



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 69 OF 2014**

**THE COOPERATIVE BANK OF KENYA LTD.....APPELLANT**

**VERSUS**

**IBRAHIM NTHITU MAKWATTAH.....RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon I. Gichobi (Ms), Senior Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 4564 of 2012 delivered on 28<sup>th</sup> February 2014)**

**JUDGMENT**

**INTRODUCTION**

1. In her Ruling that was delivered on 28<sup>th</sup> February 2014, the Learned Trial Magistrate, I. Gichobi (Miss), Resident Magistrate (RM) allowed the Respondent's Notice of motion application dated and filed on 10<sup>th</sup> November 2013 in which he had sought to have the Appellant's suit struck out under Order 2 Rule 15 (1), (b), (c) and (d) of Civil Procedure Rules, 2010.
2. Being aggrieved by the aforesaid decision, the Appellant filed its Memorandum of Appeal dated 7<sup>th</sup> March 2014 on even date. It relied on eight (8) Grounds of Appeal.
3. The Appellant's Written Submissions were dated 20<sup>th</sup> June 2018 and filed on 22<sup>nd</sup> June 2018 while those of the Respondent were dated and filed on 28<sup>th</sup> September 2018.
4. When the parties appeared before this court on 15<sup>th</sup> October 2018, they asked it to render its decision based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

5. The Appellant's case was that in an application dated 23<sup>rd</sup> August 2007, the Respondent applied for a personal loan of Kshs 2,000,000/= through Loan Account Number 0160782973900 (hereinafter referred to as "the Loan Account"). The loan was repayable over a period of sixty (60) months in monthly instalments of Kshs 49,624.50/=. The interest chargeable was sixteen (16%) per cent.
6. The Respondent breached the terms and conditions of the agreement when he defaulted in repaying the loan. As at 23<sup>rd</sup> May 2012, he was indebted to the Appellant in the sum of Kshs 1,875,892.70/= together with interest thereon at sixteen (16%) per cent until payment. The Arrears Account was No 0162682973900 (hereinafter referred to as "the Arrears Account").
7. The Appellant filed an application seeking to strike out his Defence that was filed on 25<sup>th</sup> February 2013 but the same was dismissed on 8<sup>th</sup> July 2013 by Hon Cheruto C Kipkorir. It pointed out that in his Replying Affidavit, he had urged the court to dismiss the said application on the ground that there was fraud which ought to have been investigated during trial.
8. It was emphatic that the Bank Statements it had submitted in court and the Respondent's denials of having obtained a loan ought to have been explained during the full trial and consequently, this was not a clear case warranting striking out of its claim.
9. It relied on the cases of **D.T. Dobie Co (K) Ltd vs Muchina [1982] KLR** where it was held that courts should "**carefully consider the facts of the case without embarking on a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court...**"

10. It also stated that the Learned Trial Magistrate erred when she held that its Plaintiff disclosed no reasonable cause of action and relied on affidavit evidence to arrive at her conclusion contrary to Order 2 Rule 15 (1) (a) (sic) of Civil Procedure Rules which provides that:-

**“No affidavit evidence is to be brought when applying for striking out under this heading as opposed to the provisions of sub rules (b), (c) and (d) under which the Application was premised”. (sic)**

11. It therefore urged this court to allow its Appeal as Hon Cheruto C Kipkorir had found that there were triable issues that would not have warranted the dismissal of its suit.

### **THE RESPONDENT’S CASE**

12. His case was that the reason the Learned Trial Magistrate allowed his application to strike out the Appellant’s suit was because it presented two (2) different sets of bank statements with the latest entry showing a cleared balance of 0.00. He was categorical that this was the factual position because the said loan had been fully repaid by 27<sup>th</sup> March 2012.

13. He contended that the burden of proving or disproving a fact lay with the party in whom any fact was within the knowledge of that party as provided in Section 112 of the Evidence Act Cap 80 (Laws of Kenya). He averred that the Appellant ought to have provided all its evidence before the Learned Trial Magistrate delivered her decision.

14. He asserted that there would have been no value in proceeding to trial because the evidence that was presented before the Learned Trial Magistrate showed that the loan had been fully repaid as at 27<sup>th</sup> March 2012.

15. He therefore asked this court not to disturb the finding of the Learned Trial Magistrate.

### **LEGAL ANALYSIS**

16. This court carefully analysed the Record of Appeal and noted that the Bank Statements related to two (2) Accounts namely the Loan Account Number 016670282973900 and Arrears Account Number 01626082973900. The Loan Account had a cleared balance of 0.00 as at 27<sup>th</sup> March 2012. It was not clear what the balance in the Arrears account was as there was a page or pages of the Bank statement that were missing in the Record of Appeal.

17. The Appellant did not attach a copy of the Ruling of Hon Cheruto C Kipkorir. It only attached her order dismissing its application in which it had sought to have the Respondent’s defence struck out. However, so as to do justice in this matter, this court perused the lower court record to establish what the Ruling stipulated. It was evident that the same dealt with similar issues as those that were dealt with by the Learned Trial Magistrate in her Ruling of 28<sup>th</sup> February 2014.

18. It was evident that the said Hon Cheruto C Kipkorir dismissed the Appellant’s application seeking to strike out the Respondent’s defence because his Replying Affidavit had raised several issues whose authenticity would require to be established during trial.

19. Notably, in his Replying Affidavit sworn on 30<sup>th</sup> April 2013 and filed on 2<sup>nd</sup> May 2013 that was in response to the Appellant’s Notice of Motion application dated 15<sup>th</sup> April 2013 and filed on 17<sup>th</sup> April 2013, the Respondent denied ever having been given any loan by the Appellant or signing any Loan Agreement. He was categorical that there were discrepancies in the Appellant’s documentation relating to the alleged loan amount applied for, the applicable instalments payable and the purported rate of interest amongst several other issues.

20. However, he could not deny having signed the Loan Agreement and then question the amount of loan that was disbursed, the monthly instalments payable and the applicable interest thereon. If indeed he was a stranger to the Appellant’s assertions, then he would have been a busy body during trial putting the Appellant to strict proof on issues that did not concern him at all. There were contradictions in his assertions that led this court to believe that they were triable issues that ought to be interrogated during a full trial.

21. In the same breathe, this court could not determine whether or not the Appellant advanced him financial accommodation, what the loan amount was, what the monthly instalments were, what the applicable rate of interest was or what the outstanding sum as at 27<sup>th</sup> March 2012 was. This is a task for the trial court.

22. Having considered the Respondent’s said Replying Affidavit, this court find itself in total agreement with Hon Cheruto C Kipkorir that the Respondent had raised several issues that would need to be interrogated during trial.

23. It was therefore the finding of this court that the Learned Trial Magistrate herein erred when she struck out the Appellant’s suit when the Respondent had raised arguable issues. As the Appellant’s application to strike out the Respondent’s defence was dismissed, it also ought to have been given an opportunity to explain the relationship between the Loan and Arrears Accounts, the computation of the amount therein as at 27<sup>th</sup> March 2012 and the pertinent issues the Respondent had raised in his aforesaid Replying Affidavit.

24. Indeed, as Hon Cheruto C Kipkorir had directed that the matter proceed to trial, the Learned Trial Magistrate herein erred by coming to a different conclusion. They were both magistrates and she could not have purported to overrule what her colleague had determined. The Learned Trial Magistrate’s decision of 28<sup>th</sup> February 2013 amounted to a reversal of Hon Cheruto C Kipkorir’s Ruling. Only the High Court could vacate the orders of Hon Cheruto C Kipkorir.

25. Having considered the parties’ respective Written Submissions and the case law they relied upon, it was the considered opinion of this

court that the striking out of the Appellant's suit was too draconian and drastic. As has been held in the case of **D.T Dobie Co (K) Ltd vs Muchina** (Supra), **Geminia Insurance Co Ltd vs Kennedy Otieno Onyango [2005] eKLR** and many other cases, striking out of pleadings is a draconian step that should be exercised cautiously, as a last resort and only in the clearest of cases. The present case did not fall within those cases that should be struck out summarily.

#### **DISPOSITION**

26. For the foregoing reason the upshot of this court's decision was that the Appellant's Appeal that was lodged on 15<sup>th</sup> October 2018 was merited and the same is hereby allowed.

27. It is hereby directed that the lower court file be placed before the Chief Magistrate Milimani Commercial Courts on 5<sup>th</sup> February 2019 for a mention for his further orders and/or directions in respect of this matter which should be heard and determined by any other magistrate other than the Learned Trial Magistrate herein.

28. The Respondent shall bear the Appellant's costs of this Appeal.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of January 2019**

**J. KAMAU**

**JUDGE**