



**Malhotra v Almasi Limited & 2 others (Commercial Case E124 of 2022)  
[2022] KEHC 16886 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E124 OF 2022  
DAS MAJANJA, J  
DECEMBER 21, 2022**

**BETWEEN**

**PERMOD MALHOTRA ..... PLAINTIFF**

**AND**

**ALMASI LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MBURU ..... 2<sup>ND</sup> DEFENDANT**

**MARK MBURU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiff's notice of motion dated July 20, 2022 under order 2 rule 15(1) (a) of the *Civil Procedure Rules* seeking to strike out the defendants' written statement of defence dated June 3, 2022 ("the defence") on the ground that it does not raise a reasonable defence and for judgment to be entered as prayed for in the plaint. The defendant's oppose the application through the grounds of opposition dated October 3, 2022.
2. The plaintiff's case as set out in the plaint dated March 31, 2022 is that the plaintiff and the defendants entered into a deed of acknowledgment of debt dated May 26, 2021 ("the deed") under which the 1<sup>st</sup> defendant agreed to pay Kshs 2,000,000.00 on or before July 26, 2021 and Kshs 22,420,000.00 on or before May 26, 2022 and in the event of failure to pay any installments, an interest rate of 3% per annum would accrue and It would be compounded monthly until payment is received in full. The plaintiff claims that the deed was guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
3. When the 1<sup>st</sup> defendant failed to remit the first installment as required and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants failed to honour their guarantee, the plaintiff filed this suit seeking against the defendants, jointly and



severally for first installment of Kshs 2,000,000.00 and the second installment of Kshs 22,420,000.00 together with interest at 3% from July 26, 2021 until payment in full.

4. The defendants filed their defence denying the contents of the plaint and in particular that they are indebted to the plaintiff as alleged or at all. The defendants contend that the 1<sup>st</sup> defendant did not authorize the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to execute the deed and therefore the deed is not binding upon it.
5. In support of the application, the plaintiff argues that the defence is a mere denial and does not disclose any triable issues. The plaintiff submits that since the defendants have not disputed the validity of the deed they have admitted the debt hence it should be struck out and judgment entered.
6. The defendants', in their grounds of opposition, urge that the application should be dismissed as it is frivolous and abuse of court process since it does not disclose any reasonable grounds to warrant the orders sought. The defendants submit that their defence raises triable issues in that they have disputed the validity of the deed. The defendants further submit that the court has discretion to strike out of the defence but it should only be exercised in the clearest of cases.
7. The issue for determination in this ruling is whether the defence should be struck out. The application is premised on order 2 rule 15(1)(a) of the Civil Procedure Rules which permits the court to strike out or order to be amended any pleading that, "discloses no reasonable cause of action or defence in law." Under subrule 15(2), "No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made." In such a case, the court is limited to examining the pleadings and the pleadings only to determine whether a case has been made out to go to trial. In the seminal case of DT Dobie & Co (K) Ltd v Muchina [1982] KLR, the Court of Appeal construed a "reasonable cause of action" to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...". The converse, of course, applies to a statement of defence.
8. The substance of the defendants' defence is that the 1<sup>st</sup> defendant did not authorize the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to execute the deed while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants deny knowledge of the deed or that they are indebted as alleged. In my view, it cannot be said that the defence, on its face and without more, is a mere denial. On the face of the plaint, the relationship between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is not disclosed hence the basis upon which the deed was executed and the liability of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is an issue. The court would have to look at the deed to determine the veracity of these assertions vis-à-vis the plaintiff's case.
9. The court will only strike out a pleading in the clearest of cases (see Crescent Construction Limited v Kenya Commercial Bank Limited [2019] eKLR). I therefore decline to strike out the defence under order 2 rule 15(1)(a) of the Civil Procedure Rules. Let the matter be determined at a full hearing.
10. The notice of motion dated July 20, 2022 is dismissed with costs to the defendants.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER, 2022.**

**D S MAJANJA**

**JUDGE**

Court of Assistant: Mr M Onyango

Mr Makori instructed by Hamilton, Harrison and Mathews Advocates for the plaintiff.

Mr Musyoka instructed by Okubasu, Munene and Kazungu Advocates for the defendants.

