REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 77 OF 2016

JAMII BORA BANK LIMITED ..... PLAINTIFF

-VERSUS-

DANIEL MACUA NDONGA ..... DEFENDANT

R U L I N G

1. The application before me dated 15th November, 2016 was filed by the plaintiff seeking orders that the defendant's defence dated 5th September, 2016 be struck off and judgement entered against the defendant as prayed in the plaint. The application is premised on the grounds that the defence does not disclose any reasonable defense; was likely to prejudice, embarrass or delay the fair trial of the plaintiff's claim, and; was an abuse of the process of court.

2. It is deponed in the supporting affidavit sworn by one Christine Wahome, a legal officer in the plaintiff bank that the defendant owes the plaintiff the money loaned and that the issue of interest rates does not amount to a good defence.

3. The application is opposed by the defendant vide a replying affidavit sworn by the defendant Daniel Macua Ndonga on 30th January 2017. The defendant deposes that the application was without merit and should be dismissed. He further deposes and that the defence raises triable issues.

4. Parties consented to prosecute the application by way of submissions which I have considered. The plaintiff's position is that the defendant's defence was a mere denial. They submitted that the plaintiff's claim was for credit and mortgage facilities advanced to the defendant to the tune of **Kshs. 23,640,400.65** which amounts continue to accrue interest. They cite the case of **Mashlyn Sky Limited vs City Council of Nairobi [2008] eKLR** to support the proposition that it was not a defence to deny owing a debt. The plaintiff further submitted that the defendant's defence amounted to reprobation and approbation in the sense that the defendant on the one hand denies owing any money while at the same time contending that the interest charged was excessive, unconscionable and illegal. They cite the case of **Joel Kimithu Mwangi Vs. Shadrack Kuira [2010] eKLR** for the proposition that such a defence was not acceptable.

5. The defendant submitted that the application does not meet the requirements of **Order 2 Rule 15(i) (a),(c) and (d)**. He submitted that the power to strike out pleadings should be exercised sparingly and only on very clear cases. He relied on **Cabro East Africa Ltd Vs. Rusonga Investments Limited [2013] eKLR**.

6. The only issue for my determination is whether or not the defendant's defence should be struck out. Order 2 rule 15(i) of the civil procedure Rules provide that:

> i. At any stage of the proceedings, the court may order to be struck out or amended any pleadings on the grounds that:
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> (a) It discloses no reasonable cause of action or
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> defence in law; or
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> (b) It is scandalous, frivolous or vexatious; or
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> (c) It may prejudice, embarrass or delay the fair trial of the action; or
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> (d) It is otherwise an abuse of the process of court.

7. Authorities abound on the question of striking out pleadings. **Article 50 of the Constitution** provides for the Constitutional right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or independent tribunal or body. Under sections **1A, 1B, 3A** of the **Civil Procedure Rules,** the court is enjoined to resolve disputes

expeditiously and to prevent abuse of its process. The power to strike out pleadings provided under **Order 2 Rule 15** aids the court in facilitating this overriding objective.

8. It is however now settled that the power to strike out pleadings and to decide a case in a summary procedure should be used sparingly and only in the clearest of cases and where there is no triable issue raised in their defence. See **DT Dobie & Co (K) Ltd Vs Muchina [1982] KLR; Cabro East Africa Ltd Vs Rusonga Investments Limited [2013],** and**; Isaac Awuondo and Surgi pharm Ltd & Anor. Court Of Appeal civil Appeal No 134 of 2003[UR].**

9. The plaintiff in the present case has sued the defendant for the recovery of a term loan of Kshs 7.5 million and mortgage loan of 10 million as pleaded at paragraph 3 of the plaint. It is also pleaded that there was an agreed interest rate of 21% and 27% respectively. Three securities were offered by the defendant. As stated earlier, the defendant vide his defence dated 5th September, 2016 principally denied owing the money. He also 'on a without prejudice basis' contended that the interest rate levied by the plaintiff was illegal.

10. I have considered the defendant's statement of defence. I must agree with the plaintiff that it consists of numerous denials. It would on the face of it pass for a sham defence to the extent that it denies the existence of a loan and mortgage facility despite the memorandum of acceptance signed by both parties. On the other hand however, the defendant went further in the defence to raise the issue of contested interest rates. This in my view is a triable issue which should be tested in the trial. As stated by the Court of Appeal in **Moi University Vs. Vishva Builders Ltd (Civil appeal No 296 of 2004 [UR]** cited in **Isaac Awuondo Vs Surgi Pharm Ltd & Liza Kimbo** *(Supra)*:" the law is now settled that if the defence raises even one bona fide triable issue then the defendant must be given leave to defend". The court went further to state that a triable issue need not be one that will succeed, but one that deserves to be adjudicated on merit.

I am well guided by the authority above and persuaded on the facts of the present case that the defence raises a triable issue and should not be struck out at this stage.

12. For the reasons advanced above I find the application dated 15th November, 2016 not merited. It is dismissed. Costs shall abide the outcome of the suit.

Orders accordingly.

Ruling signed this….day of……2018

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R. LAGAT KORIR

JUDGE

Ruling delivered, dated and counter signed at Nakuru this 26th day of September 2018

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JANET MULWA

JUDGE

In the presence of:

……. Court Clerk

…… For the Plaintiff

……. For the Defendant