



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 23 OF 2009

HOUSING & INDUSTRIAL DEVELOPMENT CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY.....1ST DEFENDANT

CAPITAL CONSTRUCTION LIMITED.....2ND DEFENDANT

R U L I N G

The application is a Chamber Summons dated 22nd January, 2009 brought under Order VI rule 13(i), (b), (c) and (d) of the Civil Procedure Rules. The Plaintiff is seeking the striking out of the Defendant's defence with costs, and for judgment entered as prayed for in the plaint.

The grounds upon which the application is premised are on the face of the application namely:

- 1. The defence(s) are a sham and bare denials and excuses.**
- 2. The defence(s) are untenable, unarguable and an abuse of the process of the court.**
- 3. The defence(s) will delay the fair trial and determination of this matter.**
- 4. The defence(s) are vexation, frivolous and embarrassing**
- 5. The reasons and content of the supporting affidavit of PARSEEN OLE SHUNET**

The application is supported by an affidavit sworn by PARSEEN OLE SHUNET the Managing Director of the Plaintiff dated 22nd January, 2009. I have considered this affidavit.

The application is opposed by both Defendants. On behalf of the 1st Defendant, Prof. Sibilike Makhunu swore an affidavit dated 6th February, 2009 with annexures thereto. On behalf of the 2nd Defendant, V.C. Ganti, a Director of the 2nd Defendant company has sworn an affidavit dated 25th March, 2009 with annexures thereto. I have considered both affidavits.

When the application came up for hearing, only the Applicant, represented by Mr. Mwangi, and the 2nd Defendant, represented by Mrs. Shamalla came to argue the application. The 1st Defendant was not represented either by counsel or by a representative.

The application seeks to strike out the defences filed by the two Defendants in this case. I have already set out the grounds upon which the application is made. The general principles for the exercise of summary powers under order VI rule 13(1) are well settled. It is well settled that this summary procedure is only appropriate to cases which are plain and obvious, and where on the face of it, the defence is obviously unsustainable or where the case is unarguable, and where it cannot be rectified through an amendment. The Plaintiff is relying on rule 13(1), (b), (c) and (d) of Order VI. It has to be demonstrated that the defences as filed are embarrassing, scandalous, frivolous and vexatious; that they are intended only to delay the fair trial and determination of the case, and that they are otherwise an abuse of the court process.

In **BULLEN AND LEAKE AND JACOB'S PRECEDENCE OF PLEADINGS**, 12th Ed., at page 144 and 145, scandalous pleading are described as follows:

“For this purpose, allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any “unnecessary” or “immaterial” allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else. Again, if degrading charges are made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous. One of the two defendants may apply to strike out scandalous passages from the defence served on him by the other.”

Frivolous vexatious, pleading and actions are also defined as follows.

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasoned argument. Against a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good.”

In the same text at page 148, abuse of process is described as follows:

“The term ‘abuse of the process of the court’ is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, although it should not be lightly done, yet it may often be required by the very essence of justice to be done.”

There is no doubt that the court has inherent jurisdiction to dismiss an action which is an abuse of the court process, and to strike out pleadings which are scandalous, frivolous and vexatious. This jurisdiction of the court ought to be sparingly exercised, and even then only in plain and obvious cases as stated before. The burden lies upon the Applicant to show that the defences as filed are embarrassing, scandalous, frivolous and vexatious; that they are intended only to delay the fair trial and determination of the case and that they are otherwise an abuse of the court process.

In the case of **WEN LOCK V. MALONEY AND OTHERS [1965] WLR 1238**, Sellers L.J. said at page 1242:

“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 had 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.”

The **WenLock case**, supra, gives the parameters within which these wide powers of the court are to be exercised.

Here at home in **D.T. DOBIE & CO. (KENYA) LTD. VS. MUCHINA [1974] KLR 1**, Madan J.A. stated, 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. 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 itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way...”

As shown above, this summary procedure should be the last resort for a court.

Having considered submissions by both Counsel and the application before me, the first thing I have noted is that the application was filed on 22nd January 2009, long before the two Defendants filed their defences. The application was therefore on that ground, premature, in that it sought to strike out pleadings that were not before the court at the time the application was made. On that ground alone, the application should fail. The 2nd Defendant’s advocate did not notice that point and so never raised it in her submissions. In case I am wrong in finding that the application was premature, I will now consider the merits of the case.

The Plaintiff has sued the Defendants as a sub-contractor of the 2nd Defendant. The 1st Defendant is the party that awarded the 2nd Defendant a tender for the erection and completion of a Hostel, Kitchen and Dining Hall at its campus situated in Kakamega District. The Plaintiff was the sub-contractor of the 2nd Defendant with the consent of the 1st Defendant. The 2nd Defendant subcontracted to the Plaintiff the remains of the construction works for the Kitchen and the Dining Block, and for which services the Plaintiff was to be paid. The Plaintiff has sued both Defendants for the recovery of Kshs.2,534,141.30 being the sum owed to it by both Defendants. It is the Plaintiff’s case that there was a tripartite agreement between all the three parties where the 2nd Defendant gave an irrevocable authority to the 1st Defendant to pay the sum owing to the Plaintiff. The Plaintiff’s contention is that the sum has not been paid and that both Defendants are bound to pay the said sum to it. For the purposes of this application, it is the Plaintiff’s contention that the defences filed by the Defendants herein are a sham; are mere denials; are untenable and unarguable; are frivolous, vexatious and embarrassing, and are merely meant to delay the fair trial and determination of the case.

A Defendant is entitled to unconditional leave to defend a suit where it has demonstrated that there is a triable issue. In **Nuru Chemist Limited and Another v. National Bank of Kenya CA No. 219 of 2002**, the Court of Appeal held:

“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”

I am guided by the principles in the cases cited by the parties and those in the body of this ruling. I have

had occasion to look at the defences filed by the 1st and the 2nd Defendants. In the case of the 1st Defendant, there are at least three triable issues raised. The 1st Defendant's contention at paragraphs 5 and 6 of the defence is that there is no privity of contract between it and the Plaintiff and that the sub-contract is between the Plaintiff and the 2nd Defendant. The second issue raised is that the 1st Defendant's role was only to facilitate the payment on advice by the Project Architect. The 1st Defendant avers that the advice by the Architect was that only Kshs.646,283,70 was to be paid to the Plaintiff. The 1st Defendant explains in paragraph 8 and 9 that, pursuant to a court order a sum of Kshs.242,817.80 was attached by **Kakamega CMCC No. 463 of 2008**, in payment of debts owed by the Plaintiff to Kakamega Caltex Service Station. The 1st Defendant in paragraph 9 of its defence concludes that it is holding the sum of Kshs.402,465.90 in favour of the Plaintiff, and that it was ready to pay that money to the Plaintiff subject to deduction of demurrage and storage charges for the Plaintiff's equipments and machinery left on the 1st Defendant's compound.

The 2nd Defendants statement of defence, in paragraph 7 it is averred that the Plaintiff has not made any demand for payment or any claim from the 2nd Defendant and that the 2nd Defendant therefore is a stranger to the Plaintiff's claim as particularized at paragraph 10 of the Plaint. In paragraphs 3, 4, 5, 6, and 8 the 2nd Defendant denies the contents of paragraphs 5 6, 7, 8, 9 and 11 of the plaint and puts the Plaintiff to strict proof.

It is trite that a pleading should not be struck out if it is shown there is a real substantial question which has been raised which ought to go to trial, and where it is clear that the case is not plain and obvious, and where the facts are contested. From the defences filed by the Defendants in this case, each of the Defendants has contested the facts of the Plaintiff's case. The Defendants have also raised substantial questions, which, in my view ought to go trial. The 1st Defendant in particular has raised the issue of an Architect's certificate and has averred that the only certificate issued for payment to the Plaintiff was for payment of a sum far less than the sum claimed by the Plaintiff in this suit. The supporting affidavit sworn by the Managing Director of the Plaintiff company has contested the Statements of Facts contained in the defences, especially that by the 1st Defendant. The manner in which the issues are contested by the Plaintiff clearly shows that the facts of this case are not plain and obvious, that they are contentious and are in dispute and therefore ought to go to trial in order for each party to ventilate their case.

As for the 2nd Defendant, it has filed a replying affidavit in which it shows that it gave the 1st Defendant an irrevocable authority to pay the Plaintiff all the monies the Plaintiff is claiming, upon completion of work to its satisfaction. In paragraph 8 of the plaint, the Plaintiff avers that the 2nd Defendant gave an irrevocable authority to the 1st Defendant to pay the sum due to the Plaintiff. It is averred in paragraph 8 of the plaint that the 1st Defendant has failed to pay the entire sum due to the Plaintiff on grounds that it has paid part of the sum to the 2nd Defendant. The issue of payment by the 1st to the 2nd Defendant, of part of the sum due to the Plaintiff, is a contentious issue, it does not seem to arise in the Defences filed by the two Defendants and the Plaintiff will need to adduce evidence to prove it.

Having considered this application and the pleadings on record, I have come to the firm conclusion that the Plaintiff's case is not plain and obvious, that the defences as filed by the two Defendants are not frivolous, vexatious, unarguable, embarrassing or untenable, neither are they an abuse of the court process, or intended to delay the fair trial and determination of this case. I am satisfied that there are triable issues raised by the two Defendants in their Defences, that the cases involve contentious issues of fact which ought to be ventilated at the trial by each of the parties.

Having come to this conclusion, the Plaintiff's application must fail and is therefore dismissed with costs to the two Defendants.

Dated at Nairobi this 8th day of May 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

N/A for Mr. Mwangi for the Applicant

Mrs. Shamalla for the Respondent/2nd Defendant

N/A for 1st Defendant/Respondent

LESIIT, J.

JUDGE