REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. E004 OF 2020

SIMON KIRIMA MURAGURI.....1ST PLAINTIFF/APPLICANT

AWALI TUMAINI INVESTIMENT LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

EQUITY BANK (KENYA) LIMITED.....1ST DEFENDANT/RESPONDENT

ANTIQUE AUCTIONS AGENCIES.....2ND DEFENDANT/RESPONDENT

RULING

1. The applicants took out a motion on notice dated 11th January 2020 under sections 1A, and 3A of the Civil Procedure Act (Cap 21) and Orders 2 rule 15, and 51 rules 1 and 3 Civil Procedure Rule, 2010, seeking to strike out the respondents' defence dated 3rd December 2020 and entry of judgment in their favour.

2. The motion is premised on the grounds on its face and on the affidavit sworn by the 1st applicant. In summary, the grounds are that the respondents' defence offends Order 7 rule 5 which requires that the defence be accompanied with a list of witnesses to be called; that the defendants have not tendered statements of account before the court and the amount owed remains unknown and that the 1st respondent continues to load interest onto the account based on unknown outstanding balance, among other grounds.

3. The 1st applicant also swore an affidavit on the same day deposing that the defence is a mere denial which does not respond to specific issues raised in the plaint; that it is untenable for the respondents to deny in general terms that they are strangers to the matters pleaded in the plaint and that their defence is vague. The 1st applicant states with particular reference to paragraphs 5 and 10 of the defence, that they are mere conjectures and insinuations to their claim. It is the 1st applicants' deposition, that the defence does not provide evidence that would aid the court in making a just determination of the matter. He therefore urges that the suit be struck out.

4. The respondents have filed a replying affidavit by Peter Mbuthia sworn on 29th January 2021.He deposes that their defence does not offend Order 7 rule 5 since the order allows statements under rule 5(c) to be furnished latter prior to pre-trial conference. He also deposes that the defence filed raises triable issues as the 1st defendant is exercising its statutory power of sale that has matured. According to the deponent, the power to strike out pleadings is discretionary and should be invoked cautiously.

5. The deponent further states that although the applicants ask that judgment be entered in their favour, they state at Paragraph 3 of their grounds in support of the motion, that they are willing to settle the outstanding amount. He states that they have a desire to amend their defence and, therefore, the application should be dismissed with costs.

6. Parties have filed written submissions in disposing this application. The applicants submit through their written submissions dated 5th March 2021 that they have made a case for striking out the respondents' defence. They cite Order 2 rule 15(1) which allows the court to strike out pleadings under certain circumstances, including where the defence does not disclose a reasonable defence; or it is frivolous; or vexatious.

7. The applicants rely on ***Job Kilach v Nation Media Group Ltd; Salaba Agencies Ltd & Michael Rono*** [2015] eKLR on the principles applicable is striking out pleadings. They also cite ***Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Invesco Assurance company Limited*** [2019] eKLR on when a defence may be struck out for being scandalous, frivolous, vexatious or otherwise an abuse of the court process.

8. The applicants again cite ***Kenya Commercial Bank Ltd v Suntra Investment Bank Ltd*** [2015] eKLR for the argument that a plaintiff should not be kept away from judgment by an unscrupulous defendant who has filed a defence which is a sham for the purpose of temporizing the case for as long as possible.

9. The applicants further submit that the defence does not amount to a plausible defence; it is frivolous and lacking in substance. They argue that the defendants have not stated how much they admit and how much they deny despite their specifically pleaded claim. It is their case that the nature of the defendants' defence will delay a fair trial of their case in violation of Article 50(1) of the Constitution. They rely on ***Pinnacle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & Another*** [2018] eKLR, that the right to a fair hearing includes, the right of access to court and the right to be heard by a competent, independent and impartial tribunal.

10. According to the applicants, the respondents have been given sufficient opportunity to adduce evidence and challenge their case and the court cannot be subjected to a perpetual state of inertia by the respondents who have taken to obscure factual and evidentiary material that would be essential for a meaningful trial. They rely on ***Kenya Commercial Bank Ltd v Suntra Investment Limited*** (Supra).

11. The applicants again argue, citing Order 7 rule 5, that the rule requires a defendant's defence to be accompanied by documents which the defendants did not include. They also cite section 117 of the Evidence Act on good faith and Order 13 rule 12 that a party may seek judgment on admission. They submit that the respondents cannot argue that they will be condemned unheard and cite ***Law Society of Kenya v Centre for Human rights & Democracy & 12 others*** [2014] eKLR that Article 159 (2) (d) is not a Panacea for all procedural short falls.

12. The respondents submit through their written submissions dated 5th February 2021, that their defence raises triable issues. Regarding striking out of pleadings, they rely on ***Britam General Insurance Ltd v Ukwale Agnes Ngungu*** [2019] eKLR that principles of Civil Procedure are grounded on the principle of natural justice that no man should be condemned unheard.

13. According to the respondents, their defence filed on 3rd December 2020 and the replying affidavit of 2nd February 2021 raise triable issues. They rely on ***Madison Insurance Company Limited v Augustine Kamanda*** [2020] eKLR on when a matter is considered scandalous, frivolous and an abuse of the court process. In their view, Order 2 Rule 15 relied on by the applicants to seek to strike out their defence, falls outside the ground for striking out pleadings. Under that rule, failure to file a list of witnesses at the time of filing defence is not a ground for striking out a defence.

14. The respondents further argue that striking out of pleadings involves exercise of discretion which should be exercised only in the clearest of cases and sparingly. Where there is doubt, the court should allow parties to have their day in court. They cite ***Co-operative Merchant Bank Limited v George Fredrick Wekesa*** (CA No. 54/1999) for the argument that striking out of pleadings is a draconian act which may only be resorted to in plain cases.

15. According to the respondents, their defence states clearly that they procedurally activated their statutory power of sale; that the applicants are indebted to them, an issue that has been raised in the defence and that they filed documents in support of their defence. They cite ***DT. Dobie & Company Limited v Joseph Mbaria*** [1982] I KLR, that no suit ought to be summarily dismissed unless it is so hopeless that it plainly discloses unreasonable cause of action. They urge the court to dismiss the applicants' application arguing they have intimated at paragraph 9 of their replying affidavit their intention to amend their defence.

16. I have considered the application, the supporting grounds and those in opposition. I have also considered submissions by parties and the decisions relied on. The applicants have moved this court under Order 2 rule 15 of the Civil Procedure Rules to strike out the respondents' defence. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexations; for being prejudicial or embarrassing or for being an abuse of the court process.

17. The applicants' argument is that the respondents did not attach a list of witnesses together with their defence which in their view is a violation of Order 2 rule 5 of the rules of procedure and which calls for striking out of the defence. The applicants go on to state that the respondents have refused to tender before this court statements of account, the subject of this suit to enable the court render justice to the matters in dispute.

18. I have considered parties' arguments for and against this application. The applicants' claim, according to their plaint dated 12th October 2020, is that they borrowed Kshs. 90,000,000 from the 1st respondent and offered the property, the subject of this suit, as security and the money was disbursed in the manner parties had agreed. They state that they painstakingly serviced the loan but according to them, something went wrong resulting into an overcharge on the account which they blame on the 1st respondent's breach of statutory and contractual obligations.

19. In the prayers, the applicants seek an injunction stopping the respondents from selling the security, an order compelling the 1st respondent to furnish statements of account, an order compelling the 1st respondent to adjust the amount to be found legally owing and refund of the amount irregularly drawn, among other prayers.

20. I have also perused the respondents' defence dated 3rd December 2020. At paragraph 3, the respondents state just like the applicants, that they advanced a facility of Kshs. 90,000,000 to the applicants which was disbursed. At paragraph 5, they state that the applicants defaulted in servicing that facility and the 1st respondent issued necessary statutory notices to the applicants. They state that the notices were ignored and the 1st respondent instructed the 2nd respondent to advertise the property (security) for sale.

21. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In ***Postal Corporation of Kenya v I .T Inamdar & 2 Others*** *[2004] 1 KLR 359, the* court stated that *the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.*

*22. In **Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu & Another** **[2009] eKLR**, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be bona fide.*

23. In ***The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa*** **(Civil Appeal No. 54 of 1999)** the Court of Appeal stated:

> ***Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.***

24. In ***Yaya Towers Limited v Trade Bank Limited (In Liquidation)*** **(Civil Appeal No. 35 of 2000)** the same court expressed itself thus:

> ***A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.***

25. *Similarly, in **D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another*** [1980] eKLR, **Madan JA,** stated:

> ***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.***

26. The respondents' defence is not frivolous or vexatious. It states that the applicants defaulted in loan repayment forcing the 1st respondent to summon its statutory power of sale and served the statutory notices. That is a triabe issue. Whether the applicants are in default or not and whether notices were served on not are issues that will be determined after hearing the parties.

27. The fact that the respondents did not attach a list of witnesses is not, in my view, a ground for striking out a defence. The list can be given later and even parties can change witnesses. These are issues that are sorted out during pre-trial conference. The reasons given by the applicants for seeking to strike out the defence are not compelling.

28. Applying the principles in the decisions cited above to the present circumstances and the application before this court, the conclusion I come to, is that the application lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD DAY OF JULY 2021.

E. C. MWITA

JUDGE