



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE No. 569 Of 2014

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF/ APPLICANT

Versus

JOHN MOSES ORAPA.....1ST DEFENDANT/ RESPONDENT

SALOME SAFO MWAURA.....2ND DEFENDANT/ RESPONDENT

R U L I N G

1. The Court has before it an application by the Plaintiff in the Suit. The Plaintiff is Kenya Commercial Bank, a commercial bank that offers its services to the public at large. The Defendants are a married couple who used the services of the Bank in order to obtain a mortgage to purchase a residential property in the Lavington area of Nairobi. In the suit the Plaintiff alleges that the Defendants were in default of the required repayments under the mortgage agreement. The charged property was then sold at public auction. The Plaintiff alleges that the sale raised significantly less than the outstanding sum. The Bank is now seeking payment of that shortfall together with interest.

2. The Complaint was filed on 5th December 2014. The Summons to Enter Appearance was issued on 8th December 2014. The First Defendant was served personally on 10th February 2015. The Summons and Complaint were not served on the Second Defendant. The Process Server engaged by the Plaintiff gave the pleadings to the First Plaintiff on his assertion that he had authority to receive them. It seems the Plaintiff did not take any steps to ascertain whether or not that was the correct position. At the time the Plaintiff was represented by a firm of Advocates (Messrs Kale Maina & Bundotich) that had previously corresponded with the Defendants. They would therefore have known how to contact the Second Defendant. When the issue of conflict was raised, they were replaced by the firm currently on record. The firm of Messrs Robson came on the record pursuant to a Notice of Change of Advocates that was dated 7th August 2015 but was not filed until 13th August 2015.

3. The Application is dated 7th August 2015 in Mombasa. The Plaintiff's Head Office and the Offices of their Advocates are in Nairobi. The significance of Mombasa is not readily apparent. The Application was filed on 18th August 2015. Prior to that on 25th March 2015 the Plaintiff filed a request for Judgment against the Defendant (it is not specified which) who was served with summons to enter appearance on 25th February 2015 but failed to file a Defence. It seems that at least one of the Defendants filed a Defence. Unfortunately, the Defence was not placed on the Court file. Requests of the Parties and the Registry have failed to produce either a copy of the Memorandum of Appearance nor the Defence.

4. The Application is brought by Notice of Motion pursuant to Order 2 Rule 15(1) of the civil Procedure Rules, 2010 and any other enabling provisions of the law). The Applications is seeking Orders "THAT:

1. ***THAT*** this Honourable court be pleased to strike out the Defendant/Respondents Statement of Defence dated 1st April, 2015, for failure to disclose a reasonable defence in law.

2. ***THAT*** upon striking out the Defendant/Respondents Statement of Defence, this Honourable Court be pleased to enter summary judgment in favour of the Plaintiff/Applicant as against the Defendant/Respondent for **Kenya Shillings Thirteen Million Twenty Three Thousand One Hundred and Seventy and Fourty Four Cents (Kshs 13,023,170.44)** plus interest at the rate of 19% per annum from 30th June, 2014 until payment in full.

3. ***THAT*** the costs of this Application be provided for." .

5. The Application is brought on the Grounds that appear on its face, namely:

"1. The Defendant/Respondents Statement of Defence dated 1st April, 2015 discloses no defence in law.

2. The Defendant/Respondents Statement of Defence is frivolous and vexatious; without foundation and not capable of sustaining a reasonable argument in Court.

3. The Defendant/Respondents Statement of Defence contains only mere denials.

4. The Defendant/Respondents Statement of Defence may prejudice, embarrass or further delay the fair trial of the action for being vague, ambiguous and unintelligible and raises immaterial matters

5. It is an abuse of the process of Court.

6. The Application is supported by the Affidavit of RICHARD OSAMBA OTIENO who is the Advocate with conduct. His Affidavit is very succinct. He says that:

1. The Defendant/Respondents Statement of Defence dated 1st April 2015 discloses no defence in law.

2. The Defence is frivolous vexatious and without foundation and not capable of sustaining a reasonable argument in Court

3. The Defence contains only mere denials

4. The Defence may prejudice, embarrass or further delay the fair trial of the action for being vague, ambiguous and unintelligible and raises immaterial matters.

5. At paragraph 6 it is said "It is an abuse of the process of Court. The Court must be carried out properly, honestly and in good faith and should not allow its functions as a Court of Law to be misused for oppression or in bad faith

6. Even more curiously paragraph 7 states; "**THAT** I swear this Affidavit in support of the Application filed herewith seeking dismissal of the underlying suit for want of prosecution".

That seems to this Court to be a classic example of the danger of copy pasting documents without going to the trouble of proof-reading them. This Court takes the view that the Plaintiff is not seeking dismissal of its own suit.

7. As stated above, notwithstanding this Courts direction on 4th February 2016 that "The Parties shall ensure that all the documents they have filed are on the Court record within 14 days". The Court still does not have the benefit of the Defendants' respective Memorandum of Appearance, nor the Statement of Defence and accompanying Witness Statement. In the circumstances the Court is hampered in assessing whether the bald statements made in the Supporting Affidavit are justified, whether in fact or in law. Equally, the Defendants' Written Submissions are not on the file.

8. The First Defendant/Respondent has filed a Replying Affidavit in response to the Application. He says that the Defence filed raises triable issues and therefore the Defendants should be permitted to defend the suit. He sets out the defences on which the Defendants are relying. They are:

1) That the charged property was sold at an undervalue at less than 75% of its previous valuations. The Court must hear evidence to assess this.

2) After obtaining the proceeds of sale the Plaintiff did not apply the sums to off set the loan balance and instead continued to make monthly deductions from their current account causing the Defendants to incur additional interest.

3) The notices and proceedings were prepared and commenced by a law firm that the Plaintiff would have known was in a position of conflict of interest. As a consequence the proceedings should be struck out.

4) That the Plaintiff was applying interest to the account that were not justified and this calls for a reconciliation of the accounts. It is said that the issue of incorrect calculation is raised in the Defence.

5) Reconciliation of accounts cannot be done through a summary procedure;

6) The Plaintiff acted in bad faith in not taking into account the earlier valuations for the Property.

7) The Application is an attempt by the Plaintiff to unjustly enrich itself.

8) The Plaintiff will not be prejudiced as they will have an opportunity to argue its case on its merits.

9) The Application has no merit and should be dismissed.

9. The underlying facts must be garnered from the averments in the Plaintiff as the Affidavits do not set them out. The Plaintiff is a commercial bank (hereinafter referred to as "the Bank"). The Defendants are husband and wife. They wished to buy residential property,

being Crystal Villa No 1 on a piece of land known as L.R. No 330/270 said to be in Lavington close to Braeburn School (hereinafter referred to as the Property). The Bank made an offer of the mortgage facility as recorded in the Offer Letter dated 21 May 2010. The mortgage facility was in the sum of Kshs.22,050,000/=. The loan was to be secured on the Property. In addition to repayments of the loan the Defendants as borrowers were expected to pay (1) Mortgage Protection Insurance Cover Premiums, Home Owners Comprehensive Insurance Premiums, and Ledger fees. The Loan was on a variable rate of interest of 12% chargeable daily but payable monthly. That brought the repayments to the sum of Kshs.282,868 per month. According to paragraph 5 of the Complaint that was the monthly instalment by which the facility was to be repaid. That statement ignores the premiums which were added. The Offer Letter sets out that the Bank may exercise the right of sale by public auction in case of failure to make repayments. The mortgage deed was entered into on 21st September 2010 and registered at the Lands Registry on 8th October 2010. Neither the Mortgage Deed nor the Offer Letter refer to the loan as being a 100% mortgage suggesting that even in 2010 the Property was valued at more than Kshs22,000,000/= . That will be a matter of evidence. It is common ground between the Parties that there was default and the Property was sold at public auction. The Bank has annexed various demand letters to the Complaint including a Letter dated 21 March 2012 which is marked "Without Prejudice. It seems the Bank had then refused to reinstate the monthly repayments. The interest rate also rose to 17%. The 45 day Notice under the Auctioneer's Act was dated 15th January 2012. It is unclear whether a 90 day notice under the Land Act was served. The sale was completed on 13th June 2013 and the purchaser is said to have paid Kshs.20,050,000/= only. As a consequence, there was no longer a mortgage over that property. It must have been discharged. However, the Bank continued applying the same charges and interest for another 12 months. The formal Demand Letter is dated 17th July 2014. It states that as a consequence of the shortfall the outstanding sum on the mortgage is Kshs.13,023,170.44. There is no evidence to show whether any notification was given immediately after the sale or whether there was any response from the Defendants.

10. As stated above the property was sold at a value significantly less than the value in 2010. The Court takes judicial notice of the fact that the property was situated in a suburb of Nairobi which is generally regarded as a prestigious address. It had amenity value from its position and it was also close to a relatively popular school. In the circumstances, the drop in value in an area that was appreciating at the same time requires explanation, as asserted by the Defendants.

11. The Parties were directed to file Written Submissions. The Plaintiff did so and the Submissions are on the file. Mr Were for the Defendants says he did so on the morning of 4th May 2016 when the File was already before the Court. Those Submissions did not appear on the Court File but were placed there later .

10. The Plaintiff's Written Submissions relies on the whole of **Order 2 Rule 15(1)**. Firstly, it is argued that there is no reasonable defence in law. The suit is for a liquidated claim and the Defendants are disputing quantum. The author of the Written Submissions seems to be labouring under the misapprehension that the Defendants are challenging the sale of the Property. The thread of the arguments presented by the Plaintiff are that the Defence must show a triable issue and it does not. Therefore the Defence should be struck out.

11. The Plaintiff's prayer is two-fold, firstly it asks the Court to strike out the Statement of Defence. The Application is brought under **Order 2 Rule 15 (1) of the Civil Procedure Rules 2010**. **Order 2 Rule 15(1) (a)-(c)** provides for the striking out of a pleading (in this case a Defence). The Court is empowered to strike out a pleading or parts of it on the Grounds that:

(a) It discloses no reasonable defence in law, or

(b) It is scandalous, frivolous and vexatious, or

(c) It may prejudice, embarrass or delay the fair trial of the action.

Unfortunately, the Court cannot carry out that assessment as the Defence has been kept off the Court file. In any event given the Affidavit evidence of the First Defendant, it is clear that whatever the pleaded defence, the Defendants are asserting a substantive defence to quantum. That is something which they are entitled to do.

12. The second part of the Application seeks Summary Judgment. Summary Judgment is a concept known to the Older Version of the Civil Procedure Rules. That was under **Order XII rule 6** which reads:

"6, Any party may at any stage of a suit, where admission of fact had been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may upon such application make such order, or give such judgment, as the court may think just."

The Court of Appeal in **Choitram v Nazari** set guidance on interpretation of **Rule 6** thus:

"For the purpose of Order X11 rule 6 admissions can be expressed or implied either on the pleadings or otherwise e.g in correspondence. 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 that the parties passed out of the stage of negotiations on to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether admission of fact had been made wither on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails

to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under Order X11 rule he had then exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law”.

13. There is no equivalent procedure under the **CPR 2010**. In fact **Order 36** provides a procedure identical to obtaining judgment in default. It says;

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

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,

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.

The Rule then goes on to provide; at Order 36, rule 2 that the "*Defendant may show cause either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.*". In this case the Defendant has done just that.

14. In any event, where the Court minded to grant the application for summary judgment, the Plaintiff must prove its case. Here, the Plaintiff's pleaded case contains some errors and some omissions. As stated above paragraph 5 conflates repayments with premiums. After the Plaintiff exercised its right of sale, there was no mortgage. The Plaintiff and annexures omit that step. The Plaintiff has produced an account that pre-supposes the continuation of a mortgage. That was an impossibility after June 2013. Further, the Plaintiff has not justified the rate of interest applied. Curiously, premiums were charged for an owner's policy. If the Bank had re-possessed the Property, where is the insurable interest to which that policy applies? Further, interest was being applied to "unpaid" premiums. To that extent the Defendant has demonstrated that there must be a reconciliation. The Plaintiff has failed to demonstrate at this stage what are the sums to which it is entitled. It should be borne in mind that the Defendants are not arguing that there can be no payment, but simply that it should be the amount calculated correctly.

15. For those reasons the Application is dismissed with Costs. The Defendants are hereby granted leave to defend unconditionally.

16. As recorded above, this file was in a parlous state. There were numerous documents missing. At first the Ruling was deferred in the hope that the situation would be remedied by the Registry of the Commercial Division. Unfortunately, that did not happen. That causes an impasse. **Section 3A** of the **Civil Procedure Act** provides; "*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the Court*". This Court takes the view that the best way to put the matter back on track is to deliver this Ruling, noting its shortcomings and allow the Parties to seek review or appeal. That process has caused significant delay and that is regretted.

Order accordingly.

FARAH S. M. AMIN

JUDGE

DATED and SIGNED AT VOI this 31st day of May 2018

JUDGE

DELIVERED SIGNED AND DATED this the 18th day of June 2018 in Nairobi

In the Presence of

Court Assistant: Wangeci

For Plaintiff/Respondent: Ms

For Defendant/Applicant: Mr Were on Record, no appearance

For Third Party/Respondent: