Case Number:	Tribunal Case 288 of 2018
Date Delivered:	23 Jan 2020
Case Class:	Civil
Court:	Cooperative Tribunal
Case Action:	Ruling
Judge:	Hon. B. Kimemia - Chairman, Hon. F. Terer - Deputy Chairman, R. Mwambura - Member & P. Gichuki - Member
Citation:	Peter Odago Oluotch & another v Stima Investment Co-operative Society Ltd [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
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 CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 288 OF 2018

PETER ODAGO OLUOTCH.....1ST CLAIMANT

PRISCA AWUOR OLUOTCH.....2ND CLAIMANT

VERSUS

STIMA INVESTMENT

CO-OPERATIVE SOCIETY LTD.....RESPONDENT

RULING

What is before us for consideration and determination is the claimant's Application dated 14th June, 2019. It seeks, in the main, the following Orders:

a. That the Response to the Statement of Claim be struck out for being frivolous, vexations or meant to prejudice, embarrass or delay the fair trial of the Claim;

b. That in the alternative, Judgment be entered as prayed

The Application is supported by the grounds on its face and the Affidavit sworn by the Claimant on 23rd May, 2019.

The Respondent has opposed the Application by filing a Replying Affidavit sworn by Viola Odhiambo on 20th August, 2019.

Claimant's case

It is the Claimant's case that the Respondent has admitted the claim and committed to refund the sums claimed and thus it is unnecessary to admit the claim for full hearing.

That the Claim relates to a 1/8-acre plot of land offered for sale to the Claimants by the Respondent. The cost of the plot was 1, 200,000.00. That part of the agreement for purchase of the said plot was that the Respondent would set up a greenhouse and grow crops therein for purposes of export to foreign market through Malindi Airport. That in return, the Respondent would pay the Claimants a sum Kshs. 180,000.00 twice a year.

That the Claimants made payments towards the purchase of the said plot on installments totaling to Kshs. 977,800.00

That subsequently, there was a delay in installation of the greenhouses. That this prompted them to withdraw from the project. That subsequently, the Respondents undertook to refund the monies paid. That it is on this basis this basis of the admission that they want the Respondent's statement of Defence to be struck off and Judgment entered for the sums claimed.

Respondent's case

Vide the Replying Affidavit sworn by Viola Odhiambo on 20th August, 2019, the Respondents have opposed the Application on

grounds that the same is fatally defective as it is not anchored on any provisions of the law. That the Co-operative Societies Act as well as its Rules do not provide for striking out of pleadings.

As regards the merits of the Application, the Respondents contend that the same has not been admitted and that the Respondent has blamed the Claimant for frustrating the transaction by refusing to sign transfer documents. That at no point in time did they issue a Notice to terminate the Agreement.

As regards the Claimant's contention that the Respondent's Senior Marketing Officer and Customer Relations officer ordered a refund of the purchase price, the Respondent contend that the said officers do not have authority to transact on its behalf. That the said Agreement did not provide for such an arrangement.

That the Response to the claim is not frivolous but raises issues worth hearing through a plenary. That some of the issues worthy of the Tribunal's determination include:

a. Whether there is a provision in the Respondent's policies for refund of the purchase price;

b. Whether the purchase Agreement had a condition precedent for terminating of contracts;

c. Whether the Claimant or the Respondent frustrated the transaction;

d. The impact of arbitration proceedings on this matter;

e. The meaning and/or import of various agreements entered into between the Claimant and the Respondent relating to the subject matter.

That it is on the basis of the foregoing that the Respondent wants the instant Application to be dismissed.

Directions on written submissions

On 20/08/2019, the Tribunal directed the Application to be disposed of by way of written submissions. The Claimants filed theirs on 11/12/2019 whereas the Respondent did so on9/01/2020. We will consider the same when determining the issues in controversy below.

Issues for determination

We have framed the following issues for determination:

a. Whether the Application should be defeated for want of enabling provisions of the law:

b. Whether the Response to the Claim is frivolous, vexatious and is meant to prejudice, embarrass or delay the fair trial of the Claim; and

c. Whether the Claim is admitted, and if so, whether Judgment should be entered on that basis;

Competence of the Application

The Respondent has urged us to dismiss the Application for want of enabling provisions. Put it the other way round, the Respondent contends that the Co-operative Societies Act and its rules does not donate to the Tribunal jurisdiction to summarily dismiss suits.

In determining this issue, we want to draw the Respondent to the **Rule 6** of the Co-operative Tribunal (Practice and Procedure) Rules, 2009. It provides thus:

"The provision of the Civil Procedure Rules (Cap. 21. Sub. Leg) shall apply in respect of proceedings of the Tribunal."

Order **2 Rule 15** ("of the Civil Procedure Rules provides for striking out of proceedings. Order **2 Rule 15 (1)** provides thus:

"***At any stage of the proceedings the court may order to be struck out or amended any pleadings on grounds that –***

(a) It discloses no reasonable cause of action or Defense 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."

In view of the above provisions of the law, it is our finding that the current Application is correctly founded and that the Respondent's objection to our jurisdiction to entertain it does not hold.

Whether the Claimant has laid a proper basis to warrant the striking out of the Response

The Claimant has sought to strike out the Respondent's Response to the Claim on account of being vexations, frivolous and otherwise an abuse of the process of the court. The question that begs is what constitutes a frivolous, vexations and pleading that is an abuse of the process of the court. We find the answer in the case of ***County Council of Nandi-vs- Ezekiel Kibet Rutto & 6 others*** (2013) eKLR. In the case, the court proffered the following meaning:

"…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 **vexations 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 the court in my view encompasses scandalous, frivolous or vexatious pleading but goes ahead further to take care of situations 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."

The question that arises is whether the Claimant, vide her current Application, has satisfied the conditions set out in the above case. Our answer is in the negative. Vide its Response, the Respondent has denied that it owes the Claimants the sums claimed and instead blames them for frustrating the process of completing the sale transaction. Secondly, it has denied that the purchase price was refundable. In effect, the Respondent is raising an issue which ought to be ascertained through trial. Such a Response cannot be said to be frivolous or vexatious or an abuse of the process of court.

Aside from the foregoing, we also pose the question as to whether the Respondent's Response to the claim is so hopeless as to warrant its striking out. We find the answer in the case of ***Saudi Arabia Airlines Corporation-Vs-Premium Petroleum Company Limited***. The court held in this case thus:

"***I need not re-invent the wheel on the subject of striking out of a Defence. A great number of judicial decisions have settled the 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 articles 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 any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of Defence and Counterclaim. Secondly and directly related to the foregoing constitutional principle and policy, 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 Defence should be used sparingly and only on the clearest of cases where the impugned pleading is "demur or 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 bonafide triable issue worth a trial by the court…"

We associate ourselves with the decision of the court above and find that the statement of Response is not hopeless to warrant striking out.

Admission

The Claimant has invited us to enter Judgment on the basis of an admission made by the Respondent. We reiterate our observations above and find that the Claim is denied.

Conclusion

The upshot of the foregoing is that we dismiss the Claimant's Application dated14th June, 2019 with costs.

Parties to comply by filing witness statements and documents and fix matter for hearing of main claim.

Read and delivered in an open court this 23rd day of January 2020

In the presence of ;-

Claimant: Mr.karoki

Respondent: Mr.Owea for the respondents

Court Assistant: C Maina

Hon. B. Kimemia - Chairman Signed

Hon. F. Terer - Deputy Chairman Signed

R. Mwambura - Member Signed

P. Gichuki - Member Signed