



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 395 OF 2016

LEONARD MUNYUA MBUGUA &

GRACE SIMALOI SAKUNTA T/A

**MUNLEO HARDWARE AND METAL
FABRICATORS.....PLAINTIFF/RESPONDENT**

VERSUS

**EQUITY BANK LIMITED.....DEFENDANT/
RESPONDENT**

RULING

1. To be determined by Court is the Notice of Motion dated 2nd December 2016 which seeks the following orders:-

1. THAT the defence filed by the defendant herein dated 14th September, 2016 be struck out and judgement entered in favour of the Plaintiff as prayed in the Plaint.
2. THAT the costs of this application and the suit be awarded to the Plaintiff.

2. The Defence under attack is said to be scandalous, frivolous or vexatious. That it may prejudice, embarrass or delay the fair trial of the action and lacks merit or is otherwise an abuse of the process of Court. The Motion is expressed to be brought under the provisions of Order 2 Rule 15 1(b) (c) & (d) and Order 13 Rule 2 of The Civil Procedure Rules.

3. In the Plaint dated 5th August 2016 and presented to Court on 8th August 2016, the Plaintiff states that on diverse dates the Plaintiffs and the Defendant entered into various agreements for the Defendant to provide the Plaintiffs with various loans and other financial accommodation. The facilities were to be secured by various assets. Particulars are tabulated below:-

<u>AMOUNT SECURED</u>	<u>SECURITY</u>
I. LC EUR 37,187 II. Ksh.4,016,180 III.LC \$23,294	Roller; KHMA 495H;

3,494,050	Vehicle; KHMA 913E
2,000,000	VOLVO FM 12 TRUCK PRIME MOVER; KBC 941Q
3,000,000	L.R;NGONG TOWNSHIP/BLOCK 1/310
5,156,925	CATERPILLAR 140G, MOTOR GRADER KBN 223X
1,982,000	KBP 506E
2,954,500	NGONG/TOWNSHIP/BLOCK 1/310; VOLVO FM 12-420 6X4 TRACTOR; KBQ 162A KBN 223X KBC 941Q
EU47,250(Ks h.5,433,750)	NGONG/TOWNSHIP/BLOCK KHMA 941B; KBQ 162A; KBC 941Q; KBP 506E; KHMA 913E;
910,000/=	KCB 487C

4. It is the Plaintiff's case that it has paid up all the loans advanced to it but the Defendant Bank has failed to discharge the securities it holds. The Plaintiff therefore seeks the following prayers:-

a) A declaration that the defendant is in breach of contract for failing to discharge the plaintiffs of their liabilities for the paid up loans as specified in the schedule above stated.

b) An order compelling the defendant to release the log books belonging to the plaintiffs severally and or jointly being the log books for;

(i) Roller/Grander/Crane; KHMA 459H;

(ii) Roller/Grander/Crane; HKMA 913E;

(iii) Roller/Grander/Crane; KHMA 941B;

(iv) Prime Mover; KBC 941q

(v) Prime Mover: KBQ 162A

(vi) Catepillar 140g, Motor Grader KBN 223X

(vii) Motor Vehicle KBP 506E

(viii) Motor Vehicle KCB 487C

c) Costs of the suit

d) Any other relief that the court may deem fit to grant.

5. In a Defence dated 14th September 2016 the Defendant stated that in the various letters of offer, the Defendant reserved the right to combine accounts/liabilities and set off any amounts due to it from the Plaintiffs' accounts towards the satisfaction of the Borrower's Liabilities. Further that under the Charge instrument, the Defendant has a right to hold on to the property and assets of the Plaintiff or any part thereof for or in respect to the Plaintiffs' indebtedness to the Bank. In addition the Defendant reserved the right to consolidate all mortgages and charges that the Defendant held from the Plaintiffs.

6. The Bank justifies not releasing the Plaintiffs securities on allegation that the Plaintiffs are in arrears in respect to their loan accounts. Further that the Bank honoured a letter of credit by paying Ksh.4,016,180/= which amount is outstanding and continues to attract interest at the "loan facility rate of interest".

7. In the Affidavit sworn by Leonard Munyua Mbugua on 2nd December 2016 in support of Application, the Deponent repeats the averments made in the Complaint and reiterates that the Plaintiff has paid off all the loans it owed and nothing is due and owing to the Defendant Bank.

8. In respect to the letter of Credit, Mr. Mbugua states that the exporter of the machine made fraudulent attempts to change the machine he was to purchase and the Defendant was aware of this. That after consultation with the Officers of the Defendant Bank the Plaintiff was asked to file suit and to obtain an Injunction against the Defendant not to make payment on the letter of credit.

9. The Plaintiffs then filed Milimani CMCC No.1046 of 2016, **LEONARD MUNYUA & GRACE SIMATOI SAKUNLA /a MUNLEO HARDWARE & METAL FABRICATORS VS. EQUITY BANK LIMITED**(hereafter CMCC 1046 of 2016) and obtained an Injunction stopping the payment. It is the Plaintiff's position that if any payment was made under the terms of Letter of Credit then it would be in defiance of the Court Order in CMCC No.1046/2016.

10. The response by the Defendant is that it had no option but to pay the Letter of Credit because the Documents submitted to it were compliant with the Letter of Credit as the Plaintiff had altered the description of the goods in the Letter of Credit after negotiations with the Supplier. And it would prejudice the Defendant if the Court was to order release of the Log Books in the event that the Plaintiffs suit in CMCC No.1046 of 2016 is dismissed.

11. The Application before Court is one for striking out of a Defence and for entry of Judgement. The Power of the Court to strike out pleadings should only be exercised in the clearest of cases! Where Pleadings are "so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment"**(D.T.DOBIE & COMPANY LTD VS. MUCHINA & ANOTHER** [1982] KLRI. It is a power to be exercised with extreme caution and to be used sparingly.

12. The Defence to the Plaintiffs' suit is that the Bank cannot release the security documents as the Plaintiffs are still in debt to the Bank. the Bank position is that the Plaintiff is in arrears in various of its loan accounts and secondly the Plaintiff owes it Kshs.4,016,180/= on account of the Letter of Credit it paid.

13. But in the evidence placed before Court, the arrears in respect to the loan accounts is not apparent. The Plaintiff alleges full repayment and has produced some statements in support of this. The Defendant says nothing of the statements and does not produce any proof that any loan remains unpaid.

14. However, in respect to the Letter of Credit, the Defendant is said to have paid Kshs.4,016,180

thereunder. The Defendant's position is simply that the Plaintiff owes it this money and interest thereon and so the securities should remain in place.

15. The payment of that Letter of Credit was done, notwithstanding the following Court Order in CMCC 1046 of 2016:-

“IT IS HEREBY ORDERED

1. THAT the defendant is hereby restrained by Injunction from making any payment on account of proforma invoice No.10500172 against which the defendant issued an irrevocable letter of credit Number OLCF000011815 to Commerzbank AG; Frankfurt due on 25/2/2016, to guarantee payment of the sum of #37,187# for the plaintiff's purchase of a machine the subject of this case and or debiting the Plaintiff's account and or utilizing the bank facility issued to the plaintiffs' against the proforma invoice number 10500172 in any way pending hearing and determination of this case on condition that the Applicant files an undertaking as to damages in court within the next five (5) days from the date hereof”.

The Defendant explains that it had no option but to make the payment as the Documents delivered to it had complied with the requirements for payment.

16. The Plaintiffs see this as a blatant disregard for a Court Order.

17. The view I take is that whether or not the payment made out by the Defendant was done in disobedience of a Court Order is a matter that will have to be taken up and resolved in CMCC No.1046 of 2016. But having paid out some Kshs. 4,016,180/= on account of the Letter of Credit, it does not seem a frivolous and obstinate position for the Bank to hold on to the Assets that were pledged to secure the said facility because there is no knowing the outcome of the proceedings. The Defendant may be able to persuade the Lower Court that the payment was lawful, justified and not in contempt of the Court's Order.

18. It is common ground that Letter of Credit was secured by Chattles Mortgages over vehicles KHMA 459H and KHMA 913E. The latter was consensually released by the Defendant Bank to the Plaintiff and sold to pay off the loans to the Bank. The Defendant is however insisting on retaining the securities in respect of the loans that may have been paid on the basis that the charge taken gives it the right to consolidate all mortgages and charges which the Bank may hold from the Plaintiff on any outstanding account. An argument therefore that the mortgages and charges held for the loan can be rightly retained to secure the debt arising from the Letter of Credit. The Plaintiff did not have a ready answer to this.

19. It is therefore the Courts view that this is not the clearest of cases and it is reluctant to strike out the Defendant statement of Defence dated 14th September 2016. Let the matter be ventilated on merit. The Application of 2nd December 2016 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 26th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Buseiga h/b Kithi for Defendants

Chege for Plaintiffs

Alex - Court Clerk