



**Corrugated Sheets Limited v Varsani Merchandise Limited (Civil Case
13 of 2019) [2024] KEHC 2927 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 13 OF 2019
JRA WANANDA, J
MARCH 22, 2024**

BETWEEN

CORRUGATED SHEETS LIMITED PLAINTIFF

AND

VARSANI MERCHANDISE LIMITED DEFENDANT

RULING

1. The Application before this Court is the Notice of Motion dated 7/07/2023 filed by the Plaintiff through Messrs Samba & Co. Advocates. The same seeks the following orders:
 - i. [spent]
 - ii. That this Honourable Court be pleased to strike out the Defendant's/Respondent's amended Statement of Defence amended and dated 7th October 2022 as well as the Notice of Motion dated 16th November 2022.
 - iii. That upon granting prayer (a) and (b) above, this Honourable Court be pleased to enter judgment in favour of the Plaintiff in terms of its amended Plaint dated 27th March 2019 and amended on 21st March 2022.
 - iv. That the costs of this suit, the counter-claim and indeed costs of this Application be borne by the Respondent.
 - v. Any other or further relief this Honourable Court may deem just to grant.
2. The Application is expressed to be brought under Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 11 Rules 3(2), (o), (i) and (ii), Order 2 Rule 15 1(b), (c) and (d), Order 7 Rule 17(2) and Order 51 Rule 1(b), (c) and (d) of the *Civil Procedure Rules*. The grounds of the Application are as set out on the face thereof and it is supported by the two separate Affidavits sworn by Harish Patel and Jeremiah Onger Samba, respectively.



3. In the 1st Affidavit, the said Harish Patel deponed that he is one of the directors of the Plaintiff, that the Defendant was a customer of the Plaintiff and as of the date of filing suit was indebted to the Plaintiff to the tune of Kshs 21,479,496.47 on account of goods sold and delivered to the Defendant, that this suit was filed on 3/04/2019 for recovery of the said sum, that the Defendant was duly served with Summons to enter appearance, that after the service, Mr. Devshi Karsan Varshan, in his capacity as a director of the Defendant, made an offer to transfer maisonettes he had developed, namely, Eldoret Municipality Block 8/563 (A3) Kenit estate – a 5 bedroom maisonette to the Plaintiff in settlement of his company’s outstanding account with the Plaintiff but on condition that the Defendant paid him Kshs 5,000,000/- such that it amounted to an offer to sell the maisonette at Kshs 27,000,000/-, that the directors of the Plaintiff, through their Advocate, then requisitioned a land valuer who carried out a valuation and issued a Report dated 3/06/2019 putting the value of the property at only Kshs 22,000,000/-, that following the valuation, the Plaintiff declined Mr. Varsan’s offer whereby Mr. Vasan undertook to sell the property himself and liquidate his company’s indebtedness to the Plaintiff.
4. According to Harish Patel, it is in the above regard that Mr. Varsan transferred a sum of Kshs 3,000,000/- to the Plaintiff on 19/12/2019, a sum of Kshs 600,000/- on 10/06/2020 and a sum of Kshs 500,000/- on 4/08/2020 whereas he was expected to pay off the whole balance of the debt, that the Defendant is truly indebted to the Plaintiff and the sum of Kshs 4,100,000/- was part-payment of the debt of Kshs 21,479,496.47 which was essentially an admission of debt, that Mr. Varsan in the supporting Affidavit dated 16/11/2022 admitted that Kshs 4,100,000/- was paid by his company to the Plaintiff on an account of a debt owed to the Plaintiff, that the Defendant, at the stage of seeking to set aside the ex parte judgment admitted having paid Kshs 4,100,000/- as part-payment for the goods sold and delivered to it, that the amended defence and counterclaim and the subsequent Application to amend/withdraw the baseless counterclaim are calculated to obstruct and/or delay justice whereas there is no reasonable defence to the Plaintiff’s claim, that the sum of Kshs 4,100,000/- was paid while this suit was already in Court, that entering judgment for the unpaid Kshs 17,379,496.47 in favour of the Plaintiff will not prejudice the Respondent.
5. In his Affidavit, Jeremiah Ongeru Samba, the Plaintiff’s Counsel on record in this suit deponed that the suit was filed on 3/04/2019, that on 5/02/2019, default judgment was entered in the Plaintiff’s favour the Defendant having failed to enter appearance, that by the Notice of Motion dated 9/08/2021, the Defendant sought to set aside the default judgment, that Hon. Justice E.K. Ogola in the Ruling delivered on 8/03/2022 set aside the judgment and directed that the suit be set down for hearing on merit on priority basis, that the matter came up in October 2022 to confirm compliance with Order 11 of the Civil Procedure Rules but even then the Defendant had not filed any witness statements or documents, and that the Court granted the Defendant 30 days to comply and in default the Plaintiff be at liberty to file an application to strike out the Defendant’s pleadings.
6. Counsel deponed further that the Defendant had at the stage of seeking to set aside the ex parte judgment admitted having been paid Kshs 4,100,000/- as part-payment for the goods sold and delivered to it, that in a process of shifting goalposts, that the Defendant on 7/10/2022 without the Court’s leave filed an amended defence and counterclaim seeking a refund of Kshs 4,100,000/- earlier paid to the Plaintiff alleging that it was a friendly loan to the Plaintiff, that by the Notice of Motion dated 16/11/2022, the Defendant through the firm of Bornes & Partners Advocates LLP in a further clear circus to delay and to obstruct justice sought to further amend the amended defence and to withdraw the counterclaim this time round accusing the firm of Akenga Kimtai (previously on record) for mounting a counterclaim without instructions, that Mr. Varsan in the supporting Affidavit dated 16/11/2022 admitted that Kshs 4,100,000/- was paid by his company to the Plaintiff on account of a debt owed to the Plaintiff, that the Defendant is truly indebted to the Plaintiff, and that the



amended defence and counterclaim and the subsequent application to amend/withdraw the baseless counterclaim are calculated to obstruct and/or delay justice whereas there is no reasonable defence to the Plaintiff's claim.

Replying Affidavit

7. In opposing the Application, the Defendant, through its current Advocates, Messrs J.L. Cheruiyot Advocates filed the Replying Affidavit filed on 31/07/2023 and sworn by the said Devshi Karsan Varsani who described himself as a director of the Defendant. He deponed that the Plaintiff's Application and Affidavits are full of falsehoods, misrepresentation and skewed interpretation of facts, that the suit papers were never served upon the Defendant and the Court (Hon. Justice Ogola) in its Ruling of 8/03/2022 found as much and granted the Defendant an opportunity to file its defence, that subsequent to the Ruling, his then Advocates, Akenga Kimutai & Associates, filed a statement of defence dated 15/03/2022, that in the defence, the Defendant averred that it had paid the Plaintiff the sum of Kshs 4,100,000/- which was the only monies owed to the Plaintiff, that the Defendant's Advocates then on record invited him to their office in October 2022 and handed over documents in the form of witness statement and which they advised him to sign in support of the defence and in readiness for the hearing of the matter, that unbeknown to him, the Advocates had prepared and filed an amended statement of defence and counterclaim without his instructions, that thereafter, he instructed another firm of Advocates, Bornes & Partners Advocates LLP to file an application seeking further amendment of the amended defence and counterclaim to remove the counterclaim from the pleadings as the counterclaim was introduced without instructions, that said Advocates then filed the application dated 16/11/2022, and he is aware that the Application is due for directions.
8. Mr. Varsani added that his current Advocates on record (J.L. Cheruiyot Advocates) have since perused the Court file and discovered that it is indeed true that the Amended defence and Counterclaim amended on 7/10/2022 was filed without leave of the Court and is therefore improperly before the Court, that further, he prays that the Court exercises its discretion and find that the defence dated 15/03/2022 is properly on record and is therefore the Defendant's substantive pleading in the matter and decline the invitation to strike out the Defendant's pleadings, that further, he requests the Court to exercise its discretion and allows the Defendant an opportunity to file its witness statements and documents out of time and to set down the matter for hearing. As regards the Plaintiff's allegations that he, on behalf of the Defendant, had accepted that the Defendant was indebted to the Plaintiff and paid Kshs 4,100,000/- as part-payment of the debt of Kshs 21,479,496.47, he deponed the averment is without any basis as both the statement of defence and his Affidavit sworn on 16/11/2022 clearly indicate that the sum of Kshs 4,100,000/- was paid in clearance of the debt owed by the Defendant to the Plaintiff.
9. He added that the allegation that he offered to transfer his property to the Plaintiff is untrue, that the Plaintiff has not indicated the manner and form in which the alleged offer was made, that the alleged debt lies with the Defendant, a limited liability company with its own capacity to contract and therefore his personal property cannot have been offered in settlement of the debt, that he recalls having discussions with the directors of the Plaintiff on possible settlement of the debt owed to the Plaintiff but that the same was subject to his perusal of the Defendant's records on the transaction, and that after reconciliation of accounts, he paid Kshs 4,100,000/- in full and final settlement of the debt, that the Defendant is not indebted to the Plaintiff, that the prayers sought in the Plaintiff's Application have the effect of determining the matter in a summary manner and he requests the Court not to grant the same but grant the Defendant an opportunity to be heard viva voce as some of the averments and documents filed by the Plaintiff require scrutiny and cross-examination during the hearing of the matter and allowing the Application would infringe on the Defendant's right to fair trial, that the



Defendant is ready and committed to file its statements and documents and attend Court for hearing of the matter and shall abide by any other reasonable terms as shall be set by the Court.

Hearing of the Application

10. The Application was canvassed by way of written Submissions. Pursuant to directions given, the Plaintiff's Counsel filed his Submissions on 17/08/2023 while the Defendant filed on 30/08/2023.

Plaintiff's Submissions

11. Counsel for the Plaintiff cited the Ruling of Hon. Justice Ogola whereof the Judge set aside the default Judgment. Counsel quoted the portions of the Ruling whereof the Judge noted that by virtue of the draft defence presented, "the main contention is the amount of indebtedness", that the Defendant owes the Plaintiff and that "there is no denying that the" Defendant owes the Plaintiff and that this why the Defendant "made some partial payments on diverse dates" to the Plaintiff, and that whereas the Plaintiff "says that it is owed Kshs 21,479,496.47 as of 2019, the Defendant submitted that the amount is exaggerated but offered no explanation as to what he estimates to be the amount owed to the" Plaintiff.
12. Counsel submitted further that the Defendant eventually filed a statement of defence on 15/03/2022 in which it averred that "... the defendant acknowledges indebtedness to the Plaintiff but further avers that it is not to the extent quoted by the Plaintiff as the defendant has always made good the payments as at when the same fell due" and that "the defendant has partially made good the debt due to the Plaintiff and at some point, they had entered into a mutual understanding on how to set off the debt".
13. Counsel added that on 7/10/2022, the Respondent filed an amended defence and counterclaim without leave of the Court, that the same was a complete about-turn to the original statement of defence, that the Respondent duly paid Court fees of Kshs 71,000/-, that on 16/11/2023, the Defendant filed the Notice of Motion of the same date seeking to further "amend" the amended defence and counterclaim to withdraw the counterclaim acknowledging being indebted to the Plaintiff once more, that this time round the firm of Akenga & Associates had been replaced with Bornes & Partners Advocates, that the Defendant filed the Replying Affidavit and stated that "in the statement of defence, the defendant clearly averred that it had paid Kshs 4,100,000/- which was the only money owed to the Plaintiff". Counsel observed that in the same Affidavit, the Defendant accuses its Advocates of acting contrary to its instructions, that the Defendant has been trying all manner of tricks to delay and obstruct justice in this matter, that the Respondent cannot be heard to argue that that he did not instruct his Lawyers to file the amended defence and counterclaim, that he signed a Verifying Affidavit, a witness statement and paid Court fees in excess of Kshs 70,000/-, that he has not alleged to be illiterate, that Akenga & Associates Advocates were duly appointed by the Defendant and the Defendant must take responsibility for everything done by his Advocates since it is a legal presumption that all acts of the Advocates were sanctioned by the Defendant. He cited the case of *Rachel Njango Mwangi (suing as Personal Representative of the estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & Another* [2021] eKLR and also *Duale Mary Ann vrs Amina Mohamed Mahamood & Another* [2014].
14. Counsel submitted further that the Defendant admits and acknowledges that the amended defence and counterclaim was filed without leave of the Court and that the Counterclaim was without any legal basis since the Plaintiff did not owe any money to the Defendant, that in the circumstances, the amended defence and counterclaim should be struck out. He cited the case of *Egoli Estates Limited v Bluebill Enterprises Limited* (Environment & Land Case EE395 of 2021 [2022] KEELC 2810 (KLR)) and also the case of *Willy Mwanzia v Attorney General* [2014] eKLR.



15. Counsel then submitted that the question is; what remains on record for the Defendant’s pleadings once the amended defence and counterclaim is struck out? He submitted that the Defendant wants the Court to deem the statement of defence filed on 15/03/2022 to be deemed properly on record and that the Defendant be granted leave to file fresh witness statements, but that the Respondent has grossly abused the Court process by filing inconsistent and contradictory pleadings, changing Advocates from time to time in a bid to frustrate the Plaintiff and obstruct justice altogether, that the law is clear that once an amended statement of defence is filed it replaces the original statement of defence, that once the offending amended statement of defence and counterclaim is struck out nothing of the defendant’s pleadings will remain, that the Defendant’s conduct is an abuse of the Court process. He cited the case of *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others, Nairobi (Milimani) HCCC No. 363 of 2009* and added that in the statement of defence filed on 15/03/2022, the Defendant unequivocally admitted being indebted to the Applicant and even stated that it had agreed with the Plaintiff on how to pay off the outstanding sum, that in the circumstances, there is no issue to go trial. He cited the case of *Remington v Scoles* (1897) and also [*Peeraj General Trading & Contracting Company Limited, Kenya & Another v Mumias Sugar Company Limited*](#) (2016).
16. In conclusion, Counsel submitted that the Defendant has at the same tried to hold the Plaintiff at ransom by disregarding directions of the Court on compliance and trying all manners of delaying tactics including filing of embarrassing and offensive pleadings, that the conduct amounts to “sharp practice”, and that this Court is being obstructed from achieving the overriding objectives. He cited the case of [*re Estate of Gichuiya Kahora \(Deceased\)*](#) [2021] eKLR and also Section 1A and 1B of the [*Civil Procedure Act*](#).

Defendant’s Submissions

17. On his part, Counsel for the Defendant submitted that the instant Application is not merited as it seeks orders that are final in nature and that have the effect of determining the suit in a summary manner, that the prayer for striking out the statement of defence and counterclaim amounts to an infringement of the Defendant’s right to a fair trial, that it is conceded by the Defendant that the amended defence and counterclaim dated 7/10/2022 was filed without leave of the Court and without instructions of the Defendant, that the effect of this concession is that the defence dated 15/03/2022 becomes the Defendant’s primary pleading in the matter as the defective amended defence and counterclaim returns the Defendant to the position it was before the defective pleading was filed, that the Defendant having realized the mistake committed by its former Advocate not only filed the Application dated 16/11/2023 seeking to regularize its position but also went ahead to change its Counsel, that this is clear evidence of good faith on the part of the Defendant, and that the prayers should not be granted in the interim stage. He cited the case of [*Olive Mwibaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others*](#) [2016] eKLR.
18. In respect to its frequent change of Advocates, Counsel denied that same is an abuse of the process and submitted that the Defendant has explained the reasons that necessitated the changes and that in any case, the Defendant has a constitutional right to chose Counsel of its own choice and that the Plaintiff has not demonstrated how change of Advocates amounted to an abuse of the Court process. He cited the case of [*William Audi Odode v John Yier & Another*](#), Court of Appeal Civil Application No. Nai 360 of 2004 (KSM 33/04).
19. Regarding indebtedness, Counsel denied the allegations that the Defendant had conceded to the Plaintiff’s claim. He claimed that a perusal of the defence and Affidavits clearly indicate that the Defendant has paid the sum of Kshs 4,100,000/- which had been admitted to be owing, that the Defendant has nowhere in its pleadings acknowledged owing the Plaintiff the sum of Kshs 21,479.47



as alleged by the Plaintiff, that the question of the extent of the Defendant's alleged indebtedness is a question for trial where the documents filed by the parties shall be subject to scrutiny and cross-examination, that documents filed by the Plaintiff are not evidence, and that it is therefore not in order for Judgment to be entered against the Defendant.

20. In conclusion, Counsel submitted that considering that the statement of defence dated 15/03/2022 is properly on record and further, that the Defendant has annexed its draft Witness Statements and bundle of documents to its Affidavit sworn on 31/07/2023, it is reasonable to conclude that the parties have complied with Order 11 of the Civil Procedure Rules, 2010 and the matter is ripe for hearing.

Analysis & Determination

21. Upon considering the pleadings, responses thereto and the Submissions presented, I find the issue that arises for determination to be the following:

“Whether the Defendant/Respondent's Amended Statement of Defence dated 7/10/2022 filed without leave of the Court on 3/11/2022 should struck out and whether as a consequence, Judgment should be entered in favour of the Plaintiff”.

22. In determining the above issue, it is important to consider the sequence of relevant events leading to the instant Application. For clarity, I tabulate the same chronologically, as follows:



3/04/2019	This suit is filed
12/06/2019	Plaintiff requests for default Judgment in the absence of entry of Appearance
5/02/2020	Judgment is entered by Hon. Justice Omondi
6/08/2021	Plaintiff's Bill of costs is taxed
9/08/2021	Defendant applies for setting aside of <i>ex parte</i> Judgment
8/03/2022	Judgment is set aside by Hon. Justice Ogola and Defendant is allowed to file defence within 7 days
15/03/2022	Defendant files Statement of Defence dated 15/03/2022 through Akenga Kimutai & Associates but no Witness Statements nor List of documents
4/10/2022	Defendant is granted an extension of 30 days to file Witness Statements and List of documents
3/11/2022	Defendant files Amended Defence & Counterclaim dated 7/10/2022 but without leave of the Court
16/11/2022	Defendant appoints AK Advocates to replace Akenga Kimutai & Associates
16/11/2022	Defendant appoints Bornes & Partner Advocates LLP to replace Akenga Kimutai & Associates who apply for admission and/or regularization of the said Defence & Counterclaim filed without leave
5/06/2023	Defendant appoints J.L. Cheruiyot Advocates to replace Bornes & Partner Advocates LLP
11/07/2023	Plaintiff files the instant Application seeking striking out of the Defence & Counterclaim filed by the Defendant without leave, and for entry of Judgment

23. It is evident from the chronology above that the Plaintiff has sufficient reason and grounds to protest and complain about the Defendant's conduct and lethargy in its handling of this case. Throughout the case, the Defendant has displayed shocking lack of seriousness and complete disregard for actions and



timelines set by the Court. Its successive legal teams have also shown unacceptable level of ineptitude. The constant change of Advocates by the Defendant has not only worsened the situation but has also delayed the progress of this case.

24. The Plaintiff has now moved this Court to strike out the Amended Defence & Counterclaim on the ground that the same is admittedly, filed without leave of the Court. The Plaintiff also seeks striking out of the Defence and entry of Judgment because of the Defendant's shabby and abhorrent conduct in this suit and also because the Defence is allegedly a sham raising no triable issues.
25. Striking out of pleadings has been discussed extensively in various decisions over time. For instance, the Court of Appeal in the case of [Blue Shield Insurance company Limited v Joseph Mboya Ogutu](#) (2009) eKLR stated as follows,

“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 v 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 of 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:-

“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 v 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.”

26. In this case, upon the *ex parte* Judgment being set aside on 8/3/2022 and the Defendant being allowed to defend the suit, the Defendant, on 15/03/2022, filed the Statement of Defence of the same date. The Defendant however, and without seeking leave of the Court, subsequently on 3/11/2022, purported to file the Amended Defence & Counterclaim dated 7/10/2022. In its response herein, the Defendant readily concedes that indeed the Amended Defence & Counterclaim was filed without leave and proceeds to give the explanation that the same was filed by its former Advocates without the Defendant's knowledge, consent or instructions. The Defendant therefore admits that the same is improperly before the Court and in fact goes ahead to trash its contents insofar as it introduces



- a Counterclaim. The Defendant expressly disowns the Counterclaim. The Submissions filed by the Defendant's current Advocates advances the same view and position of renouncing the Amended Defence & Counterclaim.
27. In the circumstances, the Defendant has made it easier for this Court. My feeling is therefore that there is no contention that the Amended Defence & Counterclaim should be struck out. Accordingly, the same is hereby struck out.
 28. What is in contention however is what should happen after the impugned Amended Defence & Counterclaim is struck out.
 29. According to the Plaintiff, once the Amended Defence & Counterclaim is struck out, it is deemed "thrown out of the window" together and along with the initial Defence that had been filed earlier. This however cannot be the correct position. I agree with the Defendant's contrary view that even if the Amended Defence & Counterclaim is struck out, the Defendant reverts to the initial Defence that was filed earlier. I agree that striking out only affects the Amended Defence & Counterclaim and cannot extend to the initial Defence filed earlier since the latter has not been challenged in any way. It therefore properly remains on record.
 30. As aforesaid, in seeking the striking out of both the Amended Defence & Counterclaim and the initial Statement of Defence, the Defendant has also relied on a second alternative ground. This alternative ground arises from the Ruling of Hon. Justice Ogola delivered on 8/03/2022. In the said Ruling, the Judge set aside the ex parte Judgment on the ground of insufficient evidence of service of Summons to enter appearance and granted the Defendant 7 days to file its Statement of Defence. Leave to file a defence presumably also included leave to file Witness Statements and a bundle of the documents to be produced at the trial.
 31. The Defendant however only filed a Statement of Defence within the given timeline and when the matter came up in Court on 4/10/2022, sought time to file Witness Statements and List/bundle of the documents. From the proceedings of that date, it is evident that the Court was not impressed with the Defendant's failure to comply but still reluctantly granted the Defendant a period of 30 days to do so. The Judge however stated that in default, the Plaintiff would be at liberty to apply for striking out of the Defendant's pleadings.
 32. Once again, and despite the admonishment by the Court as set out above, the Defendant, yet again, still did not file any Witness Statements or List/bundle of the documents. What the Defendant filed, instead, was the said impugned Amended Defence & Counterclaim filed without leave. The Plaintiff has now therefore taken the cue from Judge Ogola's said Ruling and seeks to strike out the Defence. As aforesaid, the Plaintiff also seeks the striking out of the Defence on the ground that, generally, the Defendant has throughout this suit abused the Court process by consistently failing to comply with Court directions and timelines and thus delaying the progress of this suit. In view of the Defendant's conduct as set out above, the Plaintiff is definitely within its rights to apply for the striking out. However, the question is; which pleadings are really being sought to be struck out?
 33. Regarding the initial Statement of Defence, leave to file it having been given on 8/03/2022 and the same having been filed on 15/03/2022 within the 7 days' timeline, it follows that it was filed within time. Regarding the Amended Statement of Defence & Counterclaim, the same has already been struck out hereinabove. Regarding the Witness Statements and List/bundle of documents, the same have not yet been filed to date. In the circumstances, the only order that the Plaintiff can ask this Court to give therefore is perhaps to bar or "lock out" the Defendant from filing any Witness Statements and List/bundle of documents. Should the Court accede to this invitation?



34. Article 159(2) of the Constitution expressly obligates the Courts to ensure that “justice shall be administered without undue regard to procedural technicalities”. Although failure to comply with Court directions and also conducting oneself in a manner that may attract accusations of abuse of the Court process may appear to be substantive omissions, and not mere procedural lapses, I do not believe that it would in the interest of justice to lock out the Defendant from calling witnesses and producing documents during the trial. The effect of barring the Defendant from filing Witness Statements and bundle of documents will amount to just that – no calling witnesses and no producing documents as exhibits. I have considered the Defendant’s constitutional right to be afforded a hearing and the substantial amount of money in issue in this matter. Although the Defendant cannot escape personal blame for some of the omissions and “blunders” committed in this matter, and although I cannot also rule out some level of complicity by the Defendant, it is clear that a larger portion thereof was as a result of the lethargy of the Defendant’s successive legal teams. Considering the nature of this suit and its facts, I would therefore hesitate to punish the Defendant for the acts of its Advocates.
35. On the allegation that the Defence filed is a sham, the Plaintiff claims that the Defendant is truly indebted to the Plaintiff and that the sum of Kshs 4,100,000/- was part-payment of the debt of Kshs 21,479,496.47 which was essentially an admission of debt, that the Defendant’s director, Mr. Varsan in his Affidavit dated 16/11/2022 admitted that the Kshs 4,100,000/- was paid by his company to the Plaintiff on account of a debt owed to the Plaintiff, and that the Defendant, at the stage of seeking to set aside the ex parte judgment, admitted having paid the Kshs 4,100,000/- as part-payment for the goods sold and delivered to it.
36. I however note that subsequent to the Ruling of Ogola J delivered on 8/03/2022, the Defendant’s then Advocates, Akenga Kimutai & Associates, filed the statement of defence dated 15/03/2022 in which the Defendant averred that it had paid the Plaintiff the sum of Kshs 4,100,000/- which, according to the Defendant was the only monies owed to the Plaintiff. In its Affidavits, the Defendant has also stated that after reconciliation of accounts, he paid Kshs 4,100,000/- in full and final settlement of the debt. I have not found anywhere in the defence or in the Affidavits where the Defendant has expressly acknowledged owing the Plaintiff the sum of Kshs 21,479,496.47 claimed by the Plaintiff. I therefore agree with the Defendant that the question of the extent of the Defendant’s indebtedness is one for the trial where the documents filed by the parties shall be subject to scrutiny and cross-examination.
37. Further, in his Ruling of 8/03/2022, Ogola J had already found that the defence raises triable issues when he made the following remarks:
- “21. The main contention is the amount of indebtedness that the applicant/defendant owes the plaintiff/respondent. There is no denying that the applicant/defendant indeed owes the respondent/defendant. This is the reason I believe the applicant made partial payments on diverse dates to the respondent/plaintiff. In fact, the defendant admits this in its draft statement of defence. However, what is in dispute is the amount of money that the applicant owes the respondent. Whereas the respondent/plaintiff says it is Kshs 21,479,496.47/= as of 2019, the defendant submitted that the amount is exaggerated but offered no explanation as to what he estimates to be the amount owed to the plaintiff/respondent.
22. In addition, the defendant denies the existence of a legally binding contract to supply the respondent/plaintiff assorted hardware materials. It was his position that the same were supplied through a running account. In the same vein, the defendant/applicant denies ever being an agreement between



them to the effect that payment was to be done strictly within the timelines agreed upon. Finally, the applicant denies any responsibility as regards any loss suffered by the respondent.

“23. My view, after assessing the draft defence is that it raises triable issues that would enable me exercise my discretion to set aside the judgment herein. Taken altogether, the defence raised against the plaintiff’s claim, raises triable issues of fact and law that are fit for trial by this court. The significance of the defendant’s written statement of defence is the fact that it avers and contends to the existence of the express terms and conditions and breach thereof. The defendant further in the pleadings deny violating any terms of the contract and specifically express terms and conditions as regards payment within the set timelines. Furthermore, the defendant/applicant denies being indebted to the plaintiff/respondent in the manner the plaintiff/respondent alleges especially the amount owed.

38. In the circumstances, I cannot find any evidence that the Defendant has expressly conceded to the Plaintiff’s claim. It will therefore be improper to enter Judgment against the Defendant on the allegation that the Defence raises no triable issues or is an admission.

39. I am further guided by the case of *The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999), where the Court of Appeal stated as follows:

“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 ... Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

40. I also take cognisance of the “oxygen” principle as espoused under Section 1A and 3A of the [Civil Procedure Act](#) and which requires the Court to exercise its judicial power in a manner that facilitates “a just and proportionate disposal of disputes”. Section 3A also grants the Court the discretion to “make such orders as may be necessary for the ends of justice”. As has oft been cited, though errors are committed on a daily basis and will always continue to be committed since “to err is human”, it does not follow that a party must always, as a result thereof, suffer the penalty of his pleadings being struck out. I take the view that, unless in exceptional circumstances, the overriding objectives of litigation should generally outweigh procedural technicalities.

Final Orders

41. The upshot of my findings above is that the Plaintiff’s Notice of Motion dated 7/07/2023 only partially succeeds. Consequently, I issue the following orders:

- i. The Defendant/Respondent’s Amended Statement of Defence amended and/or dated 7/10/2022 filed without leave of the Court on 3/11/2022 is hereby struck out.
- ii. The consequence of order (i) above is that the Defendant’s Statement of Defence dated and filed on 15/03/2022 is the defence that shall remain on record and deemed to be the one presenting the Defendant’s defence in this suit.



- iii. The Defendant is granted ten (10) days from the date hereof, to file and serve its Witness Statements and List/Bundle of documents.
- iv. The present Application having been necessitated by the Defendant's consistent "blunders" and non-compliance with Court directions and timelines, the Defendant shall bear the costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

WANANDA J.R. ANURO

JUDGE

