



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 104 OF 2017

BANK OF AFRICA KENYA LIMITED.....PLAINTIFF

-VERSUS-

MWANGAZA CIVIL WORKS COMPANY LIMITED.....1ST DEFENDANT

JEREMIAH BOY ONYACH.....2ND DEFENDANT

JERUSHA TABU ONYIMBO.....3RD DEFENDANT

ANDREW OCHUNG ONYACH.....4TH DEFENDANT

MWANGAZA ELECTROWORKS COMPANY LTD.....5TH DEFENDANT

RULING

1. The Application of 15th September 2020 seeks the following orders:-

1. The Defendants' Request for particulars dated 8th September 2020 and served on the Plaintiff on 11th September 2020 be struck out.
2. The Defendants' Statement of Defence dated 25th May 2017 and filed on 29th May 2017 be struck out.
3. Judgment be entered for the Plaintiff against the Defendants jointly and severally as prayed in the Plaintiff.
4. In the Alternative and without prejudice to prayer 3 above, there be an order for this case to proceed for hearing by way of the Plaintiff formally proving its case.
5. Costs of this application and the entire suit be borne by the Defendants/Respondents on a full indemnity basis.

2. The history of this matter shows that the Defendants have been less than vigilant in preparing their Defence to this matter. Suit was filed on 13th March 2017. The Defendants entered appearance on 2nd May 2017 and filed Defence on 29th May 2017. It is common ground that the Defence was not, as required by law, filed with the list and bundles of documents, list of witnesses and witness statements.

3. On 24th October 2018, the Plaintiff complied with pre-trials and a case management conference was held on 16th January 2019. The Defendants had not complied and were granted 30 days to do so. They have not done so to date but have an application dated 13th October 2020 for leave to file their bundle of documents, list of witnesses and witness statements out of time. Further, the Defendants have requested for particulars.

4. In the meantime the matter was certified ready for hearing. On 30th July 2019, when the matter was appointed for hearing, the Judge was not sitting. A new date of 20th January 2020 was fixed but hearing did not proceed because the Court was not satisfied with service of the

hearing notice.

5. The matter was not lucky on 16th March 2020 because of the Covid-19 outbreak and hearing on that date aborted. The matter faced a similar fate on 8th June 2020 and hearing was rescheduled to 15th September 2020.

6. Just four days to the hearing, the Defendant served the Bank's advocate with a request for particulars, the one sought to be struck out. This was a reason why the Defendants sought an adjournment of the matter and also that they had come across new evidence which they wished to place on record.

7. The answer to the application is in an affidavit sworn by the 2nd Defendant on 13th October 2020. He states that the Defendants had initially instructed the firm of Mugambi Kariuki & Co. Advocates who entered appearance on their behalf and filed Defence. In Paragraph 4 he states:-

“[4] THAT since April 2017 when I instructed the firm of Mugambi Kariuki and Company Advocates, there were particulars relating to the suit that I had wished to be included in the main suit but were not included in the main suit.”

8. It is said that Mr. Mugambi Kariuki, the Managing Partner of the law firm representing the Defendants, died in 2017 and there has been a prolonged hiatus in reorganizing the firm and that the clients file had not been traced. This Court is beseeched to give the Defendants a chance and allow it to be supplied with the following particulars:-

a. The Asset financing was for (Kshs.41,000,000) Kenya Shillings Forty One Million for the purchase of four machines and not the entire Kenya Shillings Fifty Five Million(Kshs. 55,000,000) as alleged by the Plaintiff in paragraph 5 of the Plaintiff. The particulars of the surplus Kshs. 14,000,000 (Kenya Shillings Fourteen Million) are not explained in the Plaintiffs pleadings. (Attached herewith and marked as JBO 3 the Affidavit 1 OF Wilfred Abincha Onono in Support of the IRAC report dated 11th October 2013).

b. The Plaintiff admits in its witness statement that 1st Defendant has already paid Kshs. 64,196,982.35 (Kenya Shillings Sixty Four Million One Hundred and Ninety Six Thousand Nine Hundred and Eighty Two Thousand and Thirty Five Cents) against the borrowed sum of Kshs. 56,659,773.93 (Kenya Shillings Fifty Six Million Six Hundred and sixty Nine thousand seven hundred and seventy three and ninety three cents) when the loan was restructured in December 2013. (Attached herewith and marked as JBO 4 is the IRAC Report summary dated 28th September 2020).

c. Since the principal sum of Kshs. 56,669,773.93 Kenya Shillings (Fifty Six Million Six Hundred and sixty Nine thousand seven hundred and seventy three and ninety three cents) has factually been settled, the Prayers for Judgement to be entered against the 2nd, 3rd, 4th and 5th Defendant for Kshs. 50,000,000 (Kenya Shillings Fifty Million) EACH all amounting to Kshs. 250,000,000 (Kenya Shillings two Hundred and Fifty Million Shillings only) is unsupported and unjustified yet the Plaintiff is opposed to the provision of these particulars.

d. The Plaintiff admits in paragraph 8 of its Plaintiff that in 2016 it indeed repossessed two of the four assets that the Term loan of Kshs. 41,000,000(Kenya Shillings Fifty Million) was initially acquired to purchase yet the particulars of the Value of the machines at the time of the repossession are not provided for.

e. The Plaintiff again admits in paragraph 8 of its Plaintiff that the value of the repossessed but unsold machines has not been incorporated in its Bank Statements yet it prays for Judgement against the 1st Defendant for Kenya Shillings Fifty One Million two hundred and fifty eight thousand Nine hundred and thirty nine and one cent(51,258,939.01) as if the two assets valued at over Kenya Shillings Twenty Five Million Shillings at the time of purchase are not in the Plaintiffs possession and their sale will not significantly alter the proposed decretal sum.

f. The claim for Kenya Shillings Fifty One Million two hundred and fifty eight thousand Nine hundred and thirty nine and one cent (51,258,939.01) when the first Defendant has already paid Kshs. 56,669,773.93 Kenya Shillings (Fifty Six Million Six Hundred and sixty Nine thousand seven hundred and seventy three and ninety three cents) is evidence of usurious interest rates levied upon the 1st Defendant by the Plaintiff.

g. THAT while the particulars of Paragraph 9 and 10 of the Plaintiffs Plaintiff are a demonstration of communication between the parties of a contractual agreement between a borrower and lender none of the letters attached constitute an admission as to the quantum owed to the Plaintiff.

h. THAT I have since established that the interest rates calculated by the Bank are exaggerated which particulars I would like to furnish the Court with. (Attached herewith and marked as JBO 5 is the full and final IRAC Report dated 28th September 2020.”

9. This Court has considered the oral arguments made for and against the application and the authorities cited by counsel.

10. There is no doubt that the occasion for making the request for particulars was at Case Management Conference which long passed on 19th January 2019. Further, the application for leave to file the witness statements and bundle of documents is made two years after pleadings closed. There has been prolonged inaction on the part of the Defence.

11. That delay is explained by the inability of the current advocate to access the client's file from their erstwhile advocates due to the death of its Managing Partner.

12. All matters must be decided in their circumstances. Here, it is not doubted that Mr. Mugambi Kariuki, the Managing Partner of the firm of Mugambi & Kariuki Co. Advocates passed on. The Court will give the Defendants the benefit of doubt that due to delayed re-organization of the firm, they have not been able to access their file. In giving this benefit to the Defendants, the Court is keen about giving parties before it a chance to resolve a contested matter on merit where possible. As to the request for particulars, the allegation that it is a fishing expedition is not backed by reasons. Again, it is not argued that the request is unreasonable because the Bank cannot comply.

13. Striking out of the pleadings is a drastic order, to make it leaves a party whose pleading has been struck out exposed. On this occasion the Court prefers not to make that order.

14. As to the prayer that the Defence be struck out because it is frivolous, scandalous and vexatious as there is no evidence to support it, that too is declined for two reasons. First, there is now an application for leave of the Court to allow the late filing of the Defendants' witness statements and bundle of documents. It may be better to await the outcome of that application before an order for striking out in this respect is made. Second, the application has not demonstrated how the Defence filed is frivolous, scandalous and vexatious. It is for the Plaintiff to demonstrate that the claim it has filed overawes all answers made to it in the Defence and that those answers are frivolous, scandalous and vexatious. I never saw an attempt by counsel for the Plaintiff specify the proposition made.

15. The application dated 15th September 2020 is dismissed but each party must bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of January 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court Assistant: Nixon

Wawire for Plaintiff

No appearance for Defendants