



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2250 OF 2015

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 24TH JULY, 2017)

VIVIAN MUIACLAIMANT

VERSUS

MZOORI LIMITED RESPONDENT

RULING

1. The Application before the Court is one dated 1st April 2016 filed by the Claimant on the 8th of April 2016 seeking for orders:

- a. That the Honourable Court do certify this matter urgent and that it be heard ex parte in the first instance.*
- b. That the Defendant's defense statement be struck out of the Court file.*
- c. That the request for judgment be allowed and decree be issued accordingly and such decree be executed in default of payment.*

2. The Application is brought under Order 10 Rule 4 of the Civil Procedure Act, and is based upon the annexed affidavit of Vivian Muia and upon such other grounds to be adduced at the hearing and:-

- 1. That the Defendant failed to enter appearance in good time although he was served with summons and other Court documents.*
- 2. That the Defendant has filed his defense way out of time.*
- 3. The Defendant has not provided this Court with sufficient reasons to justify why his defense which was filed out of time should be included in the proceedings.*
- 4. That the Defendant's defense statement is nothing short of brazen attempt at delaying the proceedings of this Court.*
- 5. That the Defendant is attempting to prevent the plaintiff from obtaining judgment in default of appearance.*

3. The Respondent has filed grounds of opposition to the application dated 23rd September 2016 where they state that:-

1. That the Reply to the Memorandum of Claim and Counterclaim are properly on record and raise triable issues which ought to be ventilated by way of evidential value.

2. That the Application does not meet the requisite conditions for striking out the Memorandum of Claim and Counterclaim from the court file and is filled with contravention of the Rules guiding this honorable Court.

3. That the Application is an act of desperation alluding to technicalities rather than the merits of the suit.

4. That the Application defeat the overriding objectives of the Civil Procedure Rules and violate Article 159 of the Constitution that requires this court to proceed without undue regard to procedural technicalities.

5. That the Application seeks prayers that are misconceived and that don't avail under the provision cited.

6. That the Application lacks merit and the same should be dismissed.

4. The matter was dispensed with by way of written submissions.

5. The Claimant has filed written submissions dated 28th November 2016 where they state that they filed their Memorandum of Claim on the 16th of December 2015 and promptly took out summons to enter appearance, serving them on the Respondent in January of 2016. The service is not denied by the Respondent. They submit that the Advocate Nyaundi Tuiyott & Company Advocates filed notice of appointment of advocates to act on behalf of the Respondent on the 3rd of February 2016 but filed their response on the 17th of March 2016.

6. They submit that sufficient notice was accorded to the Respondent as the claim was filed after failed negotiation. The excuse that the Respondent was looking for crucial documents cannot hold and the said documents are yet to be identified nor have they been filed.

7. They submit that the Respondent has failed to ask for leave to file out of time and the Court should not allow them to ride shotgun against the properly laid out procedure of the Court.

8. They submit that the Claimant was left jobless by the illegal actions of the Respondent and she continues to suffer and struggle as the Respondent wastes the Court's time. She has followed the proper procedure and should be allowed to enjoy a regularly obtained judgment without delay.

9. They rely of the case of **Roofs & Building Maintenance Ltd vs. David Kinuthia Kimani & another [2016] eKLR**. They pray that the Court strikes out the Respondent's Reply to the Memorandum of Claim and Counter Claim.

10. The Respondent has filed submissions dated 23rd December 2016 where they submit that Order 2 Rule 15 of the Civil Procedure Rules states as follows:

“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 defense in law;

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 prejudice, embarrass or delay the fair trial of the action; or

e. It is otherwise an abuse of the process of the Court,

11. They ask the Court to order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.

12. They submit that in the case of **County Council of Nandi vs. Ezekiel Kibet Rutto & 6 Others [2013] eKLR**, Justice Munyao Sila illustrated the meaning of the above said terms as follows:-

“A scandalous pleading in my view is a pleading that attempts to put the other party into bad light. It attempts to disparage the other party to the proceedings. Such pleadings border on defamation. However, such disparaging words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course the words cannot be scandalous. They must be disparaging pleadings which are completely irrelevant to the proceedings in issue.

A frivolous pleading in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.

A vexatious pleading in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party.

A pleading that is an abuse of the process of Court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situation where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons”.

13. They continue to state that the above authority elaborates the meanings of the said terms as follows:

“A scandalous matter is defined as a matter that is both grossly, disgraceful (or defamatory) and irrelevant to the action or defense. [6]

The word frivolous is described as something lacking a legal basis or legal merit; not serious; not reasonably purposeful.[7]

As to the word vex, the same means to harass, disquiet and annoy. Vexatious is taken to refer to conduct, which is without reasonable or probable cause or excuse; harassing; annoying.”[8]

14. They submit further that, in the case of **Carton Manufacturers Limited vs. Prudential Printers Ltd [2013] eKLR** Judge Havelock recognized that when striking out pleadings, the Court should be guided by principles laid down in **DT Dobie & Company vs. Muchina [1982] KLR1** which principles are clear that if the pleading does not disclose any reasonable cause of action or defense or that the pleading is scandalous, frivolous or vexatious, filed to embarrass, prejudice or delay the fair trial of the action or that it was otherwise an abuse of the process of the Court, then it ought to be dismissed.

15. They therefore submit that the Applicant had not demonstrated to this Court that the reply to the Memorandum of Claim and Counterclaim discloses no reasonable cause of action or defense in law, how it is scandalous, frivolous or vexatious or that it may prejudice or embarrass or delay the fair trial as set out under Order 2 Rule 15 of the Civil Procedure Rules.

16. They submit that the Applicant has failed to meet the required threshold for striking out pleadings and to this end, they rely on the matter of **Carton Manufacturers Limited vs. Prudential Printers Limited [2013] eKLR** which discussed about set down principles guiding the Court as laid out in **DT Dobie & Co Ltd vs. Muchina [1982] 1KLR**.

17. Further in the case of **Commodity House Ltd vs. Simba Merchandising Co (K) Ltd & Another (2013)** where Judge Havelock recognized that the principles applied when striking out a pleading were laid down in **DT Dobie & Co LTD vs. Muchina [1982] KLR** these are:

a. That the remedy should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question were unsustainable.

b. That it is the power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

18. They submit that the case should be heard on merit. They state that this position was taken by the Court of Appeal in the case of **Moi University vs. Vishva Builders Limited – Civil Appeal No 296 of 2004** (unreported) which authority was cited in the case of **The Kenya Power & Lightning Company Ltd vs. Alliance Media Kenya Limited [2014] eKLR** where the Court of Appeal stated the following:

“The law is not settled that if the defense raises even on bonfide triable issue, then the Defendant must be given leave to defend.”

19. They submit that the Respondent would be extremely prejudiced if ejected from the seat of justice at this stage by striking out its Reply to Memorandum of Claim and Counterclaim given the serious issues it raises. Filing out of time is due to the fact that the Respondent was winding up business and needed time to trace crucial documents so as to file a tenable defense. They were also not aware that an interlocutory judgment had been entered against them.

20. They submit that the Reply can be deemed to have been filed within the stipulated time and asks the indulgence of the Court to enlarge time.

21. They ask the Court to set aside interlocutory judgment and do them justice without regard to technicalities as enshrined under Article 50 and 159 (2) (a) and (d) of the Constitution.

22. Order 2 Rule 16(1) of the Civil Procedure Act states as follows:

“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.

23. In attempting to make a finding that pleadings are frivolous or scandalous and prejudices or delays fair trial and an abuse of the Court, the law on striking out pleadings has been well stated in **DT Dobie & Company vs. Muschina [1982] KLR 1** where the Learned JJA Madan Miller & Potter stated that:

“No suit to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. “

24. The Claimant has in this case filed case alleging that her salary between June and September 2015 were withheld for no apparent reason. The total claimed is Kshs.710,000/= plus 220,000 as notice fees.

25. The Respondent filed their defence and Counter Claim on 17/3/2016 where they deny she is entitled to salary for August and September as she didn't report to work in September 2015. This Counter Claim was indeed filed after the limit set out in the ELRC Rules 2010 (now repealed) of 14 days.

26. That notwithstanding in consideration of the provisions of Article 159(2) (d) of the Constitution that "***justice should be administered without undue regard to procedural technicalities***", it is the duty of this Court to administer substantive justice. Though the defence was filed out of time it would be beneficial for both parties if this Court were to consider it in order to determine this matter substantively. I will therefore allow the defence filed to be properly filed and on record and the Claimant can now file any response within timelines allowed under the rules.

27. In view of the fact that the same defence raises issues which are triable, I will not strike it out but would allow the parties to ventilate the issues raised during a formal hearing.

28. Costs to be in the cause.

Read in open Court this **24th day of July, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mogire holding brief for Achoki for the Respondent – Present

No appearance for the Applicant