



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E059 OF 2020**

**BETWEEN**

**OXBRIDGE LIMITED..... PLAINTIFF**

**AND**

**GUARANTY TRUST BANK (KENYA) LIMITED.....DEFENDANT**

**RULING**

**Introduction**

1. Before the court for consideration is the Plaintiff's Notice of Motion dated 8<sup>th</sup> June 2020 made under **Order 2 rule 15** of the **Civil Procedure Rules** seeking for orders that the Defendant's Statement of Defence be struck out for being scandalous, frivolous and vexatious and for failing to disclose any reasonable defence in law and that judgment be entered in favour of the Plaintiff as prayed in the Plaintiff.

2. The application is supported by the affidavit of the Plaintiff's Advocate, Lawrence Mutai Terer, sworn on 8<sup>th</sup> June 2020. It is opposed by the Defendant's Legal Officer, Josephine Gachuru, sworn on 17<sup>th</sup> September 2020. The parties relied on written submissions which their advocates briefly highlighted.

**Plaintiff's Case**

3. The Plaintiff's case is set out in the Plaintiff's Complaint dated 28<sup>th</sup> February 2020. By a Letter of Offer dated 31<sup>st</sup> March 2016, the Defendant ("the Bank") agreed to extend certain banking facilities comprising an overdraft facility in the sum of Kshs. 40,000,000.00, a term loan of Kshs. 400,000,000.00 intended to take over the Plaintiff's facility at Bank of Baroda Kenya Limited ("Bank of Baroda"), Letters of Credit/Asset Finance facilities of GBP 870,000.00, Letters of Credit/Asset Finance of USD 735,000.00 and a Credit card line of Kshs. 2,000,000.00. The facilities were amended by the Letter of Offer dated 15<sup>th</sup> June 2016.

4. The Plaintiff states that the Letters of Offer were executed by both parties and formed a contract. The Plaintiff states that it met the Bank's requirements and paid a facilitation fee of Kshs. 7,387,750.00 but the Bank, by a letter dated 8<sup>th</sup> November 2016 unilaterally cancelled the facilities on grounds of the Plaintiff's failure to abide by the terms.

5. As a result of breach of the Letters of Offer, the Plaintiff states that it suffered loss and damage including the sale of its guarantor's assets to recover monies due to Bank of Baroda which has only been halted by an injunction issued by the court. The Plaintiff therefore seeks a declaration that the cancellation of facilities issued by the Bank was not occasioned by default on its part and that cancellation of the facilities by the letter dated 8<sup>th</sup> November 2016 is unlawful, null and void and an order of specific performance compelling the Bank to disburse the entire facilities sanctioned under the letter of offer. In the alternative, the Plaintiff seeks an order compelling the Defendant to refund 1% facilitation fee of Kshs. 7,387,750.00 with interest at commercial rates from the date of payment to the Bank.

6. The Plaintiff also accused the Bank of fraud and misrepresentation. It states that the Bank fraudulently misrepresented to it that it would disburse the facility upon execution of the Letters of Offer and payment of the facilitation fee. That the Bank unilaterally cancelled the contract despite the Plaintiff having met all the obligations and purporting to retain the facilitation fee without meeting its obligations. It therefore seeks general and punitive damages against the Bank for fraud, misrepresentation and breach of fiduciary duty to the Plaintiff.

**Defendant's Case**

7. In its Statement of Defence dated 5<sup>th</sup> May 2020, the Bank admitted that it issued the Letter of Offer dated 31<sup>st</sup> March 2016 as amended by the Letter of Offer dated 15<sup>th</sup> June 2016 which was accepted by the Plaintiff, its directors and guarantors. The Bank states that in an effort to fulfil its contractual obligation under the Letters of Offer, it appointed Advocates who prepared the security documents and forwarded them to the Plaintiff's Advocates for execution by the Plaintiff and its guarantors, prepared and issued financial undertakings to Bank of Baroda and its advocates in order to facilitate the takeover of the amounts owed by the Plaintiff. It also called for and received the necessary title documents, prepared and caused to be executed necessary Discharges of Charge over various securities from Bank of Baroda.

8. The Bank further states that despite reasonable indulgence with the Plaintiff and its own efforts to complete perfection of the securities, the Plaintiff breached the conditions under the Letters of Offer by failing to avail all the required security documents and in particular it failed to avail duly executed charge documents over Title No. Mombasa/Block 1/256 which was to be created by Mantel Limited ("the Mantel Property"), a guarantor of the Plaintiff. The Bank avers that by failing to avail the missing securities, the Plaintiff failed to meet the timelines stipulated in the Letters of Offer. Consequently, the delays caused the period required for completion of the payment and registration of securities under the professional and financial undertakings set by the advocates for the Bank and Bank of Baroda to lapse. The entire transaction was therefore cancelled with the result that the Plaintiff could not draw down facilities under the Letters of Offer. The Bank had no option but to cancel the offer of facilities as it would have been exposed to possible legal obligations to the Bank of Baroda and legal fees to its advocates.

9. The Bank contends that following the Plaintiff's fundamental breach of the Letters of Offer, it was released from any obligation under the Letters of Offer and was no longer obligated to proceed with the offer of facilities. Further, the Plaintiff having failed to honour the terms of the Letters of Offer, is estopped from alleging breach of contract. The Bank also denies that the Plaintiff is entitled to the remedies sought in the Plaintiff and prays that the suit be dismissed.

#### **Matters in issue.**

10. Before I consider the substantive issues regarding the application, I propose to dispose of an objection raised by the Bank. It argues that the application is defective as the deposition sworn in support thereof is sworn by the advocate on record who does not have any knowledge of the matters in issue and is inadmissible as the advocate did not represent the Plaintiff in the subject transaction.

11. Without belabouring the issue, I think the point is answered by the Court of Appeal in ***Kamlesh Manshuklal Damji Pattni v Nasir Ibrahim Ali and 2 Others*** NAI CA Civil Appl. No. 354 of 2004 [2005] eKLR it observed that:

*Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII r 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information and the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available. The affidavit in reply in ***Kenya Horticultural Exporters Ltd case (Supra)*** was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them. [Emphasis mine]*

12. The application before the court is one to strike out the Statement of Defence based on a transaction that is proved by documents. These documents form the basis of the information that the Advocate has deponed. The affidavit therefore meets the fundamental principle of affidavits that the deponent must swear to facts which are of his own knowledge or belief grounded on facts whose sources are disclosed. As relates to this case, the jurisdiction this court is called upon to exercise is summary in nature. It does not admit any cross-examination hence the likelihood of embarrassment by the Advocate is unlikely. I therefore dismiss this objection.

13. The principles upon which the court acts in considering applications to strike out pleadings under **Order 2 rule 15** of the ***Civil Procedure Rules*** have been settled in several cases. The court is guided by the general principle that striking out of a pleading is a draconian act and that it should be circumspect in doing so unless there are clear grounds. In ***D.T. Dobie & Company (Kenya) Ltd v Muchina*** [1982] KLR 1 the **Court of Appeal expressed the principle 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.*

#### **Whether the Statement of Defence raises any triable issue**

14. Bearing the foregoing principle in mind, does the Statement of Defence raise any triable issues? The Plaintiff's case is that the Bank failed to fulfil the terms of the Letter of Offer dated 31<sup>st</sup> March 2016 as amended by the Letter of Offer dated 15<sup>th</sup> June 2016. The Bank states that the Plaintiff failed to provide an executed charge and consent to charge the *Mantel Property* which was one of the properties to become security for the facility.

15. I have read the documents referred to in the deposition in support of the application and in particular the bundle of documents filed by the Plaintiff, I do not see any executed charge and consent to charge relating to the *Mantel Property* forwarded to the Bank's advocates. It is worth noting that under Clause 19 of the Letter of Offer dated 31<sup>st</sup> March 2016, the Bank reserved the right to withdraw the offer if the security documents were not executed within 60 days from the date of the offer and draw down commenced within 90 days from the date of

the offer. It is of course arguable that the time started running from the date of the amended Letter of Offer. Apart from merely annexing security documents excluding the charge over the subject property, the Plaintiff has not shown affirmatively, say by producing a forwarding letter duly acknowledged that it forwarded to the Bank's advocates the said charge within the time contemplated by the Letters of Offer.

16. On the other hand, the Bank produced correspondence to show that the Plaintiff did not forward the executed charge and consent to charge. In a letter dated 17<sup>th</sup> August 2016, the Plaintiff's advocates, *Gathaiya and Associates*, forwarded several documents including a discharge of charge for the subject property. It did not forward what was required causing the Bank's advocates, *Coulson Harney*, to call for the same in several emails dated 13<sup>th</sup> June 2016, 13<sup>th</sup> July 2016, 12<sup>th</sup> August 2016, 1<sup>st</sup> September 2016 and 14<sup>th</sup> September 2016. Since the Plaintiff did not forward the documents respecting the subject property, *Coulson Harney* wrote to *Gathaiya Associates* the letter dated 13<sup>th</sup> October 2016 returning all the other security documents that had been forwarded to it.

17. All this evidence shows that the Plaintiff failed to comply with the terms of the Letters of Offer. I merely say that this is evidence of at least a triable issue as I am not required to conduct a mini trial to ascertain the true meaning, the tenor and effect of all the correspondence. In other words, the true tenor of the documents including correspondence will only be clarified at the trial.

18. The Plaintiff has accused the Bank of fraud and misrepresentation in the manner it dealt with the entire transaction. In my view, allegations of fraud are serious and cannot be determined through a summary process. This position was affirmed in *Cannon Assurance Company Kenya Limited v Peter Omonywa KSI HCCA No. 243 of 2009 [2014] eKLR*, where the Court observed that

*[16] In my humble view, allegations of fraud once raised cannot be decided in an interlocutory application and have to wait till trial so that evidence can be adduced to demonstrate how the alleged fraud may have taken place.*

### **Disposition**

19. It must be clear from the foregoing exposition of the facts of the case and the applicable law, that the Statement of Defence cannot be struck out as it raises issues fit for resolution at a trial.

20. I dismiss the Notice of Motion dated 8<sup>th</sup> June 2020 with costs to the Defendant.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of JANUARY 2021.**

**D. S. MAJANJA**

### **JUDGE**

Court of Assistant: Mr M. Onyango

Mr Terer instructed by Mutai and Company Advocates for the Plaintiff.

Mr Mwangi instructed by Macharia-Mwangi and Njeru Advocates for the Defendant.