REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 151 OF 2017

KENOL KOBIL LTD...PLAINTIFF/ RESPONDENT

VERSUS

DAVID MUGO NDUMIA

JAMES MWANGI NDUMIA

JULIA NYAGUTHI NDUMIA

MARY NJAMBI NDUMIA (sued as the Administrators and legal representatives

of the Estate of DANSON NDUMIA MUKURIA).....1ST DEFENDANT/APPLICANT

JAMES MWANGI NDUMIA.....................................2ND DEFENDANT/APPLICANT

DAVID MUGO NDUMIA...3rd DEFENDANT/APPLICANT

RULING

1. Before me for determination is a Notice of motion dated the 23rd January 2019which was filed on the 31st January 2019 by counsel for the Defendant/Applicants herein where they seek to have the suit herein struck out as it discloses no reasonable cause of action.

2. The Respondents herein filed their Replying affidavit sworn on the 15th March 2019 in court on the18th March 2019.

3. Parties thereafter took directions to have the said application disposed of by way of written submissions in which parties filed their respective submissions which I shall consider as follows:

Applicants' Submissions

4. The Applicant' submission was to the effect that whereas the Plaintiff has filed suit against them in regard to the breach of a lease agreement in respect to land parcel No. 6585/506, there is no existing lease between them and therefore the Respondent's claims are unsubstantiated and meant to frustrate and prejudice the Applicants.

5. The Applicants framed their issues for determination as follows:

i. Whether the Plaintiff/Respondents pleadings should be struck out

ii. Whther the Applicants are entitled to prayers sought

6. On the first issue, it was the Applicants' submission and while relying on the supporting affidavit sworn by David Mugo Ndumia, that the provisions of Order 2 Rule 15 of the Civil Procedure Rules was clear to the that the suit herein was without substance and its purpose was to defeat justice and to prevent the Applicants from enjoying their lawful entitlements over the suit property. That there was no evidence adduced by the Respondents to confirm that indeed there was a lease agreement between the parties.

7. That the parties herein entered into a memorandum of understanding dated the 19th April 2017 (the MOU) pending the execution of a lease to which the Respondents breached and thereafter failed to remedy the breach despite several reminders by the Applicants to rectify the breach reason which the Applicants were entitled to take back possession of their property.

8. That the Respondents in their Plaint left out material facts which if taken into consideration would clearly absolve the Applicants of any blame. That the Respondents have intentionally failed to disclose the fact that they had not been paying the rent and that no lease exists between the parties because they had frustrated the efforts to negotiate and/or execute a new lease.

9. The Applicants relied on several decided cases, in support of their submission, being;

i. Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others [2014] eKLR

ii. County Council of Nandi vs Ezekiel Kibet Rutto & 6 others [2017] eKLR

10. On the second issue, it was the Applicant's submission that the court looks into all the circumstance arising herein before and after institution of the suit where it will find that the Respondent is a frivolous litigant who does not appreciate and respect the court process, thereafter the court to exercise it discretion to strike out the Respondent's suit which is an abuse of the court process.

11. The Applicant relied on the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR** as sighted in the case of **Jones M Musau & Another vs Kenya Hospital Association & Another [2017] eKLR**.

12. A further list of Authorities filed by the Applicant on the 14th March 2019 in support of their application include:

i. The constitution of Kenya 2010

ii. The Law of Contract

iii. Land Act, No 6. Of 2012

iv. The Land Registration Act, No 3 of 2012

v. Tom Odhiambo Achilla T/A Achilla T.O & Co advocates vs. Kenneth Wamwbire Akide T/A Akie & company Advocates & 3 others [2015] eKLR

vi. Vivian Muia vs Mzoori Limited[2017] eKLR

vii. Kivanga estate Ltd V National Bank of Kenya Ltd {2017} eKLR

viii. Jiwanji & others vs Jiwanji & another [1068] EA 547

ix. Mas George Guesthouse vs. Githere Investment Ltd & Another [20060 eKLR

13. The Applicant sought for their application to be allowed.

The Respondent's Submission

14. The Respondent's submission in opposition of the Application dated the 23rd January 2019 was based on 4(four) issues for determination:

i. The court's Power to strike out a suit.

ii. Whether the Respondent's Suit discloses a reasonable Cause of action.

iii. Whether the Respondent's suit is scandalous, Frivolous or Vexatious

iv. Whether the Respondent's suit is otherwise an abuse of the process of the court.

15. On the first issue the Respondent submitted, while appreciating the provisions of Order 2 Rule 15 of the Civil Procedure Rules that such a drastic measure of striking out a suit should only be resorted to as a measure of the last resort and even only in the clearest of cases. Reliance was placed on the case of **D.T Dobie & Company (Kenya)Ltd vs Joseph Mbaria Muchina and Another [1980] eKLR**

16. The Respondent further submitted that the courts have remained faithful to the principle set out in **D.T Dobie (supra).** They proceeded to set out examples of the said cases and concluded that where a court found that the suit showed even a speck of promise and/or raises even a single triable issue, the Respondent must be allowed the opportunity to be heard. This was the intension of Articles 48, 50 and 159 of the Constitution.

17. On the Second issue, it was the Respondents submission that based on the decided case of **D.T Dobie (supra)** it was not sufficient only to state that a suit was disclosed no cause of action, but to state concisely the grounds upon which it is made. That the Respondent had filed an application dated the 26th November 2018 for leave to amend their plaint which application was yet to be heard. That the said application if allowed would cure the said issue which was still denied.

18. That the grounds relied upon by the Applicant did not support the averment that the plaint did not disclose a reasonable cause of action. That by the Applicants stating that the Respondent had left out material facts, they were in fact supporting their application to amend the Plaint. That they had raised various triable issues which the court was obligated to determine on merit.

19. The Respondent listed down the pertinent issues that arose from the pleadings as filed together with the draft amended plaint the subject of the notice of motion dated the 26th November 2018 for leave to amend the Plaint which issues included;

i. Whether there is a valid, binding and enforceable agreement entered into between the parties for the lease of the suit property;

ii. Whether the applicants actions of forcefully taking over and evicting the Respondent from the suit property constituted a breach of the law and the terms of the Lease Agreement entered into between the parties dated 19th April, 2017;

iii. Whether in the circumstances the Applicants were entitled to forcefully take over the suit property in the face of the Lease Agreement dated 19th April, 2017;

iv. Whether the Respondent is entitled to the injunctive relief sought restraining the Applicants from interfering with its right to quiet possession and enjoyment of the suit property;

v. Whether the Respondent is entitled to an order for special performance of the Lease Agreement dated 19th April 2017 and subsequent invalidation of the purported termination notice issued by the applicants;

vi. Whether the Respondent is entitled to damages for loss incurred arising from the Applicant's continued use of fuel pumps, equipment and generators to sell fuel and other petroleum products, and

vii. Who should bear the cost of the suit

20. In support of their submission, the Respondent further relied on the decided case of **Equatorial Commercial Bank Ltd vs Jodam Engineering Works Ltd & 2 Others [2014] eKLR.**

21. The Respondent's submission on the third issue as to whether their suit was Scandalous Frivolous or Vexatious, they relied on the case of **Mpaka Road Development Co. Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House [2001] eKLR** to submit that a the matter would only be scandalous if it would not be admissible in evidence owing to its imputation on a character of a party who was not enjoined to the pleadings or when the pleadings are indecent, offensive or made with the sole intent of abusing or prejudicing the opposite party or that they charge the opposite party with bad faith or misconduct. A fact which the Applicants failed to establish.

22. That further, the Applicants had also failed to show that the Respondents pleadings lacks substance, is fanciful a waste of the court's time and is not capable of a reasoned argument. That the Applicants had also not shown that the Plaint lacked bona fids or was hopeless or offensive or tended to cause the opposite party unnecessary anxiety, trouble and expense.

23. The Applicants had also failed to show that the Respondent's suit herein lacked foundation, or had no chance of succeeding or that it was brought for the sole purpose of annoying them or that it could lead to no good.

24. On the last issue as to whether the suit herein was an abuse of the process of court, it was the Respondent's submission pursuant to the decided case of **Vivian Muia vs Mzoori Limited [2017] eKLR,** having established that their case was well founded in law that it would be inconsistent for it to be deemed to be an abuse of the process of the court. That the suit was brought to protect the Respondents right under the lease Agreement entered into with the Applicants and did not offend the rules of pleadings and cannot therefore be said to be an abuse of the court process. That the Applicants had failed to meet the test for grant of orders to strike out the respondent's suit and accordingly the said should be dismissed with costs to the Respondent.

Analyses and Determination.

25. I have considered the able submissions of the parties' Counsel herein. The Applicable law upon which the Application dated the 23rd January 219 is pegged on Order 2, rule 15. Of the Civil Procedure Rules which provides as follows:

(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.

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

26. There is no dearth of judicial precedents on the subject of striking out of pleadings In view of the above, provisions of the law, I take heed to the judicial caution that in application such as the one before me, a court should not express any opinion on the matters in issue as that would hurt fair trial and subsequent disposal of the case should the suit be ultimately be heard on merit.

27. The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled in the case of; **D.T. Dobie & Company Kenya Ltd Vs. Joseph Mbaria Muchina,** CA No. 37 of 1978, the court of Appeal held 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 has shown 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."**

28. The Plaintiff's case is that they had leased the suit premises vide a lease that was executed and registered on 4th October 2000 for a term of 13 years. The purpose was to enable them operate the business of a petrol service station. In the lease, there was an option for renewal for a further term of 10 years. That through a letter dated 30th October 2012, the Plaintiff did invoke its option to renew the lease for the further term of 10 years and continued paying rent. That on 28th November 2013, the Defendants/Applicants wrote to them demanding new lease terms with an enhanced rent to be paid quarterly. The plaintiff however forwarded a cheque for Kshs. 150,852/= being what it considered to be the agreed rent. The cheque was returned by the Defendants who then served them with a termination notice On 7th February 2014' The Defendant /Applicants on the other hand had contended that there is no lease existing between the parties and therefore the Respondent's claims are unsubstantiated and meant to frustrate and prejudice the Applicants.

29. I find that in a scenario like the one before me, my duty would include the discovery through oral evidence subjected to test by cross-examination in the ordinary protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action.

30. The rules of natural justice require that I must not drive *away any litigant however weak his case may be from the seat of justice.* I would therefore be reluctant to remove the Plaintiff/Respondent from the seat of justice prematurely. This is in line with the overarching principles in the administration of justice as enunciated under **Articles 50** and **159** of the Constitution that provides that courts should aim to dispense substantive justice by allowing parties to ventilate their cases.

31. Indeed as it was held by the court of Appeal in the case of **Saudi Arabia Airlines Corporation V Premium Petroleum Company Limited [1986] eKLR** that:

> I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.

32. In **Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit No. 311 of 2013 [2014] eKLR**, where the defendant sought to have a plaint stricken out, 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."

33. In **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..."

34. I have considered the material placed before this court and I find that the plaint herein raises triable issues and therefore a reasonable cause of action has been disclosed. I do find that there are issues of both law and fact arising from the pleadings in this case which cannot summarily be determined by an application.

35. The Applicant has failed to demonstrate that the Plaintiff's suit is scandalous, frivolous, vexatious or an abuse of the court process. With the result that the application dated 23rd January 2019 is herein dismissed with costs to the Plaintiff/Respondent.

38. Due to the age of the matter, and in pursuant to the provisions of Sections 1B and 3A of the Civil Procedure Act, I further direct that the Plaintiff do file and serve their amended Plaint within 14 days. Corresponding leave is also granted to the Defendants to file and serve their amended defence (if need be) within the same period of time. Thereafter parties shall comply with the provisions of Order 11 of the Civil procedure Rules within 21 days of this ruling wherein the matter to be listed for Pre-trial Conference to confirm compliance and for further orders and/or directions by the court. On a date to be issued by the court.

Dated and delivered at Nyahururu this 28th day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE