REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 335 of 2011

A.S SHEIKH TRANSPORTERS LIMITED…….....….1ST PLAINTIFF

ABDI SAID SHEIKH ALI…….....2ND PLAINITFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

JOSEPH G. MUTURI T/A MUGA AUCTIONEERS

& GENERAL MERCHANTS …….....…2ND DEFENDANT

MARTIN WHITEHEAD…….....…..3RD DEFENDANT

KURIA MUCHIRU…….....4TH DEFENDANT

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R U L I N G

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1. This a ruling on an application by the Plaintiffs dated 7th March, 2013. The application brought under Order 2 Rule 15(1) (c)and (d) of the Civil Procedure Rules seeks that the Defendant's Defence and Counterclaim dated 11th February, 2013 together with the accompanying documents filed on 11th February, 2013 be struck out and the Defence and counterclaim be dismissed. The grounds upon which the application is brought are that the Defence and counterclaim and the accompanying documents may prejudice embarrass or delay the fair trial of the suit and that they are otherwise an abuse of the process of the court.

2. In the Supporting Affidavit of Abdi Said Sheikh Ali sworn on 7th March, 2013, the Plaintiffs contended that the Plaint and the accompanying documents filed on 1st August, 2011 were served upon the Defendant on 2nd August, 2011, a Notice of Appointment by Ms. Waruhiu K'Owade & Ng'ang'a Advocates was filed and served on behalf of the Defendants on 8th and 9th August, 2011, respectively. The summons to enter appearance was served on the Defendants' advocates on 26th August, 2011 and that appearance thereto was supposed to be entered 15 days thereafter. That under the rules, the Defence and counterclaim was supposed to be filed 14 days after entering appearance but was not filed

whereby on 24th November, 2011, the Defendants applied for and were granted leave to file their Defence and Counterclaim out of time, within 21 days. However, the Defendants did not comply with the said order at all and on 1st December, 2011 and 21st January, 2013, the Defendants invited bids for the sale of the Plaintiff's lorries. The matter was fixed for pre-trial directions on 6th February, 2013 when the Defendants did not attend. At that pretrial direction, the court confirmed the suit for trial on the basis of the documents then on record. The suit was finally fixed for trial on 15th April, 2013. A hearing notice was served upon the Defendants' advocates on 21st February, 2013.

3. Ms Ng'ania, learned Counsel for the Plaintiffs submitted that the failure to file the Defence and Counterclaim as directed on 24th November, 2011 was intentional and intended to hinder the timely disposal of the matter, that the failure was both in breach of the rules as well as of the order of court, that the Defence and Counterclaim was filed after the completion of private sale of the Plaintiffs lorries by the Defendants and the pretrial directions given by the court without leave. Counsel submitted that that failure was not a technicality and that the right to a hearing enshrined in Article 50 of the Constitution is in tandem with Order 7 Rule 1 of the Civil Procedure Rules which directs how pleadings are to be filed for proper exercise of that Constitutional right to a hearing. She stressed that the delay was inordinate and inexcusable and referred to various cases in support of her submissions and urged that the application be allowed.

4. The Defendants opposed the application vide a Replying Affidavit of Ken Kiurah sworn on 18th March, 2013. In it, the Defendants admitted that the Plaint and accompanying documents were served upon them on 2nd August, 2011, that the summons were served upon the Defendants' advocates on 26th August, 2011. The Defendants contended that service upon their advocates was invalid and ineffective as the advocates are not recognized agents within the meaning of Orders 8 and 9 Rules 2 and 3 of the Civil Procedure Rules. That the failure to file the Defence and Counterclaim as directed by court was largely attributed to the Plaintiff's filing a Notice of Motion dated 5th December, 2011, that the matter came up in court a record 11 times after the filing of that application. That the Defendants advocates were not in court on 14th December, 2012 when the ruling on that application was delivered. That the said advocates were not notified of the date of delivery of that ruling yet that is the time they would have applied for extension of time, that the Advocates failed to appear in court on the pretrial date out of an inadvertent mistake on the part of the Advocate's clerk to diarize the date and Mr. Thiga Advocate was in a five (5) Bench Constitutional Court. The Defendants denied that failure to file the Defence and Counterclaim within time or as directed by the court was intentional. That therefore, the Defence and counterclaim was not an abuse of Court process.

5. Mr. Thiga, learned Counsel for the Defendants submitted that the Plaintiff had failed to disclose to court that between the date of leave being granted and the filing of the Defence and Counterclaim, the parties had been in court a record eleven (11) times, the Defendant was therefore busy in court, that as at 23rd July, 2012 the parties were negotiating. Counsel referred to the case of **Dr. Kiama Wangai –vs- John N. Mugambi & Anor (2012) e KLR** on the meaning of delay or embarrassing or prejudice a fair trial which in Counsel's view did not apply to the Defendants position in this case. He also referred to the case of **Stephen Mugo Mutothori & others –vs- Commissioner of Lands HCCC No.932 of 2003** on the meaning of abuse of process of court which did not cover the Defendants. He also referred to **Nguruman Ltd –vs- Shampole Group Ranch & 3 others 2007 (eKLR)** on the exercise of the court's discretion. He submitted that the Plaintiff's application was based on technicality which would affect the Defendants right to be heard under Article 50 of the Constitution of Kenya. Counsel therefore urged that the application be dismissed.

6. I have considered the Affidavits on record, the submissions of Counsel and the authorities relied on. Striking out a pleading is a very draconian jurisdiction. It is to be exercised sparingly and only in clear and obvious cases. This was aptly put by Chitty J in **Republic of Peru –vs- Perurian Gucino Co. 36ch Div.489** at pages 495 and 496 thus:-

"It has been said more than once that the rule is only to be acted upon in plain and obvious cases and

in my opinion the jurisdiction should be exercised with extreme caution."

Per Madam J.A in **D.T Dobie & Co. (K) Ltd –vs- Muchina (1982) KLR 1** at page 9:-

"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."

7. It is not denied that the Plaint and other documents were initially served upon the Defendants on 2nd August, 2011 without summons to enter appearance. The summons were on 26th August, 2011 served upon the Plaintiff's advocates Ms. Waruhiu K'Owade and Ng'ang'a who had filed a Notice of Appointment on 9th August, 2011. The Defendant's contention is that such service was ineffectual and invalid as the Advocates were not recognized agents under Orders 8 and 9 Rules 2 and 3 of the Civil Procedure Rules. I have looked at Order 8 the same does not address the issue of appearance but it deals with amendment of pleadings. As regards Order 9 Rules 2 and 3, Mr. Thiga may be right that a firm of Advocates do not fall under the definition of recognized agents under those rules. However, a reading of Order 9 Rule 1 is instructive. It provides that:-

"1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person; or by his recognized agent, or by an advocate duly appointed to act on his behalf." (Emphasis provided).

Under Order 5 Rule 8, service of summons upon a Defendant is provided for. Rule 8(2) provides:-

"2. A summons may be served upon an advocate who has instructions to accept service and to enter appearance to the summons and judgment in default may be entered after such service." (Emphasis supplied)

8. From the foregoing, my view is that Order 9 Rule 1 as read with Order 5 Rule 8(2) of the Civil Procedure Rules allows a Plaintiff to effect service upon an Advocate who has instructions to accept service. Such service will be effective and that is why Rule 8(2) of Order 5 permits judgment in default to be entered after such service. Accordingly, I reject the Defendant's contention that service of summons on 26th August, 2011 upon its Advocates, who had on 9th August, 2011 duly filed a Notice of their appointment was invalid. In my view, their having filed a Notice of Appointment signified their having instructions to act in the matter and receive summons. To my mind therefore, the challenge to that service is an afterthought having in mind that such an argument was not raised when the Defendants applied for leave to be permitted to file the Defence and counterclaim out of time in November, 2011.

9. I think that this is in line with the holding in the case cited by Ms Ng'ania of **Mint Holdings Ltd & Anor –vs- Trust Bank Ltd (2000) e KLR.** In that case, the Court of Appeal held that:-

"Whatever Mr. Muhindi may have felt, it is quite obvious that the appellant's advocates were bound to serve the summons and copy of the Plaint on the advocates on record. Apart from what Order III Rule 8 as read with Order III Rule 3 of the Civil Procedure Rule says, it is a matter of common sense that once an advocate has been appointed to act for a party and he has taken the trouble to lodge a notice of appointment of advocates, service of any process ought to be made on that advocate." (Emphasis mine).

10. The second challenge mounted on the application is that the Defendants were engaged in many court attendances as a result of the applications filed by the Plaintiffs both in the High Court as well as in the Court of Appeal. That may be so, but I do not think that the existence of or prosecution of interlocutory applications can operate as a bar to a litigant taking the necessary steps as provided by law in a litigation. It should be noted that while leave for 21 days was given on 24th November, 2011, the 1st court attendance after that date was on 13th December, 2011, a period of 20 days! I do not think that the

Court appearance on 13th January, 2012 is a good explanation for the delay and/or failure to file the Defence and counterclaim within the time fixed by the court. In any event, it was not alleged that the Defence and Counterclaim had been prepared and ready to be filed but because of the court attendance from the 21st day of the period given by the court, the Defendant's Advocates forgot to file the same.

11. The Defendants also contended that because the ruling of 14th December, 2012 was delivered without notice to the Defendants Advocates, the latter were not able to apply for leave to file the Defence and Counterclaim out of time. I think that is an afterthought. If there was a genuine intention to make such an application, why is it that no such an application was made at any time after such date? Was failure to be served with a notice for the ruling reason enough to proceed and file the Defence and Counterclaim and other documents on 19th February, 2013 without leave? I do not believe the Defendants on this.

12. Learned Counsel for the Defendants Mr. Thiga referred the court to the cases of **Dr. Kiama Wangai (supra)** and **Stephen Mugo Mutothori (supra)** and submitted that the definitions given therein of delay, embarrass or prejudice a fair trial as well as abuse of the court process could not fit the Defendants circumstances in this case. In the **Dr. Kiama Wangai case** Odunga J held that:-

"Pleading tend to prejudice, embarrass or delay fair trail 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 raised 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 as a pleading which is ambiguous or unintelligible or which states immaterial mattes 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 misuse of the Court machinery or process. See Trust Bank Limited –vs- HemanshuSiryakat Amin & Company Limited & Another Nairobi HCCC NO.984 of 1999."

In **Stephen Mugo Mutothori** case Hayanga J held that:-

".....for abuse of Court process there the case must be a sham, lacking in honesty and bonafides where it is contrary to justice and public policy to litigate the matter where the process of the court is being sought or bent or used for ill motive, mala fide, where to use the court is to abuse its integrity, purpose." (Underlining mine)

13. I agree with the definitions given by the two courts to the terms prejudice, embarrass or delay fair trial and abuse of court process. But the said definitions are not conclusive in themselves. There may be other instances and explanations to cover them and I do not propose to engage that exercise here. In any event, do the said definitions apply to the Defendants position in this case? To answer this, an examination of the facts will assist. Service of summons was effected on 26th August, 2011, the court itself granted the Defendant twenty one (21) days leave to file the Defence and Counterclaim on 24th November, 2011. The 21 days period elapsed without any action on the part of the Defendants. More than one (1) year later, the Defendants did not apply for extention of that time or for any leave at all but filed the Defence and Counterclaim and other documents on 19th February, 2013. As at that date, the court had made an order on 6th February, 2013 during pretrial directions, that the suit shall proceed for trial with the documents then on record. Of course, that must have included the pleadings. The suit was then fixed by the Plaintiff for hearing on 15th April, 2013. In view of all the foregoing, what can the actions of the Defendants of 19th February, 2013 be termed?

14. The Defendants submit that their actions were only a procedural lapse or technicality which is excusable under Article 159 2(d) of the Constitution and that the purpose of the pleadings and the documents they filed is to enable them exercise their Constitutional right to a hearing under Article 50. The Plaintiffs submit otherwise. Rules of procedure, in my view, are meant to facilitate but not stifle justice. They are meant to facilitate a party's exercise of his Constitutional right to a hearing under Article 50 of the Constitution. In this regard, Order 7 Rule 1 of the Civil Procedure Rules does just that. It stipulates how a Defendant who is desirous to exercise his constitutional right to be heard is to approach the court, place on record his case for the court to give a fair hearing thereof to the parties.

15. Indeed cognisance of that fact, Odunga J enlarged the time within which the Defendant was to exercise this right from mid-September, 2011. Can the failure to comply with Order 7 Rule 1 and the order of the court of 24th November, 2011 be said to be technical in terms of Article 159 2(d) of the Constitution? I think not.

16. Public policy demands that justice be dispensed with expeditiously. Indeed, it is a constitutional requirement under Article 159 2(c) that justice should not be delayed. Sections 1A and 1B of the Civil Procedure Act enjoins this court to ensure a just, expeditious and proportionate resolution of disputes, this included. The court is also enjoined to ensure a timely disposal of proceedings before it. Parties are also enjoined to comply with the directions and orders of the court. Firstly, the Defendants have not complied with the direction or order of the Court of 24th November, 2011. Secondly, on 6th February, 2011, when giving the certificate of compliance, this court directed that the trial would proceed with the documents then on record. By filing the documents they did on 19th February, 2013 without leave of court, the Defendants were in breach of Section 1A(3) of the Civil Procedure Act. It does not matter that they did not attend court on 6th February, 2013, when the direction was made. Since they were aware of that date, it was incumbent upon them to peruse the court file and familiarize themselves with the directions or orders made in their absence. Thirdly, by filing the documents without leave, fresh directions re-opening pretrials need to be made as to the admitted documents, the filing of the Reply to Defence and Defence to Counterclaim and the issues. This will no doubt disrupt the date of 15th April, 2013 already fixed for the hearing of this suit. It will lead to further delay in the determination of the dispute between the parties in breach of Sections 1A and 1B of the Civil Procedure Act and Article 159 2(c) of the Constitution. While I appreciate the serious nature of the Defence and Counterclaim intended by the Defendants, they claim an amount in excess of Kshs.95million, the delay in its filing and the breaches of the law and court orders I have set out above does not permit this court to allow the same.

17. Indeed, I believe that it is similar conduct which led the Court of Appeal in the cases relied by Ms. Ng'ania **of Ramji Devji Vekarai –vs- Joseph Oyula (2011) e KLR** to state that:-

"This is an omission that goes to the root of the rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reason for following the rules of the Court, even where they have been violated with impunity."

Again in **Hunker Trading Company Ltd –vs- Elf oil Kenya Ltd (2010) eKLR** that:-

"In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double "O" principle) and in this case, we have chosen to call if ("the O_2" or "the Oxygen Principle") because it is intended to re-energize the processes of the courts and to encourage good management of cases and appeals. The violation arises from the fact that this court is again being asked to cover almost the same points although using different rules and this is a waste or misappropriation of this court's resources (time) and also an abuse of the process of the court." (Emphasis supplied).

18. In the instance case, the actions of the Defendants are not only in breach of express provisions of the law to wit, Sections 1A and 1B of the Civil Procedure Act, Order 7 Rule 1 of the Civil Procedure

Rules and Article 159 2(c) of the Constitution, but they are in blatant disregard to the court orders of 24th November, 2011 and 6th February, 2013, respectively. In my view, there could be no better abuse of the court process than the filing of the Defence and Counterclaim and other documents by the Defendants on the 19th February, 2013.

19. I think I have said enough. The upshot of it is that the Plaintiff's application is allowed as prayed. The Defendants Defence and Counterclaim is hereby struck out with costs to the Plaintiffs.

It is so ordered

DATED and **DELIVERED** at Nairobi this 10th day of April, 2013.

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A.MABEYA
JUDGE