REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 393 OF 2014

ANGALUKI MUAKA.....PLAINTIFF

VERSUS

BERYL AWINJA SAKWA.....DEFENDANT

RULING

1. The application before the court is the Plaintiff's Notice of Motion dated 21st July, 2015 which seeks to strike out the Defendant's statement of defence with costs and judgement be entered in terms of prayer (a),(b),(c) and (e) of the Plaint. That in the alternative, judgement be entered against the Defendant for Kshs. 1,977,797 /= being the start-up capital paid by the Plaintiff to the Defendant in terms of paragraph 4 of the Plaint. The Applicant also seeks for the costs of the application.
2. The application was based on the grounds that the Defendant's defence discloses no reasonable cause of action or defence in law. That the Defence constitutes mere denials that do not raise any triable issues worth going to trial. That the Defendant continues to operate the business and to utilize the start-up capital borrowed by the Plaintiff and to appropriate the revenue generated from the business.
3. The application was supported by the plaintiff's affidavit sworn on 10th June, 2015. It was averred that the parties herein entered into an agreement dated 14th February, 2013 to set up a Colon Cleansing & Beauty Shop business. That in accordance to the agreement, the Plaintiff inter alia was to provide the start –up capital for the business in three installments. Pursuant to the agreement, the Plaintiff contended that she paid Kshs. 1,977,797/= for the period of 13/2/2013 – 12/4/2013 by the time the business was started and started generating income.
4. That in breach of the agreement between the parties, the Defendant failed/refused to monthly installments agreed upon as refund for the startup capital. That given the Statement of Defence by the Defendant, the same contains no reasonable defence in fact or in law, as to why the monies sought have not been paid to the Plaintiff. In sum, the Plaintiff urged the court to allow the application and strike out the Statement of Defence on record.
5. The Defendant in response to the application filed grounds of opposition dated 24th June, 2015 and her Replying Affidavit sworn on the same date. It was contended that the application herein was devoid of merit and that there were several triable issues that raise a reasonable defence by the Defendant against the Plaintiff's claim.

6. In line with this, the Defendant contended that she objects to the terms and conditions of the purported agreement. That further the Plaintiff had no reasonable cause of action. The Defendant also took issue with the form of the Notice of Motion, arguing that it was defective and brought under the wrong provisions of the law.
7. Additionally, it was contended that the application herein was premature as the parties were yet to comply with Order 11 of the Civil Procedure Act. The Defendant therefore urged the court to dismiss the application and allow the suit to proceed on trial on merit.
8. On 30thOctober, 2015 directions were granted to determine the motion by way of written submissions. The Plaintiff filed its submissions on 29thOctober, 2015. While the 1st Defendant indicated to that it filed its written submissions, I can confirm that the same were not contained in the court record. Be that as it may, the court will look at the pleadings filed in response to the application by the Defendant.
9. I have considered the pleadings, depositions and the submissions including the various cases cited. The issue for the court's determination is whether the Defendant's Statement of Defence as filed raises no reasonable defence and is a sham to warrant the striking out as prayed by the Plaintiff.
10. I note that the instant application is substantively under Order 2 Rule 15 (1). The said provision provides as follows ;-

"15.(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 by order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

11. In the case of **D.T. DOBIE & COMPANY V MUCHINA, (1982) KLR 1, Madan J.A** (as he then was) held as follows with regard to striking out pleadings:

"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]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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 shows 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." (Emphasis added)

12. Having the above in mind, it is important to note that in striking out of a pleading on the basis that it raises no reasonable cause of action or defence, no evidence is admissible. This court is therefore only mandated to make a decision based on the plaint and the defence as filed. In examining the said pleadings, the court must establish that there is indeed a triable issue raised by the Defendant to warrant a trial.
13. So what amounts to a triable issue" The court, in the case of **Equatorial Commercial Bank Limited –vs- Jodam Engineering Works Limited & 2 Others (2014)** Eklr had the occasion to determine this question. In its decision Kasango J stated as follows ;-

"A statement of defenceis said to raise reasonable Defence if that Defence raises a prima facie triable issue. In the case of OLYMPIC ESCORT INTERNATIONAL CO. LTD & 2 OTHERS VS PARMINDER SINGH SANDHU & Another (2009) eKLR, the court of Appeal held that for an issue to be triable, it has to be bona fide. The court 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." (emphasis mine)

14. In line with the above, I have looked at what the definition of bona fide is. In the Black's Law Dictionary 8th Edition by Bryan a Garner page 186 the same is defined in the following terms;

"[Latin in good faith"] 1.Made in good faith; without fraud or deceit.2. Sincere; genuine."

15. I shall now apply the above test to the facts of this case by critically analyzing the nature of the Statement of Defence on record. In Paragraph 3, the Defendant denies in toto the contents of the agreement. It was however stated that the Plaintiff did fund the business. However, I note the contents of paragraph 3. In it the Defendant stated the following;

"3. Alternatively and without prejudice to the contents of paragraph 4 of the Plaint, the Defendant states that if there was any transaction with the Plaintiff, the same was a joint business venture and the Plaintiff did not give any commitment to the Defendant to pay him any monies, penalties or interest at all and puts the Plaintiff to strict proof thereof."

16. From the foregoing averments, I find that the issue of the validity of the said joint venture agreement that is central to this case is being attacked.
17. From my understanding, the contents of the said agreement are being challenged when the Defendant denies its contents therein.
18. Additionally, the clause on payment of the startup capital is also being challenged when the Defendant asserts that she did not give a commitment to pay the same back, after the business takes off.
19. I cannot dismiss this assertion by the Defendant as a mere farce. The same constitutes a reasonable defence and is therefore a bona fide issue for trial. Whether it succeeds or not, is an issue for the trial court to determine.
20. I have also noted the submissions of the Plaintiff with regard to paragraph 5, 6, and 7 of the Defence. It was argued that in those paragraphs, the Defendant acknowledged the existence of the agreement and that the business was as a joint venture and/or the profits were conditional on the success of the business.
21. That maybe so, however, I still find that the issues in the Defence are prima facie triable since the

answers to the issues raised by the Plaintiff are not plain and obvious.

22. The issue of the terms and conditions of the agreement between the parties would require an interpretation by the court and an analysis of the facts presented to the court. Therefore, it is my finding that the same are not issues that can be determined based on affidavit evidence at this stage.
23. In the foregoing my evaluation of the matter is that the defence on record is not without substance or fanciful. The same could only be vexatious if it was lacking in bona fides or is hopeless or offensive, but there is no firm basis laid for such conclusions.
24. I also find that it would be unfair to deny a party to civil proceedings access to a fair ventilation of its case in accordance with the Rules. In my assessment the Defendant ought to be given her day in court where she can ventilate her case in oral evidence and test the Plaintiff's claim through cross examination before a final decision is made.
25. In the result, I order the Plaintiff's Notice of Motion dated 10th June, 2015 to be and is hereby dismissed. The matter should however be listed for hearing at the earliest to expedite its conclusion. The costs of the application shall be in the cause.

26. It is so ordered.

Dated, signed and delivered in court at Nairobi this 4th day of March, 2016.

C. KARIUKI

JUDGE