



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 96 OF 2015**

**JOHN OMOLLO NYAKONGO t/a H.R. GANIJEE & SONS.....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF KWALE.....DEFENDANT**

**R U L I N G**

1. For determination is the plaintiff's Application dated 15/11/2018 in which the plaintiff seeks an order that the statement of defence filed be struck and judgment entered for him as prayed in the plaint.
2. The grounds advanced to found the application are that the statement of defence filed is a sham made up of mere denials and does not disclosed; that there is no *bona fide* defence disclosed as the contract sued upon is not disputed and that the only purposes intended to be achieved by the defence is to delay the plaintiff from enjoying a judgment from the claim.
3. No affidavit was disclosed to have been filed in support of the application to adduced evidence in support of the Application and therefore the application must be seen to be grounded on the provisions of Order 2 Rule 15(1) a. In such situations and cases the court looks at the pleading under attack and determines whether on its face there is merit disclosed. This, I say well aware that there is a bulky document called **Supporting Affidavit** bound and filed separately on the same day the application was filed. I chose to ignore that affidavit because the main ground of the application is that the defence does not disclose a defence known in law. Wherever that is the ground to strike out a defence the law dictate that no evidence is admissible<sup>[1]</sup>.
3. The said application was opposed on behalf of the defendant by the Replying Affidavit sworn by one M.K. Dzumo in which it is contended that the defence filed is a good defence raising triable issues. It is highlighted that even though the plaint makes a claim of interest on the liquidated sum at 25% p.a, the agreement between the parties covenanted for interest at 3% above the CBK average rates.
4. At the hearing parties filed written submissions which were then highlighted orally by counsel. For the plaintiff / applicant the decision in *Magunga General Stores vs Pepco Distributors Ltd [1987] 2KAR*, *Raghibir Sinh Chatte vs National Bank of Kenya Ltd [1989]eklr* were cited for the enunciation of the law that a statement of defence must answer to the plaint in substance. It was then pointed out that there was a letter from the Transition Authority which admitted the plaintiff claim unequivocally in the sum of Kshs.18,808,538.02. The decision in ***KCB VS Suntra Investments Bank [2015] eKLR*** was also cited for the proposition of the law that an evasive defence should be struck from being an abuse of the court process.
6. On the assertion that the letter by Transaction Authority was *ultra vires*, counsel submitted that the authority had the mandate to verify the assets and liabilities of the defunct local authorities and that even if it were *ultra vires* no order of certiorari had been sought and obtained to declare it so hence it remains as a record of what the authority ascertained to be the liability of the defendant to the plaintiff.
7. On interest counsel submitted that the plaintiff wrote to the defendant proposing an interest rate of 25% but the letter was not responded to hence there should be drawn an inference that it was conceded.
8. For the defendant submissions were offered to the effect that the letter by the Transaction Authority relied upon by the plaintiff was *ultra vires* in that the liability was transferred without consultation with the Natural Treasury, the commission of revenue allocation and the cabinet secretary responsible for matter relating to intergovernmental relations as the law required.
9. Resort was then made to the decision in ***Dorin Akula vs Apa Insurance Co. Ltd [2016] eKLR*** citing ***D.T. Dobie & Co. (Kenya) Ltd vs Muchina [1982] eKLR*** for the proposition that striking out is a draconian remedy that should only be exercised after the court has considered all facts but the court in doing so must not embark on the merits of the case which must remain a preserve of the trial. The decision in ***Kenya Power and Lighting Co. Ltd vs Alliance Media Kenya Ltd [2014] eKLR*** was equally cited for the proposition of law that if a defence raises even one *bona fide* triable issue, the defendant must get leave to defend. In this case the defendant contends that the contract

is admitted but the sum claimed to be due and owing is denied. It is also submitted that there is no contract for payment of interest at 25% p.a. because the contract between the parties provided for interest at 3% above the CBK base lending rate.

### **Determination**

10. I have perused the plaint and in particular paragraph 6 thereof where it is evident that the principal sum as by the certificate dated 16/8/2004 was a mere sum of Kshs.782,924/= together with extended preliminaries of Kshs.2,880,000/= making the principal sum to be Kshs.3,662,924/=. That sum has however been subjected to interest at 25% and other items called interest on delayed paid certificates as well as loss of expenses on profit and overheads and administrative costs which sum to this court require to be explained by evidence. It is of note that the contractual interest agreed was 3% above the Central Bank of Kenya leading rates. This court takes judicial notice that since 2014 the CBK lending rates has been averaged at about 14%. It is therefore a triable issue how the interest which has yielded the sum claimed was arrived at. There could be other issues including the question whether the other authorities were consulted by the transition Authority, but there being a single triable issue is sufficient to dispose of the application.

11. Even without that judicial notice, the rate of interest applicable is a matter of contract and thus evidence. To this court a term of contract cannot just be altered with a proposal from one side without the explicit concurrence of the other.

11. I do find that the question of interest rates chargeable and its mode of calculation, whether simple or compounded as has been done by the plaintiff, present a *bona fide* triable issue.

12. The law is that even if one triable issue is disclosed, and I have isolated such here, there is no discretion upon the court other than ordering that the defendant gets a chance to defend.

13. For that reason, I do find that the application dated 15/11/2018 cannot succeed but is hereby ordered dismissed with costs.

**Dated and delivered at Mombasa this 27th day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[\[1\]](#) Order 2 Rule 15(2)