REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 5056 OF 1992

DANIEL K GICHUHI.....RESPONDENT/PLAINTIFF

VERSUS

THE CONSOLIDATED BANK LTD.....APPLICANT/DEFENDANT

R U L I N G

The application before the court is the Chamber Summons filed the Defendant, dated 17th February, 1994 and seeking the striking out of the plaint on the ground that it discloses no reasonable cause of action against the Defendant. The application is brought under former Order VI rule 13(1)(a), (b) and (d) of the Civil Procedure Rules, now Order 2 rule 15(1). The application is supported by an affidavit of ten paragraphs stating facts upon which the court is requested to strike out the plaint.

The plaintiff, on the other hand, filed a replying affidavit effectively giving answers one by one, to the clauses containing in the supporting affidavit of the Defendant.

I have carefully perused the material both in support and opposition to the application. I have no doubt that this court has power at any stage of the proceedings, to strike out a pleading, including a plaint or defence. The issue in this case however, is in what circumstances the court can properly exercise such power. In the case of **Sunday Principal Newspaper Limited [1961]** 2ALL E.R. 758, the principles for striking out were expressed thus: -

> ***"It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases...."***

And in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR** at P. 9, Madan, J.A expressed himself as follows: -

> ***"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 a case before it."***

Finally, the court above on the same page, stated as follows: -

> ***"The court ought to act very 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. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by away of cross-examination in the ordinary way (Seller LJ(supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."***

The above are the principles upon which this application to strike out the plaintiff's plaint will be considered. A glance of this application will no doubt show that the Defendant went to great details in this affidavit to explain and justify the grounds upon which the plaint should be struck out. The Defendant indeed had to delve into the realm of actual evidence in order to justify its case for striking out the plaint. It was in a way embarking upon a trial of the case at this stage. It indeed purported to deal with the facts and merits of the case they ought only come out with during the trial of the case. That would and did indeed interfere with a function of the trial court which will come later. If such were to be allowed further by this court which at this stage had no opportunity to hear oral evidence, with the advantage of cross-examination, discovery and other processes which give the court opportunity to make an informed meritorious decision, the court would end up having made a travesty of justice against the Respondent.

The remedy of striking out a pleading is rarely resorted to or granted. It is a harsh and drastic one. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case. It can only be granted where the case is plain, obvious, weak and one that cannot be redeemed by amendment.

This case, in this court's view, is not one that is described above. That is why the Defendant resorted to bringing aboard facts that go to the merit of the whole claim, thus proving that it is not plainly hopeless case. Indeed the attempt by the Defendant to bring such facts and evidence aboard meant that the case should be saved to a hearing stage where each party will have opportunity to produce full evidence upon which the trial court will decide the suit on merit.

For the above reasons the court finds that the application to strike out the plaint is unjustified and has no merit. It is hereby dismissed with costs to the plaintiff. Orders accordingly.

Dated and delivered at Nairobi this 5th March, 2014.

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D A ONYANCHA

JUDGE