



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 184 OF 2010

LACHLAN KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK STAFF

PENSION FUND REGISTERED TRUSTEES.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 7th July 2010 and filed on 18th July 2010 was brought under the provisions of Section 3A of the Civil Procedure Act, Order 2 Rules 15 (1)(a) and (b) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The same sought the following orders:-

- i. **THAT the suit herein be and is hereby dismissed/struck out.**
- ii. **THAT the Plaintiff be and is hereby ordered to pay the Defendants' costs of the suit.**
- iii. **THAT the costs of this application be borne by the Plaintiff.**

2. The said application was predicated on the following grounds:-

- a. **THAT the Plaintiff's suit did not disclose any reasonable cause of action for the reason that the cause of action was founded on an alleged Letter of Offer dated 7th October 2009 that was not attested by witnesses as was required by Section 3(3) (b) of the Law of Contract Act Cap 2 (laws of Kenya).**
- b. **THAT the suit was frivolous.**

AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

3. The application was supported by the affidavit of Matano Nyaa, a Pension Liaison Manager for the Defendant. He deposed that the Defendant's agent, N.W. Realite Limited sent the Plaintiff the aforementioned Letter of Offer which was subject to the Defendant's confirmation. He stated that the Defendant was to lease the suit premises to the Plaintiff for a period of six (6) years with effect from 1st June 2004.

4. He stated that the Plaintiff returned the said Letter of Offer on 10th January 2010 instead on 25th

October 2009 which was the date the said letter was to have been returned.

5. He added that the said Letter of Offer was not executed as has been stated hereinabove as a result of which the same could not form a basis of any cause of action in any court of law.

6. In its Grounds of Opposition dated and filed on 18th October 2013, the Plaintiff opposed the Defendant's application on the following grounds:-

- a. **THAT the application lacked in merit and its objective was to short circuit the due process.**
- b. **THAT the application was bad in law and contrary to Article 159 (d)(sic) of the Constitution.**
- c. **THAT the application was self-defendant (sic) as the Defendant had filed a counter-claim.**

LEGAL SUBMISSIONS BY THE DEFENDANT

7. In its written submissions dated 7th February 2013 and filed on 11th February 2013, the Defendant submitted that its agent's Property Manager's and Director's signatures in the aforementioned Letter of Offer were not witnessed or attested by any other person. It also contended that the Guarantor's signatures were not witnessed by an advocate as was required.

8. It was its argument that the said Letter of Offer amounted to a "**disposition**" as was envisaged in Section 3 (3) of the Law of Contract. The said provision provides as follows:-

"No suit shall be brought upon a Contract for disposition of an interest in land unless-

a. **The Contract upon which the suit is founded-**

i. **is in writing;**

ii. **is signed by all the parties thereto; and**

b. **The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."**

i. It argued that the Law of Contract was a substantive law on how contracts for the disposition of interest in land was to be made and was not a procedural law in which case the provisions of Article 159 (d)(sic) of the Constitution, which the Plaintiff had relied upon, was inapplicable herein. It averred that the provisions of Article 159 (d) (sic) was for courts to ensure that substantive justice was done to the parties, even where there may have been failure by the parties to strictly adhere to the specified court procedures.

j. It submitted that that the Letter of Offer did not meet the mandatory provisions of the Law of Contract Act and consequently no suit could be founded. It referred to the case of **Civil Appeal No 112 of 1997 Machakos District Co-operative Union Limited vs Phillip Nzuki Kiilu** (unreported) in this regard.

k. In respect of the Plaintiff's argument that its application was self-defeating, the Defendant submitted that its Counter-Claim was deemed to have been a separate suit which could be determined after the Plaintiff's suit was struck out. It said that in any event, the Counter-Claim had been acceded to by the Plaintiff as it had since vacated the suit premises and the Defendant given vacant possession to a third party.

LEGAL SUBMISSIONS BY THE PLAINTIFF

9. The Plaintiff filed its written submissions dated 19th February 2013 on 20th February 2013. It submitted that the Defendant's argument that its suit was frivolous lacked legal or factual basis. It referred the court to the definition of "**frivolous**" given in the Black's Law Dictionary which defined the same as:-

“lacking in a legal basis or legal merit; not serious, not reasonably purposeful.”

10. It averred that the said Letter of Offer became binding immediately the Defendant accepted the same irrespective of the requirement of execution in accordance with the provisions of Section 3(3) of the Law of Contract. It submitted that the communication of acceptance transformed the offer into a binding, legal obligation or contract.

11. It placed reliance on the case of **Cole- McIntyre- Norfleet Co vs Holloway (1918) QB 400** in which the Supreme Court held as follows:-

“It is undoubtedly true that an offer is not binding until its acceptance is communicated to the other party. The offer, however, may be communicated by the other party either by the formal acceptance or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself.”

12. It submitted that the Defendant’s conduct in accepting terms of revision of rent to be paid bound it. It argued that upon receiving an offer to renew the lease from the Defendant, it invested heavily on machinery. It referred the court to the case of **Western Electric Limited vs Welsh Development Agencies** where the court was said to have held that even where no contract was based on the letter of offer, the plaintiff there did not occupy the unit based on gratuitous permission but that the same was on contractual license by entering the premises and allowing them to move in.

13. It therefore submitted that it had established that a contract with binding obligations on both parties arose from the aforesaid Letter of Offer and prayed for an opportunity to be heard.

LEGAL ANALYSIS

14. The Plaintiff herein did not provide the court with the citation of the case **Western Electric Limited vs Welsh Development Agencies** (Supra) or furnish it with a copy thereof. In view of this omission, this court will not consider it while giving the ruling herein as it was not able to access the same.

15. Further, while the court noted the Plaintiff’s submissions that Article 159 (d) (sic) of the Constitution required courts to determine matters without undue regard to procedural technicalities and that the court was enjoined to applying the overriding objective in both substantive and procedural matters as had been held in the cases of **Joachim Njuguna Karanja & Another vs Amos Kabue Mwangi & 2 Others [2012] eKLR** and **Justus Mongumbu Omiti vs Walter Enock Nyambati Osebe & 2 Others [2011] eKLR**, it did not demonstrate the nexus between those submissions and the facts that had been placed before this court for determination.

16. A party who wishes a court to consider the *ratio decidendi* in a particular case bears the responsibility of demonstrating the relevance of that case to the facts that have been placed before it for consideration and determination.

17. Be that as it may, the court will now proceed to consider the merits or otherwise of the Defendant’s application. The provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, which the Defendant relied upon, stipulate 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 may be otherwise an abuse of the court process of the court,**

And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case

may be.

2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the ground on which it is made.

18. It is evident from the grounds on the face of the Defendant's application that it was asking the court to strike the Plaintiff's suit on the basis that it had failed to disclose any reasonable cause of action against it. It was not required to file any affidavit in support thereof as none was required under the Rules. The Defendant was essentially inviting this court to look at the Plaintiff without considering the merits of the case and immediately find that no reasonable cause of action has been set out against it.

19. To persuade the court to strike out the Plaintiff on this ground, the Defendant was required to demonstrate, without relying on affidavit evidence, that there were sufficient reasons to show that the Plaintiff filed herein did not disclose a reasonable cause of action against it. The evidence had to be so cogent so as not to prejudice the Plaintiff's case. This is because the court would ideally be proceeding to strike out the suit without hearing the merits of the Plaintiff's case.

20. The court gathered from the parties' submissions that the existence or validity of a contract between them was hotly contested. It is quite clear to the court that these are issues that would require to be ventilated in a full trial. Making a determination at this juncture would not only be pre-empting the parties' respective cases but it would also be "short circuiting" the matter as had been suggested in the Plaintiff's Grounds of Opposition.

21. The parties were not agreed on whether or not there was a valid and binding contract between them. The issue is therefore one that would require that evidence be adduced by parties in a trial before the court can give its determination. The cases that were relied upon by the Defendant were not relevant in the circumstances of this case. The Defendant's application would therefore automatically fail in this first instance as it did not demonstrate that there was no reasonable cause of action to warrant this court to strike out the Plaintiff's suit against it.

22. However, as the Defendant had also sought to have the Plaintiff's suit struck out for being frivolous, the court finds it necessary to consider this ground for the completeness of record. It was required to adduce evidence that the Plaintiff's suit was filed with intention of annoying or vexing it and that it ought not to have been filed in the first place.

23. Its Supporting Affidavit did not, however, allude to any fact of the Plaintiff's suit being frivolous. In fact, the issue was neither referred to in the said Affidavit or submissions. While the court can only assume that the Defendant may have opted to abandon striking out of the Plaintiff's suit on this ground, suffice it to state that the court was not satisfied that the Defendant established that the Plaintiff's suit was frivolous or at all as it had alleged.

24. It must be kept in mind that an act of striking out of pleadings by the court is a draconian step which must be used as a last resort. It should therefore be exercised cautiously and with a lot of restraint. The main aim is to sustain rather than terminate a suit, striking out a suit. This was a position that was espoused in Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR where Musinga J (as he then was) had the following to say:-

"It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."

25. The seriousness with which the court takes as regards the striking out of pleadings was also considered in the case of DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR. In that case, the Court of Appeal held as follows:-

"a cause of action will not be considered reasonable if it does not state such facts as to support the claim.... "cause of action" means an act on the part of the defendant which gives the plaintiff his

cause of action. As the power to strike out pleading is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. The court should aim at sustaining rather than terminating a suit...As long as a suit can be injected with life by amendment, it should not be struck out..”

26. Accordingly, having considered the parties’ pleadings, written submissions and case law, it does appear to this court that there was a lingering question as to whether or not the said Letter of Offer was valid and binding between them. The determination of this question and issue in controversy between the parties herein will have to await the full trial. The court finds that the threshold required for the striking out of the Plaintiff’s Complaint was not met at all. The court finds that the grounds relied by the Defendant were insufficient for all purposes of the application herein.

DISPOSITION

27. The upshot of this ruling therefore is that the Defendant’s Notice of Motion application dated 7th February 2013 and filed on 18th July 2013 was not merited. In the circumstances, the same is hereby dismissed with costs to the Plaintiff.

28. It is so ordered.

DATED and DELIVERED at NAIROBI 16th day of July, 2014

J. KAMAU

JUDGE