Kenyariri v Double Win Company Ltd & 2 others (Civil Suit E288 of 2022) [2024] KEELC 1609 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1609 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT E288 OF 2022

OA ANGOTE, J

MARCH 14, 2024

BETWEEN

CHRISTOPHER O KENYARIRI ..... PLAINTIFF

AND

DOUBLE WIN COMPANY LTD ..... 1ST DEFENDANT

MIA YUNFEI ..... 2ND DEFENDANT

LIU YUPING ..... 3RD DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiff's Motion dated 27th November, 2023, brought pursuant to the provisions of Articles 23(1) and 40(1) of *the Constitution* of Kenya, 2010, Section 3A of the *Civil Procedure Act* and Orders 2(15), 13(2) and 51(1) of the Civil Procedure Rules seeking the following reliefs;

    i. Spent

    ii. The Honourable Court be pleased to strike out the Defendants statement of Defence dated 2nd November, 2023 for being frivolous and a sham.

    iii. The Honourable Court be pleased to enter Judgement on Admission and the suit do proceed for formal proof.

    iv. Costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Dr Christopher O. Kenyariri, the Plaintiff, who deposed that the Defence of 2nd November, 2023

was filed after inordinate delay and contains admissions and mere details that don't warrant the suit proceeding to trial.

3. The Plaintiff deponed that whereas the Defendant has averred that the Mother Title is un-encumbered, and has not been used as collateral, the Title indicates that it is encumbered by a loan from Equity Bank of Kshs 220,000,000 and that the same is a continuing security for the developments being undertaken at Yaya Centre Area and Kasarani.

4. It is the Plaintiff's deposition that the allegation that the Mother Title has not been converted is equally untrue; that the conversion of the title was undertaken on 12th May, 2023; that further, the assertions that the 2nd and 3rd Defendants are not the only shareholders in Sandalwood Garden Management Public Limited Company is a falsehood and that the Defendants have refused to present to the Lands Department, deed plans together with the Mother Title to enable issuance of sectional titles.

5. It was deponed by the Plaintiff that there is no suit pending between the parties, the suit between the parties in the lower Court having been settled by consent vide a Consent Order dated the 1st December, 2021; that as to the assertions that the matter should have gone for arbitration, the Defendants are well aware that Clause 21.2 of the Agreement allows the parties to invoke the jurisdiction of the Court and that it is only fair that the Defendant's Defence is struck out and the matter proceed for formal proof.

6. The 2nd and 3rd Defendants filed Replying Affidavits on 26th January, 2024. The Defendants deponed that the application is unmerited; that the Plaintiff's allegations with respect to utilization of the property as collateral and continual security, refusal to surrender the title, desertion of the suit property and refusal to surrender the deed plans for issuance of sectional titles are misleading.

7. It is Defendants' deposition that whereas the suit property was charged to Equity Bank for a loan of Kshs 220,000,000/=in 2019, the loan has been repaid and the Bank executed a discharge for charge under the previous title no L.R 1/95; that upon payment of the loan, Equity Bank has since returned the original title to them and that the title was surrendered to their Advocates who undertook conversion of the same.

8. It is the Defendants' case that they currently have a new Title Number being Nairobi/Block 19/242; that their Advocates have since applied for change of user of the property on the Ardhi Sasa Platform, which process has been pending conclusion for the last seven months and that the delays in completing the process is due to reasons beyond their Advocates' control.

9. According to the Defendants, upon consultation with the Land's Ministry, they were advised to undertake conversion of the title, apply for change of user and submit the title for the sectional titles; that they handed over the property to the Management Company to assist in the property's day to day activities and that they have at no time deployed Mungiki, an outlawed group in Kenya, to take control of the suit property.

10. It was deposed that the present application is premature as the Plaintiff has not replied to their Defence; that striking out the pleadings would prejudice the Defendants and interfere with their right to a fair trial and that Article 50 of the 2010 Kenyan Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

11. The parties did not file submissions. [As at 1st February, 2024]

Analysis and Determination

12. Having considered the Motion and the Replying Affidavits, the issues that arise for determination are;

i. Whether the Defendants Defence should be struck out for being frivolous and a sham?

ii. Whether judgment should be entered on admission as sought.

13. The Court's jurisdiction to strike out pleadings is found under Order 2 Rule 15 of the Civil Procedure Rules which provides thus;

> " Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> (a) It discloses no reasonable cause of action or defence in law; or
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> (b) It is scandalous, frivolous or vexatious; or
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> (c) It may prejudice, embarrass or delay the fair trial of the action; or
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> (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."

14. It is trite that striking out pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR restated this principle thus;

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
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> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

15. In instances where the pleading sought to be struck out is a Defence as herein, the Courts have held that where the Defendant raises prima facie triable issues, he/she should be allowed to defend his or her case.

16. As to what constitutes a triable issue, Blacks' Law Dictionary, 9th Edition at page 1644, provides as follows:

> "triable issue" is deemed to mean "subject or liable to judicial examination and trial' whilst "the trial" has been given to mean "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."

17. The Court of Appeal in Olympic Escort International Co. Ltd. & 2 Others vs Parminder Singh Sandhu & Another [2009] eKLR, stated as follows;

> "It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."

18. Similar sentiments were shared by the Court in Saudi Arabian Airlines Corporation vs Sean Express Services Limited (2014)eKLR, which persuasively stated as follows:

> "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 the judicial proceedings before it, which explains the reasoning by Madan J. in the famous DT DOBIE case that the court should aim at sustaining rather than terminating suit. That position applied mutatis mutandis to a statement of defence and counter- claim.
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> Secondly, and directly related to the foregoing, constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such a 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 a defence should be used sparingly and only in 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.
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> Thirdly, in case of a defence, the court must be convinced upon looking at the defence that it is a sham; it raises no bonafide 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 Vs. Ea Cargo Handling Services Limited (1974) EA 75 AT P 76 (DUFFUS P) (That; "..... a triable issues .... is an issue which raises a prima facie defence and which should go for trial for adjudication. Therefore, on applying the test, a defence which is a sham should be struck out straight away."

19. The Plaintiff asserts that the Defence by the Defendants is frivolous and a sham and that it does not warrant continuation of the suit. On their part, the Defendants maintain that the Defence raises triable issues and *the Constitution* dictates that their right to a fair hearing should not be impeded.

20. The Court has considered the pleadings. Vide the amended Plaint dated 11th July, 2023, the Plaintiff seeks, inter-alia, specific performance of the contract dated the 3rd February, 2020 with respect to the sale of apartments, A102 and A105 and issuance of Titles for the property; a permanent injunctive orders restraining the Defendants from charging for any expense until service charge is fixed and an

order freezing account 0766673068 at Equity Bank in the name of Sandalwood Garden Management Company.

21. In the alternative, the Plaintiff seeks a refund of Kshs 16,000,000/= together with 10% interest on the purchase price of each property and a further refund of Kshs 70,000/= paid on account of water and electricity.

22. The Plaintiff contends that he purchased the aforesaid apartments but the Defendants have failed to complete the transaction to enable him get sub-leases for the property; that the Defendants incorporated Sandalwood Garden Management Public Limited Company and failed to allot shares and issue the Plaintiff with share certificates with respect to the same and that the Defendants are solely managing the share company and have refused to account for monies they illegally collect from the apartments through an account opened at Equity Bank.

23. The Plaintiff further asserts that water from the borehole and from Nairobi Water Sewerage forms part of the common property and should be taken care of by the service charge as indicated in the third schedule of the Agreements.

24. The Defendants filed their Defence in which they affirmed the contents of the Agreement between the parties; that the disputed properties are in the possession of the Plaintiff; that a public limited company was indeed incorporated to manage the properties that the 2nd and 3rd Defendants are not its sole shareholders and that they have clarified to the Plaintiffs the reasons for the delay in providing the completion documents, which reasons are beyond their control.

25. According to the Defendants, whereas they have indeed opened an account with Equity Bank, they have not illegally collected any monies from apartment owners to maintain amenities; that the share certificate is part of the completion documents whose delivery has been delayed by factors beyond their control and that this Court has no jurisdiction to entertain the matter on account of pendency of similar proceedings and the arbitration clause in the contracts.

26. A plain reading of the Defence shows that the Defendants do not admit to have breached the contract as alleged by the Plaintiff. While they concede to delays, they assert that these are caused by factors beyond their control. The Court considers this to be a triable issue.

27. The pleadings also reveal factual disputes including the current position of the title especially whether the title is encumbered or not; the shareholding of the management company; the legitimacy of monies collected by the Defendants held in the Equity Bank Account and the jurisdiction of the Court in view of the arbitration clauses in the sale agreements.

28. A Defendant need to demonstrate only a single triable issue to be entitled as a matter of law to defend an action. Indeed, a few issues arise here, which I have considered above. The Court is thus not satisfied that this is a plain and obvious case warranting the striking out of the Defence.

29. It was argued by the Plaintiff that the Defence amounts to admission. Statutory law relating to judgment on admission is to be found under Order 13 of the Civil Procedure Rules, 2010. More specifically, Order 13 Rules 1 and 2 which provides as follows:

> " 13 (1):Any party to a suit may give notice by his pleadings, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.
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> (2) Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgement or orders as upon such admissions he may be entitled to, without waiting for

determination of any other question between the parties; and the court may upon such application make such order or give such judgement as the court may think just."

30. It cannot be gainsaid that an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. The power to enter judgement on admission is not mandatory or peremptory, it is discretionary.

31. In this respect, the Court is bound to examine the facts as pleaded keeping in mind that a Judgement on Admission is a judgement without trial, which permanently denies a remedy to the sued party by way of an appeal on merits.

32. This position was reiterated by the Court of Appeal in Maseno University vs Bubble Engineering Company Limited KSM CA Civil Appeal No. 29 of 2007 [2019] eKLR, which cited with approval its earlier decision in Agricultural Finance Corporation v Kenya National Assurance Company Ltd NRB CA Civil Appeal No. 271 of 1996 (UR) that;

> " Final judgment ought not be passed on admissions unless they are clear, unambiguous and unconditional. A judgment on admission is not a matter of right rather it is a matter of discretion of the court and where the defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion.Likewise, in Choitram – vs- Nazari, (1982-88) 1 KAR 437, Madan, J.A stated,
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> For the purposes of Order XIII r. 6 admissions have to be plain and obvious, as plain as a spike staff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must leave no room for doubt that parties passed out the stage of negotiations on to a definite contract."

33. This court has already found that the Defence raises triable issues and is not ripe for dismissal. Nonetheless, this court has noted that while some concessions have been made by the Defendants, the concessions are conditional and are by no means "as plain as a spike staff." Ultimately, they would not warrant judgement on Admission as sought.

34. For those reasons, the court finds the application dated 27th November, 2023, to be unmerited. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 14TH DAY OF MARCH, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Dr. Kanyariri for Plaintiff

Ms Gagai for Defendants

Court Assistant - Tracy