REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL CASE NO. 5 OF 2019

ALEX KIPCHIRCHIR RONO.....PLAINTIFF/APPLICANT

VERSUS

LOMSONS ENTERPRISES LIMITED.....DEFENDANT/RESPONDENT

RULING

The applicant by a Notice of Motion dated 2nd May, 2019 and filed in court on 3rd May, 2019 seeks orders;

1. That the defendant's statement of defence dated 26th February, 2019 be struck out with costs.

2. That this Honourable Court be pleased to enter summary judgement against the defendant/respondent in the principal sum of Kshs. 21,000,000.00 owed to it by the plaintiff together with interests at the prevailing commercial rates.

3. That in the alternative and without prejudice to the above, the defendant/respondent be ordered to furnish security within 14 days or such period as the court may direct for the full payment for the sum of Kshs. 21,000,000.00 which amount forms the subject of these proceedings.

4. That costs of this application be borne by the defendant/respondent.

The application is supported by grounds on the face of the motion and an affidavit in support by one Alex Kipchirchir Rono. The stated grounds are couched in the following terms:

a. That the applicant's claim is for the sum of Kshs. 21,000,000.00

b. That the defendant/respondent is truly indebted to the plaintiff/applicant.

c. That the applicant is seeking judgment for a liquidated sum with interest.

d. That the defence entered by the defendant/respondent consist of mere denials.

e. That the defendant/respondent's defence does not disclose any triable issues.

f. That the plaintiff/applicant is entitled to expeditious disposal of his case without unnecessary delays.

g. That the defendant/respondent's only known property, ELDORET MUNICIPALITY BLOCK 14/1095, is charged with Guarantee Trust Bank Ltd.

h. That vide orders dated 27th July, 2017 the environment court set aside inhibition orders registered over the above title to enable the bank, Guarantee Trust Bank Ltd, to exercise its statutory power of sale.

i. That the applicant in the premises is apprehensive that the respondent herein is out to defeat court process and his right to be indemnified.

j. That the plaintiff has filed this application expeditiously.

k. That the application is brought in good faith.

l. That it is in the best interest that the prayers sought are granted.

The defendant/respondent opposed the said application through the sworn affidavit of Jeremiah Koskei Bowen dated 22nd May, 2019.

The application was canvassed by way of written submissions which the court has duly considered together with the supporting affidavit and the replying affidavit.

ANALYSIS AND DETERMINATION.

a. Whether the matter is *res judicata*?

The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"***

The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and raise unnecessary costs on the parties who may litigate and defend two suits which ought to have been determined in a single suit and;

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings, instead of appealing.

In order to decide whether this case is *res judicata*, the court should look at the decision claimed to have settled the issues in question and the entire pleadings of the said case and the instant case to ascertain;

i. The issues raised and determined in the previous case;

ii. whether they are the same issues sought to be determined in this particular case.

iii. whether the parties are the same and are litigating under the same title and whether the previous decision was by a court of competent jurisdiction.

The said test on issue of res judicate was applied in ***Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR,*** as follows; whether,

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

Looking at the issues raised in the present suit as well as the previous suit (**ELDORET ELC NO. 6 OF 2015),** this court finds that the issues therein are distinct from those in this current suit. In the other suit the plaintiff/applicant sought to restrain Consolidated Bank of Kenya Limited from exercising its statutory power of sale whereas in this instant suit the plaintiff/applicant seeks to recover money from the defendant/respondent by virtue of him being a guarantor. It is therefore my finding that this matter is not *res judicata* as suggested by the defendant/respondent.

b. Whether the suit is time barred?

Section 4(1) (a) of the *Limitations of Actions Act* provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

The defendant/respondent has submitted that the suit is time barred. It is asserted that the plaintiff/applicant's claim is time barred as the six (6) years limitation period for actions in contract has lapsed. The contended cause of action allegedly arose on 13/2/2016. The plaintiff herein has refuted the said assertions stating that the amount of Kshs.21,000,000.00 forming the subject of these proceedings was paid on 20th May, 2016 and 12th January, 2017 when the last installment was paid. The plaint herein was filed on 29th January, 2019, and even going by the

defendant/applicant assertion that the cause of action arose sometimes on 13/2/2016, it is clear that this suit is not time barred as was filed within the stipulated 6 years period.

c. Whether the defendant's statement of defence dated 26th February should be struck out with costs?

A perusal of the defence shows that it raises triable issues and should not be struck out at this stage. The principles that guide the court in determining whether to strike out a pleading were set out in the case of ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR*** by Madan JA thus:

> ***The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.***
>
> ***If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***
>
> ***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.***

In ***Saudi Arabian Airlines Corporation v Sean Express Services Ltd Civil Case No. 79 of 2013 [2014] eKLR*** the court held:

> ***I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal 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 in Article 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 counter-claim. 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 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 'demurer 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 bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.***

In the substantive suit, the plaintiff/applicant claims that the respondent herein was advanced a loan facility of Kshs. 22,000,000.00 by Consolidate Bank Limited vide a charge dated 8/8/2012 and he stood as a guarantor for the defendant. The applicant avers that he deposited his title deed over that parcel of land known as ELDORET MUNICIPALITY BLOCK 7/190 as security for the aforesaid loan facility and the same was accordingly charged to Consolidated Bank of Kenya and that he duly executed the deed of guarantee in favour of the defendant herein securing the aforesaid loan facility.

The applicant claims that vide statutory notice dated 31/1/2014 the chargee, Consolidated Bank of Kenya Limited, initiated enforcement of its rights under the charge and guarantee instruments due to default in servicing of the said loan by the respondent. The applicant further claims that vide an order dated 13/5/2016 in ELDORET ENVIROMENT AND LAND CASE NO.6 OF 2015 he paid the amount he guaranteed the defendant herein in the aforesaid charge and deed of guarantee to the tune of kshs. 21,000,000.00 and his title was discharged thereon by the charge.

The defendant's filed a statement of defence dated 26th February, 2019 denying the averments made in the plaint. The defendant further accuses the plaintiff for fraud and also disputes the sums of monies claimed by the plaintiff. The defence clearly raises numerous triable issues. I am not persuaded that the defence is a sham. The issues raised therein are substantial issues that should be determined on merit.

d. Whether summary judgement should be entered against the defendant/respondent for the principal sum of Kshs. 21,000,000.00?

The procedural law under Order 36 rule 1 of the Civil Procedure Rules on summary judgment provides that:

> ***1. In all suits where a plaintiff seeks judgment for –***
>
> ***a. a liquidated demand with or without interest; or***

b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

A plain reading of the above rule shows that a court will grant the plaintiff summary judgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence. The Court of Appeal stated in the case of ***Harit Sheth T/A Harit Sheth Advocates V Shamas Charania Civil Appeal No. 252 OF 2008 [2014] eKLR,*** in determining an appeal from the High Court where the court entered summary judgment in favour of the respondent for KShs.32 million, with interest at court rates from the date of the suit, as well as costs, the court held:

"The principles which guide our courts in determining applications for summary judgment are not in dispute.

In Industrial & Commercial Development Corporation Vs Daber Enterprises ltd, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.(emphasis mine)

(See also CONTINENTAL BUTCHERY LTD V NDHIWA, (1989) KLR 573). (Emphasis added)

From the above cited decision, it is clear that where there are no triable issues disclosed, the court cannot sustain a defence on record. In the instant case it is not disputed that the defendant has filed a statement of defense. In that defense the defendant has admitted the plaintiff stood surety for a loan facility to a sum of Kshs. 22,000,000.00 and personal guarantee of Kshs. 31,000,000.00. The defendant however denies that it was advanced with a loan facility of Kshs. 22,000,000.00 and claims that the loan facility that was advanced by Consolidated Bank of Kenya Limited was Kshs. 76,023,660.00. The defendant also contends that the loan amount was never for the benefit of the defendant but rather for the exclusive use by the plaintiff. The defendant also contends that instead of the plaintiff paying part of the loan, the plaintiff refused to service the loan saying that the defendant should pay. The defendant claims to have paid its part of the loan but was unable to complete and subsequently notices were issued in an effort to realize the security which is a sum of Kshs. 66,673,420.00.

The question therefore is whether, on these facts, this court would find that there was an admission of the claim or that there is no triable issue capable of being ventilated through a full hearing.

The Court of Appeal in ***Job Kilach V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR*** observed that:

"Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

From the foregoing, I find that this court cannot grant summary judgment to the plaintiff/applicant, I am satisfied that the defence raises triable issues which need to be determined by this court at a full trial.

The defendant should be given the opportunity to defend the suit. The defendant has denied that the loan facility was for its benefit and has also stated that it paid up its part of the said loan. The loan facility advanced to the defendant is the subject of these proceedings. In my view the issues raised in the defence require judicial examination to determine whether or not there was breach of contract and whether or not the plaintiff is entitled to the prayers sought in the plaint. Those, in my view, are bona fide issues which ought to be allowed to go to trial.

e. Whether a call for security of costs by the plaintiff/applicant should issue?

An order for security for costs is a discretionary one as per the provisions of Order 26 rule 1 of the Civil Procedure Rules which is the relevant provision in these circumstances. It confers discretion on the court, which is recognition that there may be circumstances where a call for security for costs may be undeserved. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judiciously by taking absolute reference to the circumstances of each case. Such matters as;

(a) absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;

(b) the general financial standing or wellness of the plaintiff;

(c) the bona fides of the plaintiff's claim; or

(d) any other relevant circumstance or conduct of the plaintiff or the defendant the list is not even exhaustive.

In the case of ***Jayesh Hasmukh Shah Vs Narin Haira & Another (2015) eKLR*** the court held;

> ***"It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account".***

In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of ***Kenya Education Trust Vs Katherine S.M. Whitton Civil Appeal No 310 of 2009.*** It should, however, be noted that much will depend on the circumstances of each case.

The applicant herein has submitted that the respondent has charged his only known asset and property and it is therefore fair for this court to provide for security for costs to satisfy judgement that may result. The defendant on the other hand has denied the said assertions. I am alive to the fact that at this stage, the court should not consider the merits of the case or the defendant's defence as these issues will be determine during trial. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be unfair in the circumstances of this case, to order the plaintiff to deposit the sought for, security for costs.

I therefore find no merit in the application dated 2nd May, 2019 and I hereby dismiss it with costs to the defendant/respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY, 2021.

In the presence of:-

Ms Kibet holding brief for Mr. Kibii for the plaintiff

Ms Njomo holding brief for Mr. Mang'are for the defendant

Ms Gladys - Court assistant