**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 103 OF 2019**

**AFRASIA BANK LIMITED.....PLAINTIFF**

**VERSUS**

**SBM BANK (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. **AFRASIA BANK LIMITED**, the plaintiff has brought this case against **SBM BANK (KENYA) LIMITED**, the defendant. The plaintiff seeks judgment against the defendant for USD 7,500,000 with interest and costs.

2. It is not denied, by either party, that the defendant acquired assets and liabilities of a bank known as Chase Bank (Kenya) Limited (hereinafter Chase Bank). The plaintiff pleaded that it deposited USD 7,500,000 with Chase Bank for one month starting from 18th March 2016. On 7th April Chase Bank was placed under Receivership by the Central Bank of Kenya. The plaintiff further pleaded that the defendant acquired the assets and liabilities of chase bank and the said transfer of assets took effect on 17th August 2018.

3. The plaintiff's case is that following that acquisition, section 3 (1) of the Transfer of Business Act, as read with section 4 thereof, they mandatorily required the defendant to publish a Notice in the Kenya Gazette and newspapers with circulation within Kenya the following:

> *(a) the name and address of the transferor;*
>
> *(b) the nature of the business, and the name or style under which, and the address at which, the transferor has carried on the business;*
>
> *(c) the name and address of the transferee;*
>
> *(d) the address where the transferee intends to carry on the business; and*
>
> *(e) a statement as to whether the transferee is assuming or is intended to assume all the liabilities incurred in the business by the transferor.*

4. It is the plaintiff's case that the defendant having defaulted to put up a Notice as required under section 3 and 4 of that Act the defendant was liable to meet all liabilities of the transferor, chase bank, which liabilities includes the plaintiff's claim.

5. The defendant filed a defence to the plaintiff's claim. By that defence the defendant pleaded that the Transfer of Business Act was not applicable to the present claim but that the acquisition of Chase Bank was only subject to the Banking Act and the Kenya Deposit Insurance Act. Further that the plaintiff's deposit of USD 7,500,000 was excluded from the asset which the defendant acquired.

6. There are two application for consideration in this Ruling.

7. The first in time is the application filed by the defendant. It is a Notice of Motion dated 17th June 2019. The defendant's prayer in that application is for the entire suit to be struck out with costs. The defendant has based the application on the following grounds:

> *a. The Plaintiff/Respondent instituted the present proceedings on 21st February 2019 claiming a sum of United States Dollars*

*7,500,000.00 from the Defendant/Applicant together with costs and interest.*

*b. Such claim was anchored on the provisions of Section 3(1) of the Transfer of Businesses Act Chapter 500 Laws of Kenya, alleging that the Applicant herein had failed to publish a Notice in the Kenya Gazette and that as a consequence was liable to Plaintiff/Respondent for the said amount claimed.*

*c. In its Defence dated 23rd May 2019, the Applicant herein denied liability on the grounds therein stated.*

*d. Further, the Applicant in its Defence raised various preliminary objections which are now reiterated herein as the basis for striking out the present suit with costs:*

*(i) It is improperly brought against the Defendant/Applicant, which is a total stranger to the purported claim.*

*(ii) The provisions of the Transfer of Businesses Act Chapter 500 laws of Kenya do not apply to the matter which is the subject of the suit.*

*(iii) The transfer of certain assets and certain liabilities of Chase Bank (Kenya) Limited (In Receivership) to SBM Bank (Kenya) Limited was approved pursuant to Section 9(1) and (5) of the Banking Act Cap 488 of the Laws of Kenya and published in the Kenya Gazette of 6th July 2018.*

*(iv) The said transfer was also subject to the provisions of the Kenya Deposit Insurance Act 2012 and the Kenya Deposit Insurance (Amendment) Act 2013.*

*(v) The amount of United States Dollars 7,500,000.00 claimed by the Plaintiff/Respondent was excluded from the liabilities taken over by the Defendant/Applicant from Chase Bank (Kenya) Limited (In Receivership).*

*e. The plaint does not therefore disclose any or any reasonable cause of action against the Defendant/Applicant.*

8. The second application filed by the plaintiff is a Notice of Motion dated 10th June 2019. The plaintiff seeks, through that application two prayers. Firstly that summary judgment be entered in favour of the plaintiff, and against the defendant, as prayed in the plaint. Secondly, and in the alternative to the first prayer, that judgment be entered on admission against the defendant.

9. The application is premised on the following grounds:

*i. That the Defendant has expressly admitted in paragraph 10 of its Statement of Defence dated 23rd May 2019 that it did not publish the Mandatory notice as stipulated under section 3(1) of the Transfer of Business Act.*

*ii. The Defendant failed to publish the said mandatory Notice and as such is now fully and directly liable to the plaintiff in the sum claimed of USD 7,500,000 together with interest accrued thereon.*

*iii. The admission made by the Defendant is unambiguous and has been clearly expressed by the Defendant.*

*iv. Section 3 (1) of the Transfer of Business Act:*

*a. To protect creditors such as the Plaintiff/Applicant, so that a company (read Chase Bank (Kenya) Limited) is not stripped off its assets, which are then disposed of, leaving those owed with an empty shell from which they can make no viable claim for their legal dues.*

*b. To avoid the impunity, deception and mischief now demonstrated by the Defendant/Respondent, where it purports at paragraph 8 of its defence to have taken over "only certain assets and certain liabilities of Chase Bank (Kenya) Limited (in Receivership)" yet has failed, refused and/or ignored to provide the mandatory disclosure required by the said Act.*

*v. By virtue of the mandatory and strict provisions of section 3(1) of the Transfer of Business Act, the Respondent has no defence to the Applicant's claim of USD 7,500,000/=.*

*vi. To make it even worse, in spite of the Defendant/Respondent having been served with a Notice to produce Documents dated the 31st day of May, 2019 being the documents cited by the Defendant in its Defence, the Defendant/Respondent has failed, refused and ignored to produce the said documents.*

*vii. The Defence filed herein does not disclose any triable issues to go to trial.*

*viii. The Defendant is justly and truly indebted to the plaintiff as pleaded in the plaint and the plaintiff is entitled to Judgment on the claim together with interest and costs.*

**ANALYSIS**

10. I will begin by considering the defendant's application first because if indeed it does succeed there will be no basis for considering the plaintiff's application.

11. The defendant, to recap, seeks the striking out of the plaintiff's suit. The application is brought under Order 2 Rule 15 (1) (a) which state:

> ***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***

12. It will be recalled that the defendant's argument, in support of its application is that it was not obligated to follow the provisions of section 3(1) of the Transfer of Businesses Act, reproduced above in this Ruling. The defendant's case is that it fulfilled the requirements of section 9 (1) and (5) of the Banking Act and that it published its acquisition of certain assets of Chase Bank in the Kenya Gazette; and it also met the conditions of the Kenya Deposit Insurance Act 2012 and the Amended Act of 2013.

13. The defendants view is that since the plaintiff's case is premised on the allegation that it did not place a Notice in a newspaper, as required by section 3 (1) of the Transfer of Businesses Act, and because the defendant's defence is that it was not obligated to put that Notice in the newspaper but rather was to abide by the provisions of the Banking Act and the Kenya Deposit Insurance Act, which it did, the plaintiff's case should be struck out for not disclosing any reasonable cause of action against the defendant.

14. The plaintiff opposed the defendant's application and argued that the publishing of the Notice, under the Transfer of Businesses Act, is mandatory and the defendant failed to so publish.

15. The plaintiff submitted that the defendant erred, contrary to the provisions of order 2 Rule 15(1) (a), to rely on evidence, that is affidavit evidence, in support of its application. In support of that argument the plaintiff relied on the case Taj Villars Management Limited v Taj Mall Limited (2018) eKLR as follows:

> *"Where a party opts to make an application for striking out a pleading solely under order 2 rule 15 (1)(a), order 2 rule 15(2) denies him the right to rely on any evidence. All that such a party is required to do is to state concisely the grounds on which the application is founded. Thus for example, in* ***Mosi v. National Bank of Kenya*** ***(supra)****, interpreting order VI rule 13 (1) (a) which is now order 2 rule 15 (1) (a), the court stated thus:*
>
> ***"Order VI rule 13 specifies four distinct grounds on which an application to strike out a pleading may be grounded. These are that it discloses no reasonable cause of action or defence; that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court. If the application is made under the first ground, no evidence shall be admissible thereon but grounds on which it is made shall be stated concisely. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1). All that is required is that the grounds relied on be specified in the application and if they be other than the first one, then affidavit evidence is expected."***
>
> *Similarly in* ***EPCO Builders Ltd v Marjan & Another*** ***[2006] 2 KLR 1****, this Court held that the former order VI rule 13(2) of the Civil Procedure Rules, absolutely barred the court from admitting evidence in an application brought under it and that any evidence tendered was inadmissible. The court was only obliged to look at the averments in the pleadings and no more to satisfy itself whether or not a cause of action was disclosed. Lastly in* ***Crescent Construction Co Ltd v Delphis Bank Ltd*** ***[2007] eKLR,*** *this Court reiterated that in all cases brought under order VI rule 13(1) (a), the court is obliged in law to look at no evidence, that is to say, no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action and that the court must look at the pleadings only and not go beyond the pleadings."*

16. The above decision, by the Court of Appeal, is based on Order 2 Rule 15 (2) of the Civil Procedure Rules which provides:

> ***"No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made."***

17. The defendant, as stated before, relied on the grounds reproduced above in this Ruling, and on affidavit evidence. In view of the provisions of Rule (2) of Order 2 Rule 15, I will not consider the affidavit in this Ruling.

18. The plaintiff also cited the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another (1980) eKLR** on what the court should consider in entertaining the defendant's application. The plaintiff argument is that the court should consider the terminology ***"no reasonable cause"*** and cited from D.T. Dobie case (supra) thus:

> ***"No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the plaint are considered."***

19. I will at this stage place reliance on a Canadian case, which is persuasive to me, that is **North Bank Potato Farms Ltd v Canadian Inspection Agency, 2015 ABQB 653** as follows:

> *Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. The history of our law reveals that often new developments in the law first*

*surface on motions to strike or similar preliminary motions, like the one at issue in McAlister (Donoghue) v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.....*

*In summary, the question to be asked on an application to strike a Statement of Claim is: Based on the pleadings, is there any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed?*

20. Following from that persuasive case of Canada I cannot, on what is pleaded by the plaintiff, (assuming it is true) state that the plaintiff's case has no prospect of success. The plaintiff has relied on the Transfer of Businesses Act and until evidence is adduced at trial I cannot determine that the plaintiff's case has no reasonable cause of action.

21. The defendant's Notice of Motion dated 17th June 2019, in view of the above finding does fail.

22. The other application under consideration by the plaintiff seeks summary judgment be entered for the plaintiff or that judgment be entered on admission.

23. The defendant opposed the application on two grounds. The defendant submitted that summary judgment application cannot be filed after a defence has been filed. The defendant filed its defence in this action on 23rd May 2019.

24. The defendant based the above argument on the provision of Order 36 Rule of the Civil Procedure Rules which state:

*Summary judgment [Order 36, rule 1.]*

*(1) In all suits where a plaintiff seeks judgment for—*

*(a) a liquidated demand with or without interest; or*

*(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,*

*where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.(Underlining mine)*

25. The defendant having filed a defence, as stated before, the plaintiff's application for summary judgment does fail. This was the conclusion reached by Justice Aburili in the case **Mercy Karimi Njeru & another v Kisima Real Estate Limited [2015] eKLR** where the learned judge considered the provision of Order 336 Rule 1 and stated:

***"A plain reading of the above rule shows that a court will grant the plaintiff summary judgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence."***

26. I would also add that even if the defendant had not filed a defence this case is not so clear to justify entry of summary Judgment. In this regard I cite the **North Bank Potato Farms Ltd (***supra***)** as follows:

"*From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters—matters which would usually require ordinary forensic testing through a trial procedure with viva voce evidence and which could not be resolved through the fair and just alternative—the non-moving party's position viewed in the round has no merit in law or in fact.....*

*Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is whether there is in fact any issue of "merit" that genuinely requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily"*

27. I also cite the holding of ***KENINDIA ASSURANCE CO. LTD. v COMMERCIAL BANK OF AFRICA LIMITED eKLR***, *this Court held that:*

***"summary judgment can only be resorted to in the clearest of the cases. If a respondent shows a bona fide triable issue, he must be allowed to defend the suit without conditions. A defence that raises triable issues does not mean a defence that must succeed, it is one that discloses issues that ought to go for trial."***

28. The second limb of the plaintiff's case is for entry of Judgment on admission. The plaintiff's argument is that the defendant having admitted not to have issued on Notice as required under section 3 of the Transfer of Businesses Act this should lead to entry of judgment on admission. It will be recalled that the defendant's case is that it followed other statutes in acquiring some assets of Chase Bank and accordingly it was not obligated to give the Notice, as argued by the plaintiff.

29. In this regard I will refer to the case **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania (2014) Eklr** where the court stated:

> ***"For the respondent to be entitled to judgment on admission, the admission too had to be plain and clear. In CHOITRAM Vs NAZARI, (1984) KLR 327, Madan JA (as he then was) stated as follows regarding admissions:***
>
> ***"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt…"***

30. This case is not a plain and clear case to justify entry of judgment on admission. In my view the defendant does not admit the plaintiff's claim. Rather the defendant denied it was required to give Notice as the plaintiff submits.

31. It follows that the plaintiff's Notice dated 10th June 2019 does also fail.

**CONCLUSION**

32. The two applications having failed I will order each party to bear their own costs.

33. I therefore order; that the Notice of Motion applications dated 17th June 2019 and 10th June 2019 be and are hereby dismissed and each party will bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 28TH day of NOVEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read*** *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**