the allegations of illegality amounts to unjust enrichment on the part of the defendant since it was enriched by the services of the plaintiff. That the success of the 4/3/2013 general elections and the credit given to the defendant was as a result of the services rendered by the plaintiff to the defendant under the UNDP and IEBC contracts.

The plaintiff also submitted that the claim is not bad in law and void for compliance with the public procurement law, since the rates that were applied by the parties in the portion constituting the IEBC contract were the same as those used under the UNDP contract following a competitive bidding process. That the said rates were proposed, fixed and adopted by the defendant/respondent itself in its letter of 18/2/2013.in addition, that compliance with the public procurement processes was for the defendant who should not be allowed to turn around after benefiting from the services rendered.

The plaintiff further submitted that having lawfully and procedurally contracted the plaintiff to carry out additional and or revised work, there was no breach of the public procurement laws. The plaintiff argues that if at all there was any breach then that breach was occasioned by the defendant and the defendant should not be allowed to rely on its own breach to run away from its liability to the plaintiff. The plaintiff further submitted that in the peculiar circumstances of this case, there was no breach of law relating to public procurement, as the defendant expanded the scope of work or services to be rendered under the UNDP contract at its own cost, using the same rates that were applicable under the UNDP contract.

The plaintiff additionally submitted that the defendant does not have a defence or any defence to the plaintiff's claim and the statement of defence filed is a sham, frivolous, vexatious and a gross abuse of the process of court aimed at defeating the course of justice and denying the plaintiff the fruits of its labour.

In support of the plaintiff application, the court was referred to the cases of **Commercial Advertising & General Agencies Limited vs. Qureshi (1985) KLR 458; Banque Indosuez vs. Dj Lowe &Company Limited (2006) 2KLR 208; and Vishava Builders Limited vs. Moi University (2002) 2KLR 618.**

In their opposing submissions, it was submitted on behalf of the defendant that the defendant has the legal status pursuant to **Article 88(b) of the Constitution** which obligates the defendant to exercise its powers and perform its functions in accordance with the Constitution and national legislation. That the **Public Procurement and Disposal Act 2005** applies with respect to procurements by a public entity and there is no doubt that the defendant is a public entity.

That **Section 27 of the PPDA** obligates contractors, suppliers and consultants to comply with all the provisions of the Act and the regulations. The defendant submitted that both the plaintiff and defendant are bound by the provisions of the Public Procurement and Disposal Act. They stated that the procuring entities are required under **Section 29(1) of the Act** to use open tendering under part V or an alternative procurement procedure under part VI if the procedure is allowed under part VI.

The defendant further submitted that under section 74(2) of the Act the procuring entity may use direct procurement if the following conditions are satisfied:-

a) there is only one person who can supply the goods, works or services being procured; and

b) there is no reasonable alternative or substitute for the goods, works or services being procured.

The defendant stated that there was no evidence to suggest that the plaintiff was the only legal person with the ability of supplying the goods or rendering the services in question or that there was no reasonable alternative or substitute for the services that were allegedly being procured from the plaintiff.

The defendant also submitted that under **Section 75(c)**of the PPDA, the contract for direct procurement must be in writing and signed by both parties. That the said provision leaves no room for reliance upon oral contracts or unsigned procurement contracts. That direct procurement may also be undertaken through negotiations teams to establish for unforeseeable urgent needs of which an election is not one; and that the said procedure of direct procurement may not be used to avoid competition.

The defendant argued that the plaintiff's argument that it acted on an oral contract does not favour the plaintiff as an applicant for striking out the defence or for summary judgment. That reliance on an oral contract by the plaintiff creates uncertainty and ambivalence and therefore the court must determine whether there was a contract as not contract was annexed to the application. That the letter that the plaintiff is relying on to be a contract was a correspondence and not an offer or a contract that a written contract was contemplated by the IEBC between the parties before proceeding with implementation of the amendments to the UNDP contract.

The defendant submitted that it raised the defence that the alleged contract was illegal null and void for contravention of the Public Procurement and Disposal Act hence unenforceable in law. The defendant relied on the case of **Patel Vs Singh (No. 2) (1987) KLR 585.** That it has genuine defence is genuine, arguable and raises bona fide triable issues, which justifies the defendant being granted unconditional leave to defend the suit.

The defendant further argued that the plaintiff is not entitled in law to take a benefit from an illegally procured contract as this would offend public policy, encourage impunity and contravention of the law. That an act of an officer in contravention of the law cannot create or operate as an estoppel against a Constitutional body when the claimant knew and reasonably ought to have known that the officer's acts were not valid in statute law and common law overrides equity.

The defendant also submitted that summary judgment cannot be entered pursuant to an application brought under Order 2, rule 15, or Order 51 rule(1). The defendant opined that the court's jurisdiction must be properly invoked before the court can come to the assistance of an applicant.

The defendant relied on the case of **Kenindia Assurance Company Limited vs. Commercial Bank of Africa ltd & 2 others (2006) 2KLR 280** where the court held that summary judgment was a procedure to be resorted to in the clearest of cases and that If the defendant shows a bona fide triable issue, he must be allowed to defend without conditions. Further, that a defence which raised triable issues did not mean a defence which must succeed.

The defendant submitted that its defence on record raises the issue contravention of constitutional and statutory law and therefore such a defence cannot be wished away simply by calling the same "**a sham or frivolous or vexatious."**Further, that the challenge for the court is that where an officer of a constitutional body disregards public procurement, constitutional and statutory provisions and regulations namely **Article 227 (1) of the constitution**, and **Section 74 and 75 of the Public Procurement and Disposal Act** and purport to award a contract in contravention of the Constitution and the Act, is the court obliged to disregard that flagrant breach of law and enter judgment on the basis of those acts which are in flagrant breach of the Constitution and the law? It was further submitted that the plaintiff cannot feign ignorance of the law by hiding under the UNDOP contract as the law is clear on what a supplier of a service to a public entity should do since there are consequences for non compliance with constitutional and statutory law.

The defendant submitted that there is no evidence that the defendant resolved to permit its officers to breach the law. The defendant argued that even if there was a resolution to expand the UNDP contract, such resolution would be clearly null and void for the same reason that it would be a violation of the Constitution and the law. The defendant relied on Article 3 of the Constitution which enjoins all persons to protect, defend and uphold the Constitution. It also relied on the cases of **Napier vs. National Business Agency Ltd (1951) 2 ALL ER 264, Paramount Bank Ltd vs. Qureishi & Another (2005) IKLR 730, Kenya Transport Association vs. Municipal Council of Mombasa & Another (2011) eKLR, Eric Okeyo vs. The County Government of Kisumu, HC Petition No. 1A of 2014.**

The defendant maintained that it would not deny a letter which is not a contract but it denies the existence of a contract executed between the parties. The defendant concluded with the submission that the defence raises very serious constitutional, statutory and factual issues which should be allowed to go to full trail as there is no evidence that the plaintiff performed any of the services pursuant to the alleged contract which is nonexistent and that an act which is unconstitutional cannot be validated by a court of law. Mr

Lubulelah advocate for the defendant/respondent urged the court to dismiss the plaintiff's application with costs.

In a brief rejoinder, Ms Nyamwata submitted that section 3 of the Law of contract Act Cap 23 provides for what forms part of a contract and urged the court to allow the application as presented.

Having set out the respective parties' positions and having considered all the eminent points of view of all the parties' advocates, I am of the view that the only issue for determination given the circumstance of this case are:

1. ***Whether the defendant's Defence is open to striking out.***
2. ***Whether judgment should be entered in favour of the Plaintiff.***

On the first issue, the power to strike out pleadings, and in this case, the defence filed by the defendant Independent Electoral and Boundaries Commission (IEBC) and in the process, deprive a party of the opportunity to present their case has been held over and over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases.

That power of striking out pleadings or suit should only be exercised after the court has considered all facts and not the merits of the case.

The substantive law governing striking out of pleadings is founded in the provisions of **Order 2 Rule 15 of the Civil Procedure Rules**. Sub-rule 15 (1) of the aforementioned Order, enacts 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."

The above provision gives the court power to strike out pleadings.

In **Dev Surinder Kumar Bij v Agility Logistics Limited CIVIL SUIT NO. 311 OF 2013[2014] eKLR it was held, inter alia, that:**

> ***"For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant."***

The plaintiff's contention is that that the defence is scandalous frivolous and vexatious and may prejudice or delay the fair trial of the case. The plaintiff also claims that the defence is an abuse of the court process and raises no reasonable cause of action or defence against the plaintiff's claim.

In my view the following sufficiently expounds the principles underlying the striking out of pleadings under **Order rule 15** (1) of the Civil Procedure Rules:

A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that

are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

However, the word "scandalous" for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.** But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

Again 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 and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). Where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

A Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

A pleading is an abuse of the process where it is frivolous or vexatious or both.

Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties say, the

appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**the same Court of Appeal expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

In **Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others Civil case no. 37 OF 2013 [2014] eKLR Anyara Emukule J when dealing with an application seeking to strike out a plaint observed that:**

> ***"22. There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.***
>
> ***23. A cause of action is "a factual situation the existence of which entitles one person to obtain a remedy against another person-" LETANG VS. COOPER [1965] Q.B. 232. <u>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 to trial.</u> However, where the suit is without substance or is groundless or fanciful and/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 recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for***

such ventures."

The Court of Appeal in the case of **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR enunciated the principles applicable in considering whether or not to strike out pleadings.** The Court of Appeal in the above case was categorical, Madan JA (as he then was) adopting the finding of **Sellers LJ** in **Wenlock v Moloney (1965) 1 WLR 1238** where the learned Judge had this to say, while setting out principles to be considered by a court in striking out a pleading:

> ***"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."***

Further and in the same case, ***Danckwerts LJ*** *detailed:*

> ***"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."***

Madan JA (as he then was) in the said **DT Dobie** case (as above) added his own view as to the matter with striking out of suits:

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."***

The above holding has been applied as the ***locus classicus*** in all matters of striking out pleadings and or amendments to pleadings and can be summarized as:

a. The Court should not strike out suit if there is a cause of action with some chance of success;

b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;

c. The power should only be used in cases which are clear and beyond all 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.

In **CRESCENT CONSTRUCTION CO. LTD v DELPHIS BANK LTD**

CIVIL APPEAL 146 OF 2001 [2007] eKLR the Court of Appeal in dealing with an appeal where a plaint was struck out on grounds that it disclosed no cause of action and it was also an abuse of the court process and vexatious observed that:

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal***

principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter.

Ringera J (as he then was) in the case of **Dr. Murray Watson v Rent-A-Plane Ltd HCCC No. 2180 of 1994**quoted from the **4th Edition, Volume 36, of Halsbbury's Laws of England** at **paragraph 73** held:

> ***"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute defence exists, the court will strike it out. Its pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases….."***

The learned Judge, after adopting the above statement with approval, went on to state:

> ***"The pith and marrow of it is that where on a consideration of only the allegations in the plaint the court concludes that a cause of action with some chance of success is shown then that plaint discloses a reasonable cause of action."***

In the case of a defence, the court must also be satisfied upon examination of the defence that it is a sham, it raises no bona fide triable issue worth a trial by the court and note that a triable issue is not necessarily one which must succeed but one that passes the Sheridan J Test **in PATEL VS EA CARGO HANDLING SERVICES LTD(1974)EA 75 at p.76**where Duffus P held that ***"a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication."***

According the Blacks' Law Dictionary, 9th Edition at page 1644, a ***"triable issue" is deemed to mean "subject or liable to judicial examination and trial' whilst "the trial" has been given to mean "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."***

In my understanding triable issues are those that are subject to judicial examination in a Court, for determination on their merits. From the foregoing, this court concludes that the power to strike out pleadings is not a mandatory but permissive one and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances of the offending pleading. See **CALL ZEISS STIFTUNG VS KEELER LTD and OTHERS (NO 3(1970) ChpD, 506**, by Lord Justice Dankwerts).

From the foregoing, this court concludes that the power to strike out pleadings is not a mandatory but permissive one and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances of the offending pleading. See **CALL ZEISS STIFTUNG VS KEELER LTD and OTHERS (NO 3(1970) ChpD, 506**, by Lord Justice Dankwerts).

The question then for this court is, has the plaintiff/ applicant shown that the defendant's defence as filed is a sham, frivolous, and vexatious, scandalous, raises no triable issue and is an abuse of the court process?

The defendant is clear that its defence raises triable issues such as whether or not there was any agreement or enforceable contract between the defendant and the plaintiff, and or whether the purported agreement was made in contravention of the Constitution and the clear provisions of the Public Procurement and Disposal Act, 2005. It should also be noted that there is a third party mentioned- UNDP on whose initial contract with the plaintiff the plaintiff alleges relied on for review and rewriting of another contract by representation with the defendant herein for additional services at the defendant's own cost.

The plaintiff through his plaint dated 9/6/2014 is seeking damages for breach of contract. He alleges that the defendant vide their letter dated 18/2/2013 offered the plaintiff to provide additional services to the agreed UNDP contract. Under paragraph 8 of the statement of defence the defendant has denied that it

instructed the plaintiff to carry out a revised media plan for the media campaign and to also undertake extra production and buying of guaranteed spots to address the emerging information needs, including the publication of polling stations in the country and the presidential results. The defendant also denied that it has the capacity to give such instructions orally. The defendant has also denied that the alleged letter created a contract and or that it authorized any additional cost of Ksh 69,083,374.

The issues raised by the defendant in the defence, in my view, require a close examination by the court and therefore in my humble view, those issues will only be resolved after careful examination of the evidence from both sides which this court cannot embark on at this preliminary stage. I have perused the said statement of defence and in my view the defence raises triable issues.

This court employs the principles as espoused in the Constitution that its core sense of duty is that of serving substantive justice in any judicial proceedings before it, which echoes the reasoning of Madan JA in the ***DT DOBIE vs. MUCHINA*** case (supra) that the court should aim at sustaining rather than terminating a suit prematurely before hearing all the parties to the dispute, which position, it has been held time and again, applies mutatis mutandis to a statement of defence or counterclaim. Further, this court also acknowledges that striking out a pleading completely divests a party of a hearing, thus, driving them out of the judgment seat which act is so draconian, only comparable to the proverbial "**sword of Damocles.**"

It would, in my humble view, be a travesty of justice to make a determination of this suit based on documents which are not even properly before the court. It is bad enough to try such a case involving public resources by affidavits. It is worse to do so based on documents filed by parties to be relied upon at the trial which documents are neither on oath nor have been tested by cross-examination.

For those reasons, I find that the application by the plaintiff does not meet the threshold for striking out of a pleading (defence). This court restrains itself from making any matters of opinion on the merits of the matters in issue as that would be engaging in a mini trial which can hurt the fair trial and restrict the freedom of the trial judge in fairly disposing of the case should the case be heard on merit.

On the second issue of whether judgment can be entered in favour of the Plaintiff, It is the plaintiff's case that the defendant is truly indebted to the plaintiff in the sum of Ksh 198,787,892.40. Under Order 2 Rule 15(1) of the civil procedure Rules, where the pleading is struck out, the court may enter judgment in favour of the success full applicant.

I note that the claim herein by the plaintiff is liquidated claim founded on an alleged contract between the parties. In such circumstances, entry of judgment would also be available to the plaintiff under Order 36 Rules 1 and 2 of the Civil Procedure Rules for summary judgment. I say so because Order 36 rule 1 is the Other alternative enabling provision of the law that this court would, in the circumstances of this case be reverting to in deciding whether or not to enter judgment in favour of the plaintiff/applicant, besides Order 2 rule 15. The plaintiff in citing the provisions under which the application was brought also relied on ***"all enabling provisions of the laws"*** Order 36 rule 1 of the Civil Procedure Act provides as follows:

> **1. (1) In all suits where a plaintiff seeks judgment for—**
>
> **(*a*) <u>a liquidated demand with or without interest; or</u> (emphasis added).**
>
> **(*b*) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.**

A plain reading of the above rule shows that a court will grant the plaintiff summary judgment where the

claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence.

The Court of Appeal in the cases of **Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono Civil Appeal no 94 of 2006[2015] eKLR** observed that:

> ***"Summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in <u>Laljit/a Vakkep Building Contractors v. Casousel Ltd</u>. [1989] KLR. 386, in which the predecessors of this Court held that:***
>
> ***"Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist."***
>
> ***An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence rises no triable issues, and is a mere sham. In the authority of <u>Continental Butchery Limited v Nthiwa</u> [1978] KLR (Civil Appeal No. 35 of 1977) Madan JA set out the scope of the court's power to grant summary judgment as follows:***
>
> ***"With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend."***
>
> ***The principles upon which a court may grant summary judgment are therefore well settled. They have been the subject of various decisions of this Court, such as that of <u>Postal Corporation of Kenya vs. Inamdar & 2 Others</u> [2004] 1 KLR 359where the following passage appears:***
>
> ***"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. <u>The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend</u>."***
>
> ***10. before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."***

Thus, the same stringent conditions for striking out pleadings are also applicable in cases of seeking for entry of summary judgment for a claimant even where the claim is liquidated like in the instant case.

Having found that the statement of defense as filed in this case raises some triable issues, I also find that judgment or summary judgment for that matter should not be entered in this case. I do not find the averments in the defence to be in any way mere denials. In my view, making a summary determination at this juncture would not only be pre-empting the parties' respective cases but the court would also be analyzing affidavit evidence when it was quite clear to the court that there are weighty and triable issues that would require to be ventilated in a full trial.

Therefore, Given the circumstances of this case, there is merit to allow the defendant an opportunity to confront the plaintiff's claim that the letter dated 18th February 2013 constituted a contract that is binding

between it, being a public entity and the plaintiff or that the defendant owes the plaintiff Ksh 129,704,518.40 for publicizing all polling stations and the presidential results. The defendant should also be permitted to challenge the claim that it increased production and airtime cost over the UNDP contract in the Sum of Ksh 69,083,374.

In the end, I find that the application by the plaintiff seeking to strike out the defendant's statement of defence and for judgment is not merited and I decline to grant the same. It is therefore dismissed.

I order that each party shall bear their own costs of the application dated 24th July, 2014.

Dated, signed and delivered in open court at NAIROBI this 5th day of June, 2015.

R.E.ABURILI

JUDGE

In the presence of:

Miss Nyamwata advocate for the plaintiff/applicant;

Mr Simiyu holding brief for Mr. Anthony Lubulelah for the Defendant/Respondent

V. Kavata ……Court Assistant

R.E.ABURILI

JUDGE

5/6/2015