



**Prime Bank Limited v Tanna (Commercial Case E039 of 2022)
[2023] KEHC 1058 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E039 OF 2022
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

KETUL SURENDRA TANNA DEFENDANT

RULING

1. The plaintiff has filed the notice of motion dated July 4, 2022 made, *inter alia*, under order 2 rule 15(1) (a), (b), (c) and (d) of the [Civil Procedure Rules](#) (“the Rules”) where it seeks to strike out the defendant’s statement of defence dated April 23, 2022 (“the defence”) and prays for judgment against the defendant as prayed for in the plaint together with costs of the application and the entire suit on a full indemnity basis. The application is supported by the affidavit of the plaintiff’s legal manager George W Mathui, sworn on July 4, 2022. It is opposed by the defendant through his replying affidavit sworn on September 29, 2022. In addition to their pleadings and depositions, the parties have also filed written submissions in support of their respective positions.
2. The plaintiff’s case against the defendant as set out in the plaint dated December 21, 2021 is that the defendant applied for and was granted credit facilities set out in the letter of offer dated April 11, 2014 for the maximum principal amount of Kshs 50,000,000.00 under various conditions set out therein. The facility was secured by, *inter alia*, a letter of agreement for advance accounts, a letter of general lien and set off, a letter of instalment, a legal charge dated August 21, 2019 over property LR No 209/12909 registered in the name of Valley View Enterprises Limited (“the suit property”), a corporate guarantee by Valley View Enterprises Limited along with the board resolution and a deed of guarantee and indemnity by the defendant dated April 15, 2014.



3. The plaintiff states that through a letter dated April 28, 2014, the defendant informed the plaintiff to remit the funds to his account number 30****119, and further debit the said account with the commitment fess/processing charges, legal fees, and to recover the monthly interest and instalments.
4. As regards the charge over the suit property, the plaintiff contends that the defendant misrepresented and deceived it by withholding material facts. It claims that the defendant, as borrower and director of the chargor, concealed the existence and pendency of Nairobi HCCC No. 1624 of 2001; *Kantibhai Magnbbhai Patel v The Attorney General and Valley View Enterprises Ltd* and that it only became aware of the suit when it issued statutory notices. It avers that the defendant misrepresented to it that the suit property was free of encumbrances and that it concealed that the suit seeks orders that are likely to jeopardise or prejudice the value of the security and its rights over the property. Accordingly, the plaintiff avers that it is unable to exercise its statutory power of sale and is thus entitled to claim the debt from the defendant.
5. The plaintiff claims that the defendant is now indebted to it to the tune of Kshs 26,186,848.65 as at October 31, 2021 accruing interest at 20.5% from November 1, 2021 until payment in full. That despite written demands, the defendant has failed to honour the same hence it seeks judgment for the said amount.
6. In his defence, the defendant denies that on his own account, he sought credit facilities from the plaintiff and that the facilities were granted on the basis and request of two companies; Valley View Enterprises Ltd and general printers ltd that the plaintiff was to make advances to him or available to him. The defendant denies that he received Kshs 50,000,000.00 or any part thereof as the said sum was withheld by the plaintiff for its own use. He further denies that he withheld any material facts pertaining to Nairobi HCCC No. 1624 of 2001 and declined to make any further comments thereon as the matter is subjudice.
7. The defendant therefore denies that he is indebted to the plaintiff in the sum of Kshs 26,186,848.65 or that the said sum attracts agreed interest at 20.5%. The defendant states that the amount claimed is made up of interest contrary to the In duplium rule. It also denies receiving the demand and notice of intention to sue.

Analysis and Determination

8. The main issue for determination is whether the court should strike out the defendant's defence on the grounds set out in order 2 rule 15 of the rules which empowers the court to strike out or order amendment of a pleading on the ground that it discloses no reasonable cause of action or defence in law; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. The court may as a result stay the suit, dismiss it or enter judgment as the case may be.
9. The principles guiding the courts exercise of discretion in striking out a pleading were distilled by the Court of Appeal in *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 where Madan JA, stated as follows:

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.



10. I have considered the plaintiff's claim and the defendant's defence against the general principles I have outlined and I find that the defence is made up of mere and general denials. In as much as the defendant states that he did not seek the loan facilities on his own accord, the credit application form annexed by the plaintiff demonstrates otherwise. The form clearly shows the defendant as applicant and borrower of the Kshs 50,000,000.00 credit facility. The letter of offer dated April 11, 2014 shows clearly that he is the borrower and all the security documents issued by Valley View Enterprises Limited show that the defendant is the borrower. The defendant, in his letter dated April 28, 2014 whose subject is "loan to Ketul Tanna (KS Tanna)", acknowledges receipt of the Kshs 50,000,000.00 and directs the plaintiff on how the amount should be utilized and remitted.
11. As to the amount owed by the defendant, the plaintiff has produced a statement of account indicating that the defendant's loan account is in arrears with a debit balance of Kshs 26,186,848.65. It should not be lost that section 176 of the *Evidence Act* (chapter 80 of the laws of Kenya) creates a presumption in favour of the plaintiff as follows:

176. A copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded.

The defendant has not rebutted the presumption that this statement of account is *prima facie* accurate and a true reflection of the defendant's debt position by adducing any other evidence or demonstrating otherwise in his deposition.

12. The undisputed documentary evidence placed before the court by the plaintiff puts to rest the defendant's argument that he did not, on his own account, seek credit facilities from the plaintiff. The documents produced by the plaintiff, and which were not rebutted by the defendant, do not support the defendant's position that the facility was advanced on the understanding that Valley View Enterprises Ltd would guarantee payment of any sums owed to the plaintiff and on the part of General Printers Ltd that all payments due as the defendant's salary were to be remitted to the plaintiff, that the plaintiff processed the said amount. There is also no evidence that the loan amount was paid to General Printers Limited and never to the defendant and on condition that General Printers Ltd was to remit to the plaintiff. In addition, the defendant is unequivocally liable for the debt as the principal. It is not a legal requirement for the lender, in this case the plaintiff, to realise the securities either by selling the suit property or calling in the corporate guarantees. Section 90(3) of the *Land Act*, 2012 gives charge various options available to it, if a chargor does not comply within the period for settling an outstanding debt. It could choose to either (a) sue the chargor for any money due and owing under the charge; (b) appoint a receiver of the income of the charged land; (c) lease the charged land, or if the charge is of a lease, sublease the land; (d) enter into possession of the charged land; or (e) sell the charged land. The plaintiff therefore has the option to choose to pursue recovery of the debt either against the principal debtor independently and/or from the guarantor or sell the charged property. Thus, the action by the plaintiff to seek recovery of the debt from the defendant, in my view, could not and did not prejudice any right of action the plaintiff had against the guarantor or suit property as long as there had been default on the payment of the loan by the principal debtor and demand had been made on the principal debtor to pay (See *Monda Matundura v National Bank of Kenya Ltd* Kisii ELCC No 737 of 2016 [2018] eKLR).
13. I am therefore in agreement with the plaintiff that the defendant has not laid out any reasonable ground of attack against the plaintiff's suit. The defence does not raise any triable issue or reasonable ground of defence nor has it made out a case for amendment that would otherwise breathe life into



the defence The amount claimed is of a liquidated nature and the interest claimed is supported by the loan agreements and the statement of account.

Disposition

14. My overall finding and conclusion is that the plaintiff's application dated July 4, 2022 is merited and is accordingly allowed on the following terms:
 - (a) The defendant's defence dated April 23, 2022 be and is hereby struck out
 - (b) Judgment be and is hereby entered for the plaintiff and against the defendant for Kshs 26,186,848.65 together with interest at the rate of 20.5% per annum from November 1, 2021 until payment in full.
 - (c) The defendant shall bear the costs of the application and the suit.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr P. Wawire instructed by Wamae and Allen Advocates for the plaintiff.

Mr K. Mogeni instructed by Mogeni and Company Advocates for the defendant.

