



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 174 OF 2019

BETWEEN

GULF AFRICA BANK LIMITED.....PLAINTIFF

AND

SUZIE GENERAL AGENCIES LIMITED.....1ST DEFENDANT

CYNTHIA NDUNGE.....2ND DEFENDANT

SUSAN NDUKU JOSHUA.....3RD DEFENDANT

RULING

Introduction

1. In its plaint, the plaintiff (“the Bank”) seeks judgment for Kshs. 20,386,681.20 due and owing as at 24th June 2019 with accrued profits and damages together with interest at 20% p.a. against the 1st defendant (“the Company”) and judgment for Kshs. 20,000,000.00 together with profits and damages with interest thereon at a rate of 20% p.a. until payment in full against the 2nd and 3rd defendants. The Bank also prays for costs on an Advocate-Client basis.

2. What is before the court is the Bank’s Notice of Motion dated 22nd February 2020 seeking an order that the defendants’ statement of defence be struck out and judgment be entered for the Bank against the defendants’ jointly and severally as prayed in the plaint.

3. The application was supported by the affidavit of Lawi Sato sworn on 22nd February 2020. It was opposed by the affidavit of Susan Nduku Joshua sworn on 11th May 2020. The parties agreed to canvass the application by written submissions in support of their respective positions.

Plaintiff’s Claim

4. The Bank’s case is set out in the plaint and supported by documents annexed to the affidavit in support of the Notice of Motion.

5. By a letter dated 17th January 2018, the Company was awarded a tender to construct Wamba North Sub-County Water Dam in Samburu County for the sum of Kshs. 56,000,000.00 by the Ministry of Water and Sanitation. In order to finance the contract, the Company approached the Bank for financing support.

6. By a letter of offer dated 12th April 2018 (“the Letter of Offer”), the Bank advanced to the Company, at its request, Kshs. 20,000,000.00 under its Tawarruq Local Purchase Order Finance Facility. In consideration of the plaintiff granting the 1st defendant banking facilities, the 1st and 2nd defendants executed a guarantee and indemnity dated 16th April 2019 (“the Guarantee and Indemnity”). The Company also executed a Letter of Set-off irrevocably authorizing the plaintiff to set off any time all monies held by the bank against the amount of the Company’s account or indebtedness arising from the aforesaid facilities. The initial facility was later restructured at the Company’s request by a Letter of Restructure dated 23rd November 2018 (“the Letter of Restructure”) on terms set out therein.

7. The Bank pleaded that according to the terms of the Letter of Offer and the Letter of Restructure, the Company was supposed to provide a duly executed contract between it and the Ministry of Water and Irrigation and also channel the contract proceeds directly into a Margin/Escrow account with the plaintiff.

8. The Company failed to honour the terms of facility causing the Bank to demand the entire debt from the 1st and 2nd defendant’s guarantors and thereafter file suit for recovery of the outstanding amount.

The Defendants’ defence

9. The defendants filed a joint statement of defence. They denied the banking facilities advanced to the Company as pleaded by the Bank and in particular the letter of offer dated 12th April 2018, Letter of Restructure dated 23rd November 2018 and the Guarantee and Indemnity and the Letter of Set-off.

10. In the alternative, the 2nd and 3rd defendants stated that if the Letter of Restructure was issued, it was done without their authority. The 2nd and 3rd defendants admitted that although they were directors of the Company and had authority to enter into agreements, they denied that they entered into any of the agreements with the Bank.

11. The defendants denied that there was an executed contract between the Company and the Ministry of Water and Irrigation as alleged and that if indeed there was such a contract, it was done through fraud and/or misrepresentation of material facts by employees of the Company. The defendants also denied that there was any contract between the Company and the Ministry of Water and Irrigation. The defendants further averred that the Bank failed to conduct due diligence and comply with the terms of the agreement including taking security and realizing security from one Grace Wangui Nyagu.

12. The defendants denied that the Bank was entitled to any relief as prayed or at all.

The Submissions

13. **Both parties are agreed on the principles applicable in an application to strike out a statement of defence under Order 2 rule 15 of the *Civil Procedure Rules* which empowers the court to exercise drastic powers to strike out a statement of defence on 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. [Emphasis mine].

14. The Bank's case is that the defendants' statement of defence, when considered in light of the documents in support of its case, amounts to a mere denial, is evasive, contradictory, inconsistent and embarrassing. Counsel for the Bank submitted that the contractual documents, that is the Letter of Offer, Letter of Restructure and Guarantee and Indemnity were voluntarily executed by the plaintiff and they cannot be heard to deny their existence or the terms contained therein.

15. The Bank cited several cases; *Magunga General Stores v Pepco Distributors Limited [1986] LLR 4111 (CAK)*, *Ragbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR* and *Erwen Electronics Limited & 3 Others v Radio Africa Limited [2018] eKLR*. Counsel for the Bank submitted in those cases set out the principle that in an action for a debt, a mere or general denial was an insufficient defence which was applicable in the present case.

16. The defendants relied on **Article 50(1)** of the Constitution which protects the right of every person to have any dispute decided in a fair and public hearing before a court and to argue that they are entitled to state the facts giving rise to the suit for the court to make a proper determination.

17. Counsel for the defendants added that the Bank had not demonstrated that the defendants' statement of defence should be struck out. The defendants contended that they disputed the loan agreement and further disputed the allegations made by the Bank hence the court should be keen to hear the evidence on both sides to hear the matter. In short, the defendants submitted that their defence raised triable issues and emphasized the fact that a defence that raises triable issues is not one that must necessarily succeed. Counsel maintained that even where the defence comprises denial, this does not discharge the plaintiff's burden of proof required under **section 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*.

18. Counsel for the defendants relied on several cases to urge the court not to strike out the statement of defence; *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No. 37 of 1978 [1980] eKLR*, *Patel v East Africa Cargo Handling Services [1974] EA 75*, *Kenya Trade Combine Limited v Shah Civil Appeal No. 193 of 1999*, *Yaya Towers Limited v Trade Bank Limited Civil Appeal No. 35 of 2000*.

Determination

19. Resolution of this case turns on the nature of the cause of action as pleaded by the plaintiff and defendants' statement of defence in light of the principles that the parties have outlined. To recap these principles, this court should exercise the power to strike out a pleading sparingly and where the statement of defence raises a bona fide triable issue then the matter ought to proceed for full trial.

20. It is not inconsistent with the right to a fair hearing protected under **Article 50** of the Constitution for the court to strike out a pleading on the ground that it does not disclose a cause of action. A hearing encompasses several modes of hearing including hearing on the basis of affidavits or on the basis of oral or written submissions. The nature of the hearing depends on the circumstances of each case and the key determinant of whether a hearing is fair is whether the parties have been given a fair opportunity to present their respective cases. The main purpose of an application to strike out is to determine whether the court ought to expend resources on a case, based on the material presented, which is not fit for a full trial. The principles that the parties have outlined above provide the basis upon which the court will make such a determination.

21. The Bank's case outlined in the plaint and supporting affidavit is premised on three contract documents; the Letter of Offer, the Letter of Restructure and the Guarantee and Indemnity. Each of the documents is executed by the 2nd and 3rd defendants as directors of the Company.

22. In addition to those documents, the Bank positively verified resolution of the Company's Board meeting dated 16th April 2018 signed by the 2nd and 3rd defendants, an undertaking dated 16th April 2018

from the Company not to transfer any shares from the Company and a resolution of the Board of Directors of the Company dated 28th November 2018 authorizing the Company to borrow, letters dated 16th April 2018 and 30th November 2018 from the defendants advocates, Chege Kibathi and Company Advocats confirming that the 2nd and 3rd defendants were directors of the Company and that there were no restrictions on the Companies borrowing. The Memorandum of Objects and Articles of Association of the Company together with searches from the Registrar of Companies dated 24th September 2018 all showed that the 2nd and 3rd defendants were shareholders and directors of the Company. The Bank also produced a statement of the Company's account for the period 13th April 2018 to 24th June 2019. The statement shows a several debits and credits over that period.

23. Despite being given the opportunity, the defendants' replying affidavit did not contest these documents or produce any other documents showing the contrary. They confirmed that the Bank advanced money to the Company and which was guaranteed by the 2nd and 3rd defendants. The Letter of Restructure as the name suggests was an acknowledgement of the debt and an offer to restructure the debt on terms set out therein. There is no evidence that the defendants paid the debt. The replying affidavit does not set out any facts that would negate liability or show any triable issues arising from those documents which establish liability. It is argumentative and reiterated the arguments counsel made to the effect that the defence raised triable issues and that the case ought to proceed to trial.

24. The nature of the defence proffered by the defendants, when viewed against the documents, is a bare denial of the debt. In **Magunga General Stores v Pepco Distributors Limited (Supra)** it was held that:

A mere denial is not a sufficient defence and a defendant has to show either by affidavit oral evidence, or otherwise, that there is a good defence.

The same conclusion was reached by the Court of Appeal in **Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR** where Platt JA., stated that:

First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment has been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.

25. In light of the positive case put forth by the plaintiff, I find that the statement of defence does not raise any triable issue in so far as the indebtedness of the defendants is concerned. *It is scandalous, frivolous and vexatious and it may prejudice, embarrass or delay the fair trial of the action.* A full trial would add nothing to the defence as the documents produced by the plaintiff speak for themselves.

26. The liability of the 2nd and 3rd defendant is limited to Kshs. 20,000,000 as a result of the guarantee. Although the plaintiff claims interest at 20% per annum, it is not clear on what basis this is claimed as Letter of Offer refers to the profit rate and not interest rate. Further the plaintiff claim judgment for profit and damages which require proof. These issues must proceed for trial.

Disposition

27. Consequently, I allow the Notice of Motion dated 15th November 2019 on terms that judgment be and is hereby entered for the plaintiff against the defendants jointly and severally as follows:

(a) Kshs. 23,396,681.20 save that the 2nd and 3rd defendants shall be liable to the extent of Kshs. 20,000,000.00 only.

(b) The defendants shall bear costs of the application.

(c) The matter shall be set down for determination of interest, profits and damages as claimed in the

plaint.

DATED and DELIVERED at NAIROBI this 22nd day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Wawire instructed by Wamae and Allen Advocates for the plaintiff.

Mr Mulandi instructed by Mulandi Kisabit and Associates Advocates for the defendants.