



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 50 OF 2017**

**ECOBANK KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**1. KEL ENTERPRISES LIMITED**

**2. FREDRICK GICHINE**

**3. ABDI FATAH HASSAN MOHAMED.....DEFENDANTS**

**R U L I N G**

1. Invoking Order 2 Rule 15(1) c & d as well as Order 36 Rule 1 of the Civil Procedure Act, the plaintiff filed a notice of motion dated 19<sup>th</sup> July 2018 and prayed that:-

**i. “The statement of defense dated 31/7/17 be struck out and Judgment be entered as prayed for in the plaint because the said statement is prejudicing, embarrassing, and delaying the fair trial of the action and it is otherwise an abuse of court process.**

**ii. In the alternative, summary judgment be entered as prayed for in the plaint or in the event the Defendant is given leave to defend, the leave be on condition that the Defendant deposit the total of such instalments as the Defendant may not be able to show that they have paid”.**

2. The application was evidently served upon the defendants advocate on the 16/8/2018 and an Affidavit of service duly filed but no opposition was ever filed and on the hearing date there was no attendance on behalf of the defendant. The grounds upon the application was made were that the statement of defense dated 31/7/2017 was filed unaccompanied by the documents dictated by Order 7 Rule 5, that one year later the same had not been filed and served nor had an application to file same out of time been made hence the fair and just trial of the matter was being prejudiced, delayed and embarrassed.

3. For the alternative prayer, the application was grounded on the fact that paragraphs 3 & 4 of the statement of defense admit the fact that the 1<sup>st</sup> defendant was advanced the loan as much the same was guaranteed by the 2<sup>nd</sup> & 3<sup>rd</sup> defendant. Additionally there was a pleading that the debt was paid and the defendants do not owe yet there were no particulars of the dates and sums paid and wholly unsupported by any documents.

4. The application was supported by the Affidavit of Pauline Wangare , the plaintiff’s manager in Mombasa whose gist was to reiterate the grounds of the application with an addition that by virtue of Central Bank prudential Guidelines 2013, and Section 33B(1), central Bank act, the loan has become non-performing yet the plaintiff must pay to the depositors at least 7% interests. For that reason it is contended that the plaintiff continues to suffer prejudice while there is no defense to merit proceeding to trial without the trial being embarrassed and delayed. Those same facts were reiterated in submissions with further addition that the plaintiff has no chance to fairly and adequately respond to the defense.

5. Though served the defendant did not file any response to the application nor did counsel attend court on the date set for hearing and therefore the same proceeded as undefended.

**Issues and determination**

6. Even though there are two prayer on the face of the motion, the second payer being an alternative once can only be dealt with, on the merits, if the first fails or it would be dealt with as a consequence of the success of the 1<sup>st</sup> in which event its success would largely depend on

the success of the first.

7. All in all the only issues for determination is whether, on the facts disclosed, the defendant should be given a chance to defend or if the defense should be struck out and judgment entered as prayed in the plaint.

#### **Should the statement of defence be struck out?**

8. The law is that every litigant need to be allowed and granted his chance to present his case to the best of his abilities save that such right should be exercised purposely to meet the ends justice and the overriding objective of the court by having the dispute not only adjudged justly but also fairly, proportionately and expeditiously. Therefore while the defendant has all the rights to be heard, it is, in exercising that right, obligated to do everything not to be seen bent on delaying, embarrassing or just obstructing those values of a fair and just determination of the dispute. Beyond the constitutional threshold to ensure fair hearing there are also statutory facilitative provisions which equally must be observed. Therein comes the rules of pleadings which make parties to the proceeding be aware of what is alleged against them so that they exercise their converse right, just like that by the adversary, to respond.

9. With such needs in mind, The Rules Committee has over the years worked to modernize the rules and make them more facilitative to resolution of civil disputes.

10. In 2010, the Rules Committee carried out a near-overhaul of the rules and introduced the requirement that pleadings filed be accompanied by the witness statements as well as the documents to be relied upon as evidence<sup>[1]</sup>. The rules make it mandatory that documents to be used be filed with the pleading. It is only the witness statement that may be filed later with the leave of the court<sup>[2]</sup>.

10. As said before, the purpose of the rules was to make the playing ground level, avoid ambush and give sufficient time to both sides to prepare their defenses and counter the allegations levelled against them. Those are the same values I see enshrined under article 50 of the constitution.

11. In this suit a statement of defense was filed on the 01/8/2018 and served upon the plaintiffs on the same day. That statement of defense did not make the meekest of attempts to comply with Order 7 Rule 5. That was a violation of the rules which violation has seen the matter stay inert for one year without any step being take.

12. In *Caltex Oil Ltd vs Evanson Wanjhli* CAC Application No. 190 of 2009 (UR), quoted with approval in *Nicholas Kiptoo Arap Salat Korir Vs IEBC & 7 Others (2013)Eklr* the court of appeal said of the purpose of overriding objectives of the court:-

**“Principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistake or lapses of counsel or negligent acts, or dilatory tactics or acts constituting abuse of the court process”.**

13. Even after the current application was filed no response was filed and on the date fixed no appearance was made.

14. I am in no doubt that without the documents in support of the Statement Of Defense it is not possible for the plaintiff to justly and effective answer to the assertions in there. If that be true then the right of plaintiff to fair hearing cannot be guaranteed and that is contrary to the constitution. The plaintiff shall be exposed to being ambushed if the matter was to be allowed to proceed and witnesses be put on the box. Parties and counsel, by virtue of the overriding objective provisions, obligated to assist the court meet its overriding objectives. Where a party makes it difficult or slower for the court to discharge its mandate, that party or counsel fails in its duty to court and cannot escape being seen as abusing the court process. That is what I make of the defendant conduct here.

15. While I come from the learning that a default should not be the only reason for a party to be shut from the seat of justice, every default needs to be explained or justified. Where there is no explanation or justification the party in default may as well be seen to grand stand and dare the court to do what ought it to do. Here the court feels it has been dared to remind the defendant that the rules of procedure under the Act are to be complied with by all, court, litigants and counsel, and where there be a misstep an explanation is due.

14. In *Nicholas Kiptoo Salat Arap Korir vs IEBC & 7 Others, [2013] eKLR*, the court of appeal when underscoring the need for compliance with the rules viz-a-vie the need to avoid undue technicalities and meet overriding objective of the court said:

**“It is emphasized that procedure Rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties are reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules”.**

15. I have taken regard that despite service no opposition to the application was filed and at the hearing no appearance was made with the result that the application was not opposed and no explanation offered for the failure to file the documents. I have gone this length well aware that striking out a pleading is a draconian remedy that the court only resorts to in the clearest of the cases,<sup>[3]</sup> and therefore the fact that an application has not been opposed does not excuse the court from the desired scrutiny.

16. I would, on the materials availed to me, hold that the conduct of the defendant is inexcusably dilatory and runs counter the constitutional dictate that court disputes be dealt with fairly proportionately and expeditiously and therefore is not in consonance with the notions that are known to facilitate fair trial.

17. On a second note and on the merits, the defense admits the advances made to the 1<sup>st</sup> defendant and furnishing of guarantees by the 2<sup>nd</sup>

and 3rd defendants. That admission leaves the only question for investigations to be whether there has been payment of that sum so that, as the defendants contend, there is no sum due to the plaintiff. That question would have been due for deeper investigation by production of evidence if there had been attempts to give details as to when and how much payment was done. That is the part, I have held, compliance with Order 7 Rule 5 would have been a facilitator to fair disposal of. The court has been denied that chance in a way I have held is dilatory and inexcusable.

18. With the default to comply with the rules, the defense filed is what the courts have called bare denial. Such defenses are frowned upon by the courts for being evasive and not made *bona fides* and the courts have not been reluctant to strike the same out.

19. Long before the new constitution with its fair trial ethos and dictates together with the codification of the overriding objectives of the court, the court of appeal had severally held that evasive defenses are due for striking out. In *Raghibir Singh Chatte vs National Bank of Kenya Ltd [1996] eKLR* the court said:-

**“When a party in any pleading denies an allegation of fact in a previous pleading, of the opposite party, he must not do so evasively but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum, or any part thereof, or else set out how much he received...First of all, a mere denial is not sufficient defense in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is therefore not sufficient to deny liability without some reason given”. (emphasis added)**

20. Here, like in Raghibir’s case, the defendants say they had paid without stating when the payment was made and how much was paid. Being a bank-customer kind of a relationship, nothing could have been hard for the defendants to specifically answer to the documents filed with the plaint and attack each or some of them in a particular way. That was not done. In effect the statement of defense filed, even if it had not been insufficient for failure to be accompanied by documents, was itself not sufficient in answering the plaintiff’s suit. It is a mere and bare denial. It is bad as a defense and cannot be sustained but stands out to be struck out. I do strike it out.

21. Having struck it out, **Order 2 Rule 15** provides:-

**“At any stage of the proceedings the court may order to be struck out or amended any pleadings on grounds that:-**

- a) it discloses no reasonable cause of action or defense in law; or**
- b) it is scandalous, frivolous or vexatious; or**
- c) it may be prejudice, embarrass or delay the fair trial of the action; or**
- d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed, or dismissed or judgment to be entered accordingly; as the case may be”**

22. Having struck out the defense, I now enter judgment for the plaintiff in the sum of **Kshs.178,868,993.32** and **USD 11,927.26** with interest thereon at the contractual rates, not being above the statutory rates, from the 23/3/2017 till payment in full.

23. I also award to the plaintiffs of the suit with interests or full costs for the date the same shall have been taxed or otherwise ascertained till payment in full.

Dated, signed and delivered this **30<sup>th</sup>** day of **October 2018**.

**P J O OTIENO**

**JUDGE**

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[1] Order 3 Rule 2 and Order 7 Rule 5

[2] Provisions to Order 3 (3) and Order 7 Rule 5

[3] Kivanga Estates Ltd vs National Bank of Kenya Ltd [2017] eKLR