Case Number:	Civil Case 263 of 2017
Date Delivered:	20 Dec 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	James Aaron Makau
Citation:	Desbro (Kenya) Limited v Polypipies Limited & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION-MILIMANI

CIVIL CASE NO. 263 OF 2017

DESBRO (KENYA) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

POLYPIPIES LIMITED.....1ST DEF./RESPONDENT

TRIDENT INSURANCE CO. LIMITED.....2ND DEF./RESPONDENT

R U L I N G

1. Before me is a **Notice of Motion** dated 18th August, 2017 brought to Court pursuant to **Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act; Order 2 Rule 15(1)(b)(c)** and **(d)** and **Order 13 Rule 2 of the Civil Procedure Rules, 2010**. The Applicant seeks the following orders:

a. That the Defendants statement of defence dated 3rd August 2017 and filed on 7th August 2017 be struck out and judgment entered against the Defendants for Kshs. 8,219,463 and USD 251,082 with interest thereon at 14% and 9% p.a. respectively as prayed in the Plaint.

b. That the costs of this application and suit be paid to the Plaintiff by the Defendants.

2. The Applicant's application is premised on the grounds on the face of the application under (i) – (viii) and is supported by an Affidavit of Devraj Saghani sworn on 18th August 2017 and annexture DS-1.

3. The application is opposed. The Respondent filed grounds of opposition dated 18th September 2018 setting out 12 grounds of opposition.

4. The Plaintiff/Applicant filed submissions in support of the application on 4th October 2018, whereas the Defendants' submissions were filed on 5th November 2018.

5. I have very carefully perused the application, the grounds of opposition, the Advocates rival submissions in support and in opposition of the application dated 18th august 2017. The issues arising thereto can be summarized as follows:-

a. Whether the Defendants statement of defence dated 3rd August 2017 amounts to a defence in law and whether it ought to be struck out and judgment entered for the Plaintiff as prayed in the Plaint"

b. Whether the Defendants have plainly and unequivocally admitted to owing the Plaintiff Kshs. 8,219,463 and USD 251,082 and therefore judgment on admission should be entered against the Defendants as prayed"

6. The application is premised on **Order 2 Rule 15** and **order 13 Rule 2 of the Civil Procedure Rules, 2010**. Order 2 Rule 15 of Civil Procedure Rules provides:

"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"

Whereas **Order 13 Rule 2 of Civil Procedure Rules** provides:-

"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 judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such *judgment, as the court may think just."*

7. The Defendant in its grounds of opposition urge that the present application is premature as parties are yet to comply with the provisions of Order 11 of the Civil Procedure Rules and that the application is in breach of procedure, in that, the main suit has not been listed for pre-trial and the suit is yet to be certified ready for hearing. That the application is a mere waste of judicial time as it ought not to have been filed in the first place and that of this the court should not act in darkness without full facts of this case having been placed before it. It is further argued, that the issue of whether or not documents to be relied upon at the trial have been filed can only be canvassed during the pre-trial conference and not by way of an application to strike out pleadings.

8. From the provisions of **Order 2 Rule 15 and Order 13 Rule 2 of the Civil Procedure Rules**, it is plainly clear that an application similar to the one before court, can be filed at any stage of the proceedings. There is no requirement for compliance with **Order 11 of Civil Procedure Rules** before filing of an application for striking out of a suit as argued by the Respondent. I therefore find and hold there is no requirement that an application of this nature be brought at certain stages by the defendant/Respondent. This application is not premature nor is it in breach of any provisions of the civil procedure rules and I find that it is properly before court.

9. There are myriads of authorities on the subject of striking out pleadings. In the case of **Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR,** the Honourable court quoted with authority the celebrated case of **Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd [2014] eKLR** where this court held 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. 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 of 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 SHEDRIDAN 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."**

10. The Applicant seeks to have Defendants defence dated 3rd August 2017 struck out on the grounds that the defence is a mere denial, frivolous, scandalous and vexatious; a sham and raises no triable issues or any possible defence in law. The Defendants on their part think otherwise, and contend that the defence filed raises issues which can be determined at trial and that Defendants have denied each and every allegation labeled against them and it is up for the Plaintiff to substantiate its claims and it can only do so once the matter gets to trial.

11. I have considered the defence filed on 3rd August 2017 and more particularly paragraph 5, 6, 7 and 11 of the defence where the Defendants have with specifity and particularity denied the Plaintiff's claim. It is clear from the above mentioned paragraphs that the Defendants have not admitted the indebtness and have specifically and in no uncertain terms denied the Plaintiff's claim. The Defendants have denied having been supplied with the goods by the Plaintiff and accepting the goods, they have denied being invoiced for the goods supplied and entering into a deed of settlement with the Plaintiff and making part payments as per the alleged deed of settlement and defaulting in payment of the subsequent installments.

12. The Defendants defence, in my view, cannot in view of the defence raised, be termed as a mere denial, sham, an abuse of the court process nor can it be termed as vexatious and frivolous. The defence, in my view, raises serious triable issues. The issues raised cannot be determined summarily or by way of an application. I am alive to the fact that a defence raising triable issues, need not convince court that the defence shall succeed, but a triable issue is the one, which raises a prima facie defence and which should go to trial for adjudication.

13. In the case of **Job Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR,** the court stated as follows:

"Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" **as,** subject or liable to judicial examination and trial". **It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.**

14. I am alive to the fact, that striking out of a suit or defence is a jurisdiction, which a court should exercise sparingly and in a clear and obvious case that the defence raised by the Defendant is a mere smoke screen meant to divert the court's attention to the real question in issue and cannot amount to a prima facie defence warranting judicial examination or trial. That unless the defence is sham, vexatious, frivolous and an abuse of the court process a party to a civil litigation should not be deprived of his right to have his day in the court and have the suit determined in full trial. The court should act cautiously and carefully, consider all facts of the case without rushing to embarking on striking out the defence which otherwise raises triable issues in respect of the would-be action of the case.

15. Having considered the defence in this matter, I am satisfied from its facts, that the defence raises triable issues which cannot be wished away, and which calls for full trial. I find that if the suit proceeds to full trial, no party will be prejudiced as both parties will have fair trial as enshrined under Article 50 of the Constitution of Kenya 2010 and substantive justice shall be done to both parties.

16. It is contended that the Defendants have plainly and unequivocally admitted to owing the Plaintiff the sum claimed in the Plaint and that judgment should be entered on admission under **Order 13 Rule 2 of the Civil Procedure Rules**.

17. It is contended that the Defendants executed a deed of settlement admitting being indebted to the Plaintiff to the tune of Kshs. 9,132,738 and USD 271,980. The Defendants in their defence have denied having undertaken to pay the Plaintiff's claims. The alleged executed deeds of settlement is not attached to the Applicant's application though mentioned under paragraph 4 of the affidavit of Devraji Saghani nor is it marked as an exhibit as required. It is not for the court at this stage to be involved in searching for such documents amongst Plaintiff's list of documents when the same should have been identified by the deponent and duly commissioned by a commissioner for oaths as an exhibit. I therefore find that admission of the Plaintiff's claim by the Defendants hasn't been established.

18. The end result is that the application dated 18th August, 2017 is without merits and is accordingly dismissed with costs.

Dated, signed and **Delivered,** on this **20th** day of **December, 2018**

.....

J. A. MAKAU

JUDGE