REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. EO83 OF 2019

DEVELOPMENT BANK OF KENYA LIMITED .....PLAINTIFF

VERSUS

1. AMBROSE DICKSON OTIENO RACHIER

2. OTIENDE AMOLLO

3. J. OKOME ARWA

4. FRANCIS OLALO

5. STEPHEN LIGUNYA all trading as

RACHIER & AMOLLO ADVOCATES

6. MARENYO LIMITED.....DEFENDANTS

RULING

INTRODUCTION

1. Through an amended plaint filed on 31st May 2019, the plaintiff herein, who describes itself as a limited liability company and a banking institution, sued the 6 defendants herein seeking the following orders:-

A. kshs 179,867,449.71

B. Compound interest on (a) above at 13% p.a. from 31st May 2019 until payment in full.

C. Costs of the suit.

2. A summary of the plaintiff's case is that at the request of the 1st to 5th defendants (hereinafter **"R&A"**), it extended financial facilities to them that enabled them to overdraw their account No. (*particulars withheld*) to the tune of Kshs 177, 903,203.38 as at 30th April 2019 and that the 6th defendant guaranteed the repayment of the said loan facility .

3. R&A denied the plaintiff's claim through the statement of defence and counterclaim dated 7th May 2019 wherein they state that the plaintiff breached the duty of care that it owes each of the defendants not to expose them to risk arising out of any unauthorized, illegal and/or fraudulent acts. They claim that the plaintiff allowed illegal/irregular /fraudulent withdrawals from the said account that had the effect of depleting all the money in their account. They maintained that their account should have a credit balance of Kshs 89,476,436.06. R&A seek the following prayers in the counterclaim;-

a) The plaintiff's suit be dismissed.

b) A declaration that the amounts of money illegally withdrawn by the plaintiff as particularized in paragraph 5(d) and (e) above should be returned to the said account.

c) A declaration that the plaintiff was not entitled to levy interest on the sums illegally withdrawn from the said account as particularized in paragraph 5(f) above.

d) A declaration that the said account has a credit balance of Kshs 89,767,436.06 and not debit balance of kshs 174,098,576.33 as claimed by the plaintiff.

e) Judgment be entered for the defendants as against the plaintiff in the sum of kshs 89,767,436.06.

f) Compound interest on (b) above at 13% p.a. from the date when each of the sums promised in (b) above were withdrawn from the said account till the date of payment in full.

g) Cost of this suit and of the counterclaim.

Application dated 6th September 2019

4. Through the application dated 6th September 2019, the defendants seeks the following orders:

1. That this honourable court be pleased to strike out the amended plaint filed herein on 30th day of May, 2019 on grounds that it does not disclose a reasonable cause of action as against the defendants and is therefore scandalous, frivolous, vexatious and is otherwise an abuse of the process of court.

2. That this honourable court be pleased to strike out the plaintiff's reply to defence and defence to counterclaim filed herein on 30th day of May, 2019 on grounds that the same does not disclose a reasonable cause of defence to the defendants' counterclaim and is therefore scandalous, frivolous, vexatious and therefore an abuse of the process of court.

3. That this honourable court be pleased to enter judgment for the defendants in terms of their counterclaim filed herein on the 8th day of May 2019.

4. That costs of this application as well as of this suit and the defendant's counterclaim be borne by the plaintiff.

5. The application is premised on the grounds that the amended plaint dated 30th May 2019 does not disclose any reasonable cause of action as against the 1st-5th defendants, besides being scandalous, frivolous and vexatious. They further state that the plaintiff's reply to defence and defence to counterclaim (hereinafter **"RDDC"**) does not disclose any reasonable defence to the defendants counterclaim. They contend that since the only issue raised in the defendants' counterclaim is the negative claim that R&A never authorized the withdrawals, it follows that no hearing can be conducted in proof of the said counterclaim in the face of failure, by the plaintiff, to furnish particulars and/or any documentary proof of the alleged authorizations. It is the defendants' case that the only option available to this court is to grant the orders sought in the counterclaim.

The 6th defendant's case.

6. On 27th September 2019 the 6th defendant filed its statement of defence to the amended plaint wherein it states that it was not privy to the bank –customer relationship between the plaintiff and R&A. It is the 6th defendant's case that it is not indebted to the plaintiff as alleged and denies that it guaranteed the repayment of the alleged loan.

6th defendant's application.

7. Through the application dated 12th November 2019, the 6th defendant similarly seeks orders to strike out the amended plaint on the grounds, *inter alia*, that it is frivolous vexations, scandalous and raises no cause of action. The 6th defendant reiterates that it is not liable to repay the plaintiff the amount of money claimed as it did not guarantee the repayment.

Plaintiff's application.

8. Through the application filed on 6th June 2019, the plaintiff seeks the following orders:

1. Spent

2. That pending the hearing and final determination of this application the court be pleased to prohibit all dealings in the following properties.

i. L.R. No. 25469 Embakasi Area, Nairobi belonging to the 6th defendant

ii. L. R No. KJD/MAILUA/1410 belonging to the 1st defendant.

iii.Flat No. 3, one type "A" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as

I.R. No. 92070/9 belonging to the 1st defendant; and

iv. Flat No. 2, one type "B" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as I.R. No. 92070/9 belonging to the 1st defendant.

3. That the honourable court be pleased to grant leave to the plaintiff bank to sell public auction the following properties of the 1st defendant to reduce the loans advanced to Rachier & Amollo Advocates now owing to the tune of Kshs 179,867,449.70 at 31st May 2019 with compound interest at 13% p.a. until full payment namely:-

i. L.R. KJD/MAILUA/1410;

ii. Flat No. 3, one type "A" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as I.R. No. 92070/9; and

iii. Flat No. 2, one type "B" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as I.R. No. 92070/9.

4. That the honourable court be pleased to grant leave to the plaintiff bank to sell by public auction the property of the 6th defendant known as L.R. No. 25469 Embakasi, Nairobi to reduce the loans advanced by the plaintiff to Rachier & Amollo Advocates and Guaranteed by the 6th defendant now outstanding to the tune of kshs 179,867,449.70 at 31st May 2019 with compound interest at 13% p.a. until full payment.

OR IN THE ALTERNATIVE

5. Pending the hearing and final determination of this suit, the honourable court be pleased to prohibit all dealings in the following properties namely;-

i. L.R. No. 25469 Embakasi Area, Nairobi belonging to the 6th defendant.

ii. L.R. No. KJD/MAILUA/1410 belonging to the 1st defendant

ii. Flat No. 3, one type "A" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as I.R. No. 92070/9 belonging to the 1st defendant; and

iii. Flat No. 2, one type "B" in block "A" East Church Flats erected on L.R. No. 1870/V1/61, Westlands and registered as I.R. No. 92070/9 belonging to the 1st defendant.

6. Costs be provided for.

9. The application is supported by the affidavit of the plaintiff's Credit Manager **Ms Olga Sechero** and is premised on the grounds that:

a) The 1st defendant deposited with the plaintiff bank, the original title deed to his property known as L.R. No. Kajiado/Mailua/1410 to secure advances made to his firm, Rachier & Amollo Advocates;

b) The 6th defendant guaranteed the full repayment of debts advanced by the plaintiff to the firm of Rachier & Amollo Advocates to the aggregate of Kshs 167,000,000/= then outstanding at 1st March 2016, with interest thereon;

c) The 6th defendant in addition to the guarantee was to provide additional security by way of charge over its property to secure repayment of advances to the firm of Rachier & Amollo Advocates but failed to do so;

d) The defendants also deposited with the plaintiff titles to L.R. 9892,9878 and 1870/VI/61 to secure repayment of advances to his firm Rachier & Amollo Advocates;

e) The 1st defendant owns two flats on 1870/V1/61 known as Each Church Flats which he pledged as security to repay this debt;

f) At the request of the defendants, the plaintiff released to them the titles to the said properties to L.R. 9892, 9878 and 1870/VI/61 for purposes of sale to settle their accounts but it turned out to be a ruse to deprive the plaintiff its securities.

g) The defendants have offered the property L.R. No. 25469 Embakasi belonging to the 6th defendant to secure the debts of Rachier & Amollo Advocates;

h) The defendants have not agreed to execute Legal Charge over the said properties and they remain informal charges to secure debts owed to the plaintiff;

i) The defendants no longer bank with the plaintiff and are likely to dispose of their mentioned assets to deprive the plaintiff its securities;

j) That by dint of this suit, the defendants are likely to encumber, deal or transfer their mentioned properties out of reach of any order the court may make a final hearing;

k) The firm of Rachier & Amollo has repeatedly admitted this debt;

l) The plaintiff is apprehensive that the defendants may transfer or deal in the properties to defeat the debt herein;

m) The defendants now owe the plaintiff Kshs 179,867,449.70 at 31st May 2019 with interest thereon which sum they have refused to service or formally secure;

n) The plaintiff is unable to trace any other free and attachable assets of the defendants to recover this debt;

o) The defendants have no intention of repaying this debt to the plaintiff bank;

p) The plaintiff has large claims against the defendants which may be defeated if these prayers are not granted; and

q) The orders sought readily commend themselves in the light of the facts of this case.

10. R&A opposed the plaintiff's said and the 6th defendant's application dated 12th November 2019 through the 5th defendant's replying affidavit wherein he avers that **R&A** has never requested for and was never granted any credit and/or overdraft facility from the plaintiff as alleged in the plaint.

11. He further states that **R&A** never requested the 6th Defendant to guarantee any debt allegedly owed to the plaintiff and is completely unaware of the alleged guarantee. He avers that loans that **R&A** secured from the plaintiff were fully repaid and that the alleged debt arises out of sums of money that were illegally withdrawn from their account by third parties without their knowledge and/or authorization. He contends that all the request by **R&A** to be furnished with written authorization for each of the impugned withdrawals have been ignored by the plaintiff.

The plaintiff's response to the application by R&A dated 6th September 2019 and the 6th defendant's application dated 12th November 2019.

12. Through the replying affidavit its Credit Manager **M/S Olga Sechero,** the plaintiff states that R&A are partners in the law firm of **Rachier & Amollo** and were the plaintiff's customers with a long record of good standing. She states that the said advocates were also trusted by the plaintiff's external advocates and that they enjoyed the plaintiff's banking facilities which enabled them to overdraw their accounts including the subject account No. (*particulars withheld*) held at Loita Street Branch upon the security of fixed deposits and deposit of original title deed to LR No. Kajiado/ Mailua/1410. She attached the copy of the defendant's letter dated 12th November 2013 forwarding the title to the plaintiff on this arrangement as annexure **"0S-1"** to the replying affidavit.

13. She states that on 15th October 2015, the firm of **Rachier & Amollo** received two payments amounting to a total of Kshs 22,816,736 from the Central Bank of Kenya - Kitui County Accounts but that the said payments were immediately withdrawn by the said firm in large cash transactions as shown in copies of cheques marked as annexures **"0S-2"** and **"0S-3".**

14. She explains that soon after the quick cash withdrawals, the plaintiff bank received information that the two payments were funds stolen from the accounts of Kitui County held at the Central Bank of Kenya (CBK) and that Central Bank of Kenya demanded that the plaintiff debits the accounts of **Rachier & Amollo** and refund the money.

15. She adds that the bank relayed the information from Central Bank of Kenya to the 1st defendant, a senior partner in the law firm of **Rachier & Amollo** who promised to go to the bank to demonstrate that they were entitled to the payments. She avers that R&A did not produce any documents showing that they were entitled to receive the said funds and that on 3rd November 2015 the Chief Magistrate's Court at Kitui issued orders freezing the subject account of **Rachier & Amollo** in Kitui Miscellaneous Application No. 270 of 2015 and allowed the police to investigate the transactions on the said account. A copy of the court order was attached to the replying affidavit as annexure **"0S-4".**

16. She states that the plaintiff acted on the court order and froze the account of **Rachier & Amollo** after which the 1st defendant requested the bank to settle the debt owing to Central Bank of Kenya Kitui County upon the security of the cash deposits and land titles already deposited with the bank so as to allow them to re-open their account and avert criminal sanctions against their law firm.

17. She further avers that is it on this basis that the plaintiff debited the said account and made a refund to Central Bank of Kenya Kitui County in two payments of Kshs 10,736,589 and Kshs 12,080,147 thereby overdrawing the account and increasing their liability to kshs 74,213,116.47 as at 5th November 2015.

18. She states that it is after the refund of Central Bank of Kenya that **Rachier & Amollo** filed an application in Kitui CMC CR. 270/2015 seeking the setting aside of the freezing order on the basis that they had refunded the money to Central Bank of Kenya, and that on 3rd November 2015, the freezing order was lifted as shown in the court order marked **"0S-6"**. She further explains that the law firm of incurred

additional liabilities that made their debt grow to Kshs 160,544,758.36 as at 30th January 2016.

19. It is the plaintiff's position that the defendants' application to strike out their case on the ground that there is default in supplying them with documents is not merited as they have on numerous occasions and through numerous correspondence answered the defendants' concerns.

20. It is further averred that the defendants' request for documents is not warranted in the circumstances of this case and is an attempt to frustrate the plaintiff's case.

21. In response to the 6th defendants application dated 12th November 2019, the plaintiff's deponent avers that the 6th defendant's deponent, **Alvin Samuel Oketch** has concealed his other name, **'Rachier'**, so as to avoid being linked to his father, the 1st defendant and one **John Okello Rachier** who are his co-directors in the 6th defendant company. She states that the 6th defendant's officers properly issued the Guarantee to secure advances made to R&A to the tune of kshs 167,000,000. She further states that the Guarantee was assessed for stamp duty and stamp duty paid on 25th September 2018. It is the plaintiff's case that the guarantee and correspondence are sufficient proof of contract to bind the 6th defendant to the debts of the law firm.

22. In a rejoinder to the plaintiffs replying affidavit, the 5thdefendant swore a supplementary affidavit on 28th January 2020 wherein he avers that the mandate given by the firm of **Rachier & Amollo** expressly prohibited the plaintiff from honouring instructions that were not signed by at least two signatories of **Rachier & Amollo**. He states that it is therefore annoying for the plaintiff to keep presenting letters allegedly signed by the 1st defendant alone and to treat the same as lawful instructions given on behalf of **Rachier & Amollo**.

23. He states that at no point did **Rachier & Amollo** forward to the plaintiff the title for the alleged property known as Kajiado/Mailua/1410 or requested for any guarantee from the 6th defendant. He contends that **Rachier & Amollo** had no knowledge of the deposits of money from Central Bank of Kenya which deposits were transferred by the plaintiff to Central Bank of Kenya without any reference whatsoever to **Rachier & Amollo** and that no correspondence or communication was exchanged between the plaintiff and the defendants over the subject of deposits which the plaintiff stated were sent in error to the accounts of **Rachier & Amollo.**

24. He states that the alleged quick withdrawals referred to by the plaintiff were actually made before the deposits were received. He accuses the plaintiff of malice, and falsehood made in a desperate attempt to salvage hopeless proceedings. He reiterates that the plaintiff has furnished none of the particulars requested in support of any instruction or authorization to make any of the impugned withdrawals.

25. Parties canvassed all the applications by way of written submissions which their respective advocates highlighted at the hearing thereof. This ruling is therefore in respect to the three applications namely:-

a) The plaintiff's application dated 6th June 2019 wherein it seeks leave to sell the 6th defendant's properties listed at paragraphs 3 and 4 in order to reduce the overall debt owed by the defendants.

b) The 1st -5th defendants application dated 6th September 2019 seeking orders to strike out the amended plaint, reply to defence and that judgment be entered for the defendants on their counterclaim.

c) The 6th defendant's application dated 12th November 2019 seeking the striking off of its name from these proceedings.

Analysis and determination.

26. I have carefully considered the three applications that are the subject of this ruling, the submissions by counsel together with the authorities that they cited. Looking at the three applications as a unit, this court gets to the irresistible conclusion that each of the parties herein is eager to have dispute summarily determined, in their favour, at this interlocutory stage without having to hear the merits of the case.

27. The main issue for determination is whether each of the applicant's has made out a case for the granting of the orders sought in their respective applications.

28. I will now turn to determine the three applications as a unit as they were canvassed concurrently. Before doing so, I wish to isolate the undisputed facts to be as follows:

a) That the plaintiff and R&A have had a good and long standing bank/customer relationship spanning several years.

*b) That the 1st-5th defendants are partners in one of the leading law firms in this country being **Rachier & Amollo** (R&A) Advocates.*

c) That owing to their bank/customer relationship, the 1st-5th defendants enjoyed the plaintiff's banking facilities and loans.

d) That on 15th October 2015 two cheques amounting to a total of Kshs 22,816,736 were received in the 1st-5th respondents' account at the plaintiffs bank from Central Bank of Kenya- Kitui County which sum was later refunded, by the bank to the said Central Bank of Kenya- Kitui County.

*e) That the 6th defendant is a company linked to the 1st defendant who is a senior partner in **Rachier & Amollo** Advocates.*

29. The defendants sought the striking out of the amended plaint, the reply to defence and defence to counterclaim. R&A also sought orders for summary judgment against the plaintiff in terms of the prayers in the counterclaim.

30. At the hearing of the application, **Mr. Arua**, learned counsel for the defendants submitted that the plaintiff's claim, as framed, is not ascertainable and is unintelligible as the particulars sought in the defendants' request for particulars have not been furnished.

31. Counsel argued that in the absence of particulars, the defendants had no case to answer as the defendants are not able to comprehend and/or defend the suit unless the particulars of the alleged credit are provided. For this argument, reference was made to the decision in ***Masha Birya & 5 others v Vipingo Estate Ltd & 17 Others*** [2018] eKLR wherein it was held that where the plaint is unintelligible, confused and so muddled up that it cannot be reasonably comprehended or defended, the same ought to be struck out.

32. The 6th defendant sought the striking out of the amended plaint on the basis that it did not guarantee the loan repayments. For this argument the 6th defendant relied on the decision in ***Ebony Development Company Ltd v Standard Chartered Bank Ltd*** wherein it was held:-

> "***The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum."***

33. On its part, the plaintiff maintained that the 6th defendant guaranteed the debt by delivering to it land title documents as security for the debt.

34. On his part, **Mr. Ojiambo**, for the plaintiff maintained that the plaint discloses a reasonable cause of action as the bank statements are not disputed. It was submitted that the court cannot strike out pleadings merely because particulars were not furnished.

Striking out of pleadings

35. Order 2 Rule 15 of the Civil Procedure Rules, establishes the clear principles which guide the court in the exercise of the power to strike out pleadings in the following terms:

> "***15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***(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.***
>
> ***(3) So far as applicable this rule shall apply to an originating summons and a petition."***

36. The language used in the above provision indicates that striking out of pleadings is a drastic measure in litigation that can only be resorted to sparingly and that it is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". Case law is awash with precedents on the subject of striking out of pleadings. I am will highlight a few of the authorities in this ruling but will hasten to heed the judicial caution that in an application such as the one before me, a court should not express any opinion on the matters in issue as that would prejudice fair trial and restrict the freedom of the trial Judge in disposing the case should the suit be ultimately be heard on merit.

37. In ***Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa*** Civil Appeal No. 54 of 1999 the Court summarized the principles as follows:

> ***"The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....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....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."***

38. Courts have taken the position that even though the striking out of a pleading is a draconian measure, the court will nevertheless still resort to it in the exercise of its discretion, where for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. See ***Kivanga Estates Limited v National Bank of Kenya Limited*** [2017] eKLR

39. This is the position that was also taken in ***Trust Bank Limited v Amin Company Ltd & Another*** (2000) KLR 164 it was held:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?"

40. In ***Blue Shield Insurance Company Ltd v. Joseph Mboya Oguttu*** **[2009] eKLR the** Court of Appeal Judges stated:

"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

41. The constitutional underpinning to the requirement that the discretion to strike out pleadings should be exercised sparingly can be found in Article 50 thereof on the right to fair hearing which provides that every person should as much as possible have his day in court and should not unnecessarily be shut out the seat of justice unless his case is so hopeless that it does not warrant the courts time. This principle was expounded in ***Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited*** **NBI HCCC No. 79 of 2013** when the court stated: -

"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."

42. In ***Dev Surinder Kumar Bij v Agility Logistics Limited*** Civil Suit No. 311 of 2013 [2014] eKLR, the court deliberated on an application by the defendant to strike out a plaint and it was held, *inter alia*, that:

"For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1) ,it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant."

43. From the above cited decisions, it is clear that the core principles that a court should consider in determining whether or not to strike out pleadings is that pleadings should not be struck out if there is a semblance of a cause of action or defence. Such a cause of action or defence need not be one with a chance of success. Secondly, the power to strike out must be used sparingly, only in the most plain and obvious cases, and with extreme caution.

44. In closing my analysis on the issue of striking out I will also be guided by the words of the Court of Appeal Judges in ***Crescent Construction Co. Ltd v Delphis Bank Ltd*** Civil Appeal 146 of 2001 [2007] eKLR:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must

not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a nonstarter." (Emphasis added)

45. Applying the test/principles advanced in the above cited cases to the present case, I find that plaintiff's case is one that cannot be said to be unintelligible, confused or frivolous. I note that the plaintiff has explained, in great detail, the circumstances under which the defendants' indebtedness arose. My finding is that the mere fact that the plaintiff has not furnished some particular documents that the defendants expected him to furnish does not necessarily mean that the plaintiff's case is totally hopeless, confused, vexatious or is an abuse of the court process.

46. My understanding of the defendants' position is that the plaintiff will not be able to prove its case in the absence of particulars sought. I find that the mere fact that the defendants believe that the plaintiffs case is weak for lack of sufficient documentary evidence is not a ground for the striking out of the plaintiff's pleadings. I find that the justice of this case will require that the plaintiff be given an opportunity to present its case. I further find that the defendants' claim that the plaintiff's case is unintelligible and impossible to defend cannot be true because the defendants have already filed their defences in court that also include a counterclaim. To my mind, the fact that the defendants filed their statements of defence is clear proof that they were able to understand the plaintiff's case.

Summary Judgment

47. In ***Ideal Ceramics Ltd v Suraya Property Group Ltd*** HCCC No. 408 of 2016 (unreported), the court stated as follows:

"[16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.

[17]The court's power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.

[18]An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)."

48. The principles of the law appear clear and not in dispute when it comes to processing a summary procedure application. In the instant case, the defendants argued that the court should deem the Reply to Defence and Defence to Counterclaim as admissions in view of the fact that the plaintiff did not furnish them with the documents that they had requested for. The defendants further argued that admissions do not have to be direct.

49. Guided by the above-cited authority, I find that it is trite law that courts will enter judgment on admission only where the said admission is clear and unequivocal. In the circumstances of this case, I am unable to find that the plaintiff admitted the defendant's counterclaim or that the alleged admission is clear plain, unconditional, obvious and unambiguous. I note that the reply to defence and defence to counterclaim contain clear denial of the denial of the defendants' claim and cannot by any stretch of imagination be said to constitute admission of the counterclaim. My finding is that the plaintiff has established that it has a prima facie case against all the defendants that may require further interrogation at the full hearing of the case.

Prohibition of dealings in the 1st defendant's properties and leave to sell the 1st and 6th defendant's properties.

50. ***Section 68 (1) of the Land Registration Act 2012*** donates to the Court the powers to grant orders of prohibition. It states that:

"The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge".

51. An order of prohibition or inhibition is similar to a temporary injunction for it prohibits the registered owner of property subject of a dispute from registering any dealings on the said property until the dispute is determined or until the Court granting the said orders decides otherwise. Before issuing such an order, the Court must be satisfied that the applicant has good grounds for that order to be granted, that the property is at risk of being alienated to the applicant's detriment, that the applicant's suit would be rendered nugatory unless the order is granted and also the prejudice likely to be caused to the other party.

52. In the present case, this court takes cognizance of the fact that bank loans and the provision of security for such loans are contracts that are ordinarily governed by written agreements between the parties specifying the action to be taken by the bank in the event of default in loan repayments. In this case, no material was placed before this court to show that the plaintiff will be entitled to sell or restrict dealings in the defendants' properties should the defendants not keep up with the loan repayments. The plaintiff has also not demonstrated that the defendants will not be able to satisfy any decree that may be made against them should the court find in its favor so as to justify the granting of the orders sought in their application filed on 6th June 2019.

53. Turning to the plaintiff's application for leave to sell the 6th defendant's property in order to settle part of the debt, I note that the 6th defendant has in its defence denied being responsible for the 1st-5th defendants' debts. My finding is that owing to the 6th defendant's

express denial of involvement in the 1st-5th defendants' debts it will be necessary for the plaintiff to tender evidence, at the hearing, to establish the 6th defendant's liability for the debts before any orders can be made regarding the sale of its property.

54. In conclusion and having regard to the findings and observations that I have already made in this ruling, I find that all the three applications are not merited and I therefore dismiss them with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of May 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Arwa for the 1st-5thdefendants

Mr. Ojiambo for the plaintiffs

No appearance for Juma for the 6th defendant

Court Assistant: Sylvia