REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 296 OF 2016

TONAK STOCK LTD .....PLAINTIFF

VERSUS

SIDIAN BANK LTD (FORMER K-REP BANK LIMITED.....1ST DEFENDANT

FINANCE INNOVATION FOR CLIMATE CHANGE FUND.....2ND DEFENDANT

R U L I N G

1. Before this Court are two applications for determination. The first is the Notice of Motion dated **24th April, 2017** by which **FINANCE INNOVATION FOR CLIMATE CHANGE FUND,** the 2nd Respondent/Applicant herein seeks the following orders:-

> **"1. THAT the Petition herein dated 22nd July, 2016 and filed in Court on even date and all other subsequent pleadings filed for and/or on behalf of the Petitioner be and is hereby struck out entirely with costs.**
>
> **2. THAT in the alternative the petition herein dated 22nd July, 2016 and filed in Court on even date and all other subsequent pleadings filed for and/or on behalf of the Petitioner as against the 2ndRespondent/ Applicant be and is hereby struck out with costs .**
>
> **3. THAT in the result, the Petitioner's suit against the 2nd Respondent/Applicant be and is hereby dismissed with costs.**
>
> **4. THAT the 2nd Respondent/Applicant be at liberty to apply for such other and/or directions as it may deem fit.**
>
> **5. THAT the cost of this application be provided for".**

The second application for determination before this court is the Notice of Motion dated **3rd May, 2018** in which **TONAK STOCKS LIMITED**, represented in court by one **MR ANTHONY MWAU WAMBUA** (The Applicant) seeks the following orders:

> **"(a) [Spent].**
>
> **(b) That in view of the urgency hereof, this Honourable Court be pleased to make ex-parte orders prohibiting the 1st Respondent whether by himself, his servants, employees and/or agents from selling through public auction and disposing the petitioner's property pending hearing of this application inter-partes and subsequently until this matter is heard and determined.**
>
> **(c)That costs be provided for".**

Although I propose to deal with each application separately it is instructive at the outset to set out the basic facts of this case. The Petitioner who was the Director of **Tonak Stock Limited** initially filed this matter as a petition before the Constitutional and Human Rights Division of the High Court, together with a Notice of Motion dated **22nd July, 2016**. The application was expressed to have been filed pursuant to **Article 40(1)(a) and (b) of the Constitution of Kenya 2010.** However upon a determination that the crux of the matter was in fact a commercial transaction, the matter was promptly transferred to the Commercial and Tax Division of the High Court.

The background of this case is that on or about March 2015, the Petitioner applied for a loan styled "**Kilimo Plus"** from the 1st Respondent.

The interest rate of the loan according to the Petitioner ought to have been 12% per annum. In his affidavit sworn on 22/7/2016, the Petitioner claims that the 1st Respondent without any justification fraudulently and illegally proceeded to categorize the loan as a personal loan and proceeded to apply interest at a rate of 19% per annum. The Petitioner averred that the loan was not meant for his personal use but was taken in order to boost farming initiatives and was based on the "**Finance Innovation for Climate Change Fund**" which had been launched at the Hilton Hotel on 4th March, 2015.

Sometime later the Petitioner received a short text message that its name would be forwarded to the Credit Reference Bureau for being in default of the loan repayment. The petitioner then moved to court to seek protection to forestall this threatened violation of what it termed its "**Constitutional Rights**".

The petition was heard by **Hon. Lady Justice Olga Sewe** who in her ruling dated 25th July, 2016 dismissed the Petitioner's application on the grounds that it was "**completely devoid of merit**". Following that dismissal the 2nd Respondent filed the application dated 24th April, 2017.

Both applications were disposed of by way of written submissions. The 2nd Respondent filed their written submissions on 17th April, 2018, while the Petitioner filed his "**reply to 1st Affidavit and 2nd Respondent submissions"** on 2nd July, 2018.

The 2nd Respondent submitted that upon being served with the Petition and the Notice of Motion dated 22/7/2016, they were at a loss since neither the Petition nor the Application sought any reliefs and/or orders against it. Nevertheless the 2nd Respondent did duly instruct counsel who entered appearance on 21st October 2016 albeit under protest, arguing that the suit did not concern them at all.

It was further submitted on behalf of the 2nd Respondent that following the Ruling delivered by **Hon. Lady Justice Olga Sewe** on **7th April 2017**, it is evident that the petition involved a dispute over a contractual agreement between the Petitioner and the 1st Respondent and did not involve the 2nd Respondent at all. That enjoining the 2nd Respondent in these proceedings was an act of malice done in bad faith and in an extremely careless manner, which amounted to an abuse of the court process, as evidenced by the fact that no orders and/or reliefs were sought against the 2nd Respondent at all. That being the case the 2nd Respondent sought to have the entire suit against itself struck out with costs.

The Petitioner in its submissions filed on 2nd July, 2018 opposed the application to have its suit against the 2nd Respondent struck out and maintained that it had a valid case against the 2nd Respondent, in that it was the 2nd Respondent who introduced the Petitioner to the 1st Respondent.

ANALYSIS AND DETERMINATION

The 2nd Respondent's application is brought under **Order 1 Rule 10(2)** of the Civil Procedure Rules which provides:-

> **"(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added".**

In the Petition dated **22/7/2010** the applicant clearly set out it cause of action as follows

> **"(c) At an inception and launching workshop held at the Hilton Hotel on 4th March, 2015, the Representatives of the 1st Respondent clearly indicated that their institution would apply interest at rate of 12% to beneficiaries of this programme.**
>
> **a. The Petitioner applied for and was granted loan facilities by the 1st Respondent but fraudulently applied interest rate at the rate of 19%. [sic]**
>
> **b. The 1st Respondent did not disclose this fact to the Applicant at the time of applying for the same.**
>
> **c. The 1st Respondent has now threatened vide a short text message to forward its name to the Credit Reference Bureau and there is a real danger of the 1st Respondent disposing of the Petitioner's property".**

Nowhere in this Petition was any reference made by the applicant to the 2nd Respondent.

Similarly in the Notice of Motion filed by the petitioner on **22nd July, 2016** no reference is made at all to the 2nd Respondent. It is clear that the party with whom the applicant entered into a loan arrangement and the party against whose actions the applicant was aggrieved was the 1st Respondent. Nowhere in the Petition or in the Notice of Motion did the applicant seek any orders and/or reliefs as against the 2nd Respondent.

I have carefully perused the ruling delivered by **Hon. Justice Olga Sewe** on 7th April, 2017. Nowhere did the learned Judge hold or find that there existed any relationship between the applicant and the 2nd Respondent whether commercial, contractual or otherwise. The petitioners

at all times dealt exclusively with the 1st Respondent. It did not seek, or obtain any loan from the 2nd Respondent.

The applicants only grievance against the 2nd defendant was its claim that that it was the 2nd defendant who "**introduced**" him to the 1st Respondent. Nowhere in the applicant's documents has it been stated how, when or where such introduction occurred. In his petition the applicant stated that he met the 1st Respondent at a meeting held on **4th March, 2015** at the Hilton Hotel. There is no allegation that the 2nd Respondent or any representative of the 2nd Respondent was present at that meeting.

It is trite law that he who alleges must prove. If the applicant claims that it was the 2nd respondent who introduced his firm to the 1st Respondent Bank, then he is required in law to tender proof that this was in fact the case. No such evidence documentary or otherwise has been tendered in court to support this allegation.

In any event, even if it had been proved that it was the 2nd Respondent who **"introduced"** the applicant to the 1st Respondent (which is not the case) a mere introduction by one party to another does not give rise to a cause of action tenable in law. Aside from this alleged **"introduction"** the applicant makes no further or other claim against the 2nd Respondent.

I am mindful of the fact that the striking out of a suit is a serious and draconian measure and one that should only be used sparingly, where it has been shown that said suit is utterly hopeless and can in no way be reviewed. In **ELIJAH SIKONA & GEORGE PARIKEN NAROK** on behalf of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS MARA CONSERVANCY & 5 OTHERS[2014]eKLR.** The court held as follows;-

> **"….In particular Order 2 Rule 15(1)(b)(c) and (d) upon which the applications are primarily based, provides grounds for striking out pleadings. This Rule allows the court at any stage of the proceedings to order to be struck out or amended any pleadings on the grounds that**
>
> **a. It discloses no reasonable cause of action of defence in law** [emphasis supplied]

The court went on to hold that

> **"……A cause of action is a factual situation the existence of which entitles one person to obtain a remedy against another person".[emphasis supplied]**

In the present petition I find that the facts reveal no single cause of action by the Applicant as against the 2nd Respondent. The petitioner engaged in no contract or enterprise whatsoever with the 2nd Respondent.

In the **Elijah Sikona case [supra]** the court went on to hold thus

> **"If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as forum for such ventures. To do so would amount to opening a front for parties to ventilate vexatious litigation which lack bonafides with the sole purpose or intention of causing the opposite party unnecessary anxiety trouble and expense, at the expense of deserving cases. This would be contrary to the spirit of the overriding objective of the Civil Procedure Act which requires the court to allot appropriate share of its resources, while taking into account the need to allot resources to other cases"**. [emphasis supplied].

My analysis of the Petition and Notice of Motion filed by the Applicant on **22/7/2016** reveal clearly and without a shadow of doubt that the applicant has no claim whatsoever, however tenuous, against the 2nd Respondent. The enjoinder of the 2nd Respondent in this suit was without basis and can be described as **"fanciful"** in line with the **Elijah Sikona Case.** The applicant's suit against the 2nd Respondent has no substance**.** It is an abuse of court process and to allow the same to proceed to trial would amount to a monumental waste of judicial time.

In the circumstances and based on the foregoing, I am satisfied that the Notice of Motion dated 24th April, 2017 has merit and I make orders as follows:-

i. The Petition herein dated 22nd July, 2016 and filed in court on even date and all other subsequent pleadings filed for and/or on behalf of the Petitioner as against the 2nd Respondent/Applicant be and is hereby struck out.

ii. As a result the Petitioners suit against the 2nd Respondent/Applicant is hereby dismissed in its entirety.

iii. The 2nd Respondent/Applicant is at liberty to apply for such other and/or further orders and/or directions as it may deem fit.

iv. Costs are awarded to the 2nd Respondent.

NOTICE OF MOTION DATED 23rd May, 2018

By this Notice of Motion the applicant sought an order prohibiting the 1st Respondent whether by himself, his servants, employees and/or agents from selling by way of public auction the Petitioner's property. The 1st Respondent though properly served did not file any response to this application and did not appear in court to defend the same. As narrated in this Ruling earlier, the Applicant representing **Tonak Stocks Ltd** had sought for and obtained a loan facility from the 1st Respondent. The applicant readily concedes to the fact that he did seek and obtain a loan facility from the 1st Respondent. Indeed in his written submissions filed on 2nd July 2018 the Applicant states as follows:-

> **"Your Honour, it is not in dispute, that the Petitioner was advanced loan facilities by the 1st Respondent. The bone of contention is the interest rate at which the 1st Respondent purports to charge**".

What the Applicant is challenging is the interest rate on the loan. The applicant avers that he was advanced the loan facility at an interest rate of 12% per annum. He accuses the 1st Respondent of fraudulently illegally, and without notice to himself increasing the interest rate to 19% per annum.

This dispute over the rate of interest to be levied on the loan facility is precisely the issue which **Hon Lady Justice Olga Sewe** dealt with in her Ruling of **7th August 2017**. In that ruling the learned Judge found as a fact that the applicant was truly indebted to the 1st Respondent when she held as follows:-

> **"Moreover it is apparent that the Applicant is justly indebted to the 1st Respondent and the said arrears continue to accrue interest. The interest of justice would require that the debt be repaid".**

There exist several authorities to the effect that in cases where the loan has been admitted a dispute over the rate of interest to be levied is not sufficient ground to stay execution. In **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD, Kwach J/A** (as he then was) expressed himself thus on this point

> **"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligation under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent time for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether…"**

The applicant gave land as a security for the loan. Having admitted the loan and being in arrears then the 1st Respondent is well within its rights to act in order to realize that security. In

ISSAK O. LITALI –VS- AMBROSE W. SUBA 1 &2 OTHERS. HCCC NO.2092 OF 2000. Ringera J (as he then was) held thus

> **"….once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful..for nothing is more clear in a contract or charge than that default in payment of the debt will result in the sale of the security. In that respect land is no different from a chattel such as a motor vehicle or any other form of security…"**

The applicant has not denied his indebtedness to the 1st Respondent. He only seeks to challenge the interest levied upon the loan facility. There exists no justifiable cause to prevent the 1st Respondent from realizing its security.

I therefore find no merit in the application dated 23rd May, 2018. The same is hereby dismissed with costs.

Dated in Nairobi this 27th day of July, 2018.

Ruling delivered at the Nairobi High Court this 27th day of July, 2018.

…….……..

JUSTICE MAUREEN A. ODERO

……

JUDGE