



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 357 OF 2017

MWANANCHI CREDIT LIMITED.....PLAINTIFF

-VERSUS-

ANERLISA MUIGAI aka ANNALISA W. MUIGAI....DEFENDANT

RULING

The Applicant Mwananchi Credit Limited Filed Notice of motion on 8th September 2018 and sought the following orders;

- a. The Defence filed herein on 27th September 2017 be struck out and judgment entered against the Respondent for the admitted sum of Ksh 13,000,000/-
- b. That in the alternative but without prejudice to Prayer 1 above; the Defence filed herein on 27th September 2017 be struck out and judgment entered against the Defendant for the sum of Ksh 19,911,773.53 the principal sum and accrued interest.
- c. That following judgment on admitted sum , the Court be pleased to enter judgment on the admitted sum; judgment is entered as per the Plaintiff.
- d. The Defence is a sham and contains general denials that are not worthy of a trial in light of the express admission of the debt.

The Defendant Anerlisa Muigai aka Annalisa W. Muigai filed Grounds of Opposition through Counsel and objected to striking out of Defence on the following grounds;

- a. The Defendant's Defence raises triable issues
- b. The Defendant mentioned Ben Kangangi in the Defence paragraph 6 and intends to institute 3rd Party proceedings against Ben Kangangi as the party liable for the debt.
- c. The Plaintiff varied the loan Agreement by accepting 3 motor vehicles from Ben Kangangi as full payment of the monies due which is a triable issue in the Defence.
- d. The Defence raises issue with illegal interest.

The Applicant (**herein "Anerlisa Muigai a.k.a Annalisa W. Muigai"**) filed chamber summons application dated 13th February 2019, brought under the provisions of **Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, order 1 Rule 15 of the Civil Procedure Rules 2010 Cap 21 Laws of Kenya.**

The Applicant sought orders;

- 1. That leave be granted to the Defendant to issue and file Third Party Notice against Benson Kangangi out of time;**
- 2. That an order be granted to issue Third Party Notice against Benson Kangangi;**

3. That further or any other order that this Honourable Court may deem fit to grant;

4. That costs of the Application be in the cause.

The Application is based on the following grounds;

a. That the Defendant/Applicant will seek indemnity and/or contribution from the proposed Third Party for any liability that may be found accruing from the Defendant to the Plaintiff relating to the subject matter of the suit;

b. That the Defendant shall be entitled to any relief or remedy relating to or connected with the original subject matter of the suit;

c. That the subject matter between the Defendant and the proposed Third Party is the same as the subject matter between the Plaintiff and the Defendant;

d. That it is necessary that the question of the Defendant's claims against the 3rd Party for indemnity and/or contribution be heard and determined within the trial of this suit;

e. That it is in the interests of justice that the said orders be granted.

The Plaintiff opposed the Application on the following grounds;

a. That the Application has been brought inordinately late as it offends the mandatory provisions of Order 1, Rule 15 (1) (d) of the Civil procedure Rules 2010 requiring such application to be made within 14 days after close of pleadings;

b. That the application is lacking in evidence and infested with purely unsubstantiated allegations;

c. That the application is not made in good faith therefore an abuse of the court process, frivolous and vexatious.

DETERMINATION

Order 1, Rule 15 CPR 2010 provides;

Notice to third and subsequent parties

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

He shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action.

The law envisages a situation where the Court may grant application to join 3rd Party to the proceedings after 14 days of filing the notice. In the instant case, the Defendant alluded in paragraph 6 of the Defence that the intended 3rd Party Ben Kangangi; that the money admitted as borrowed from the Plaintiff by the Defendant it was borrowed on behalf of the said intended 3rd Party. Subsequently the Plaintiff varied the Loan Agreement by accepting 3 motor vehicles from the intended 3rd Party as full payment of the monies due.

The plaintiff opposed the Defendant's application to join the 3rd party on grounds of opposition filed on 6th March 2019, that there was inordinate delay in terms of **Order 15 (1) (d) CPR 2010**. That the application lacks evidence and is based on unsubstantiated allegations. That the application is not made on good faith.

With regard to Plaintiff's application of 6th September 2019, to enter judgment on admission and strike out the defence; it was submitted;

The Plaintiff submitted that the Defendant admitted the debt at paragraph 5 of the Defence and hence the Court ought to enter judgment on admission and strike off the Defence. The Plaintiff relied on the cases of **Guardian Bank Ltd Vs Jambo Biscuits KY Ltd (2014) Eklr** where the Court held;

“The principle applicable in judgment on admission is that the admission in the sense of Order 13 Rule 2 CPR is not one which requires copious interpretations or material to discern. It must be plainly discernible.

In **747 Freighter Conversion LLC vs One Jet One Airways Kenya Ltd Vs 3 Others HCCC445 of 2012**; the Court held judgment on admission that there is no point in letting the matter go for trial for there is nothing to be gained at trial.

The plaintiff buttressed its position by annexed judgments of;

Ecobank Kenya Ltd vs Bobbin Ltd & 3 Others (2014) Eklr

Margaret Njeri Mbugua vs Kirk Mweya Nyaga (2016)

The plaintiff stated that the Defence by the plaintiff failed to raise any triable issue(s) for determination at the hearing. This court finds that the Defence raises triable issues for determination not only with regard to admission of loan but of settlement and payment by 3rd party. Therefore judgment on admission may not be entered until after joining and hearing the 3rd party.

On the issue raised in the Defendant's Defence that the Plaintiff operates contrary to statute and its memorandum and articles of association, the plaintiff filed on 6th October 2017 the Plaintiff's Business Permit, the Plaintiff's memorandum and Articles of Association and certificate of incorporation and change of business Name. All these documents confirmed that the Plaintiff lawfully and legally conducted its business as a regulated money lending institution and hence lawfully advanced credit to the Defendant.

The Defendant submitted and relied on the following cases;

a. Dt Dobie & Company (K) Ltd vs Muchina 1982 LR 11

b. Kenya Trade Combine Ltd Vs Shah C.A. 193 1999

c. Choitram vs Nazari 91984)

With regard to the Defendant's application to join the intended 3rd party to these proceedings, the Court finds it a reasonable proposition because;

d. The Defendant mentioned the 3rd Party as the recipient of the borrowed funds

e. The intended 3rd party settled the amount owing by delivery to the plaintiff 3 motor vehicles and apparently settled the claim

f. It is not clear whether the said motor vehicles are the same ones the Defendant gave the Plaintiff to hold as she settled the debt or not and the intended party brought other vehicles to settle the claim.

g. The intended 3rd party seems to be privy to the transaction of loan facility between the Plaintiff and Defendant

h. The issue whether the loan was settled by the intended 3rd party as defendant alleged is a pertinent issue to these proceedings to establish whether if there is a legitimate statement of claim or the debt was/is partly /fully settled.

i. The loan facility documents shall be presented to confirm the parties negotiated the loan how much was advanced and on what terms and which party was/is in breach of the contract.

All these issues are triable issues for determination at trial, at this stage the Defendant's defence does not constitute a clear and unequivocal admission of the debt in light of allegation of an intended 3rd Party who maybe partly /fully liable for the debt.

DISPOSITION

1. The Defendant's application to join intended 3rd party Ben Kangangi is granted.

2. The Notice to 3rd Party shall be served within the requisite period to the intended 3rd Party who shall file appropriate and relevant pleadings to the claim.

3. The Plaintiff's Application to have the Defendant's defence struck out is not granted as the Defence raises triable issues for determination at hearing *inter partes*

4. The matter shall proceed for case management before Deputy Registrar for 30 days and then parties shall obtain a hearing date.

5. Each party shall bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KURAUKA HOLDING BRIEF MR. KULOBA FOR PLAINTIFF

NO APPEARANCE FOR DEFENDANT

MS

JASMINE

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COURT

ASSISTANT