



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 411 OF 2014**

**AYABATWA TRIBERT RUJUGIRO.....PLAINTIFF**

**-VERSUS-**

**DYER & BLAIR INVESTMENT BANK LIMITED.....DEFENDANT**

**RULING**

1. The application before the Court is the Plaintiff's Notice of Motion dated 7<sup>th</sup> May, 2015 and filed in Court on 8<sup>th</sup> May, 2015. It is expressed to be brought under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act as well as Order 2 Rule 15 (c) & (d) of the Civil Procedure Rules, 2010.
2. The Plaintiff sought for the following orders:-
  1. **THAT the Statement of Defence filed herein on 10<sup>th</sup> November, 2014 be struck out and judgment be entered for the Plaintiff as prayed in the Plaint, or as Court shall determine on this summary Motion without prejudice to the Plaintiff's residual claim.**
  2. **THAT the costs of this suit and of the application be borne by the Plaintiff.**
3. The application is based on the grounds set out therein and is supported by the Affidavit of the Plaintiff, **AYABATWA TRIBERT RUJUGIRO**, sworn on 22<sup>nd</sup> April, 2015.
4. The Plaintiff avers that the Defendant acted on his instructions to liquidate stock held on his behalf but then purported to decline to release to him the proceeds of the said sale. He further averred that the Defendant failed to deposit the sale sum in an interest earning account notwithstanding his express instructions to the Defendant to do so. It is the Plaintiff's position that either way the Defendant was enjoined by the Capital Markets (**Conduct of Business**) (**Market Intermediaries**) Regulations, 2011 to deposit the sale sum in an interest earning account immediately after the liquidation of his shares. It is also his position that under the aforesaid regulations, the Defendant was further enjoined to act with skill, care and diligence and ought to have converted the sale sum when the dollar rate was 85.47 instead of converting the same when the dollar rate was 86.60 thereby occasioning him loss.
5. It is the Plaintiff's case that the general conduct of the Defendant on his investment portfolio was negligent and contra statute. It is further his case that the demands made by the Defendant for release of his money were all illegal. He further argues that his claim is legal and has been proven by events and that there is nothing remaining deserving trial of facts.
6. Thus, the Plaintiff's argument for striking out of the Defendant's Statement of Defence is

premised on the grounds that the same does not defend the issues raised in the Plaintiff and that the Defence shall only serve to prejudice, embarrass or delay the fair trial of the action. It is also the Plaintiff's case that the said Defence is an abuse of the Court process.

7. The Defendant opposed the application vide the Replying Affidavit sworn on **9<sup>th</sup> June, 2015** by its Finance Director, **STANLEE NJUGUNA NG'ANG'A**.
8. The Defendant contended that they did not use or apply the proceeds from the sale of the Plaintiff's shares in any manner inconsistent with the Plaintiff's interest. They further averred that owing to certain discrepancies in the Plaintiff's identity, they put up a reasonable inquiry as to whether they were faced with a case of identity fraud and therefore stopped the transaction of releasing the sale sum to the Plaintiff to avert any possible fraud from happening. According to the Defendant, they were just exercising the common law duty of care expected of a Banker to its customer in instances of suspected fraud.
9. It is therefore the Defendant's case that the lapse of time in remitting the funds was attributable solely to the identity red-flag raised with respect of the Plaintiff. The Defendant also blames the Plaintiff for contributing to the delay in releasing the said sale sum by repeatedly refusing to co-operate with them in the verification process.
10. The Defendant further contended that the Statement of Defence raises numerous triable issues which ought to be ventilated at a full trial. Some of the proposed triable issues were listed at paragraph 10 of the Replying affidavit, among them being whether the Defendant was justified in being put on a reasonable inquiry upon discovering discrepancies in the Plaintiff's identity details and whether the Defendant was justified in stopping the transaction pending resolution of the aforesaid discrepancies.
11. It was thus The Defendant's case that striking out the Defence would gravely prejudice them as they would immediately be liable to the Plaintiff to the tune of USD 577,569.54, as opposed to the Plaintiff who would suffer no prejudice if his claim is taken through the normal trial process.
12. I have considered the application in the light of the Pleadings herein as well as the written and oral submissions made by Counsel for the respective parties. The application is brought under **Order 2 Rule 15(1) ( c ) & ( d )** of the **Civil Procedure Rules** which provides as follows:-

***“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***

**(a) ...**

**(b) ...**

**(c) *it may 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.*”**

13. The Plaintiff instituted the present suit by way of the Plaintiff dated 12<sup>th</sup> September 2014 and filed on 22<sup>nd</sup> September, 2014. The Plaintiff sued the Defendant alleging, *inter alia*, breach of duty of care and breach of contract arising from the handling of Kshs. 85,702,073.10 by the Defendant being proceeds from the sale of Safaricom shares owned by him. In his written submissions, Counsel for the Plaintiff isolated the following pertinent aspects of their case and asserted that the same have not been responded to in the Defence:

**(a) Whether the Defendant was enjoined to deposit the Kshs. 85,702,073.10 in an interest earning account;**

**(b) Whether the Defendant was enjoined to act with diligence and convert the Kshs.85,702,073.10 when the dollar rate was 85.47 on 6th November 2013 and not 86.47 as it did;**

**(c) whether the Plaintiff is entitled to USD 500,000 from the Defendant on account of lost**

**investment opportunity;**

**(d) Whether the Plaintiff is entitled to special damages of USD 30,264 that he spent to hire an agent in Nairobi to pursue his payment.**

It was thus the Plaintiff's contention that there being no defence to the Plaintiff's case in its various strands as set out above, the overriding objective of the Civil Procedure Rules as set out in Sections 1A and 1B of the Civil Procedure Act would require that the Defence be struck out as sought pursuant to Order 2 Rule 15, to facilitate timeous and cost effective disposal of this suit. Counsel relied on the case of **Saudi Arabia Airlines Corporation vs. Premium Petroleum Co. Ltd NBI HCCC No. 79 of 2013**

14. The Defendant in its Statement of Defence denied breaching the duty of care owed to the Plaintiff and averred that as a reasonable Banker it acted in good faith to avert the possibility of loss to the Plaintiff. The Defendant further responded to the Plaintiff's allegations in his Plea and provided reasons as to why it handled the Plaintiff's funds in the manner it did. In the Replying Affidavit sworn by **Stanlee Njuguna Ng'ang'a** on 9 June 2015 several issues were set out at paragraph 10 thereof, which the Defendant contends warrant full hearing, namely:

- a. **whether there were any discrepancies in the Plaintiff's identity as set out in his account opening forms as compared to his identity at the time of putting in the sale order;**
- b. **whether the Defendant was justified in being put on a reasonable inquiry upon discovering discrepancies in the Plaintiff's identity details;**
- c. **whether the Defendant was justified in stopping the payment transaction pending resolution of the aforesaid discrepancies;**
- d. **whether the Defendant used or applied the funds in any manner inconsistent with the Plaintiff's interests, so as to amount to conversion;**
- e. **whether in all circumstances of the matter the Defendant as any reasonable investment banker faced with similar scenario would have acted.**

The Defendant relied on the authorities of **Ramji Megji Gudka Ltd vs. Alfred Morfat Omundi Michira & 2 Others [2005] eKLR, Coast Projects Ltd vs. M R Shah Construction (K) Ltd [2004] 2 KLR 119** and **Central Bank of Kenya & Another vs. Uhuru Highway Development Ltd & 4 Others [2000] KLR 382** to support its argument that the power to strike out pleadings must be sparingly exercised.

15. From the foregoing, there can be no denying that the Defendant has raised pertinent issues in response to the claim against it, which, in any event is far from being a clear case of a liquidated demand to which a summary determination would apply. The Plea entails aspects of general and special damages which would require proof. Hence, in as much as the Plaintiff is entitled to a speedy determination of his matter, the Defendant is equally entitled to defend its case at a full trial.

16. In **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** the court stated thus:-

*“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is the function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits ...As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action...”*

17. In view of the foregoing, it is the Court's finding that the Plaintiff's Notice of Motion dated 7<sup>th</sup> May, 2015 and filed on 8<sup>th</sup> May, 2015 is not merited. The same is hereby dismissed. Costs shall be in the cause.

**RULING SIGNED DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH  
2016**

**OLGA SEWE**

**JUDGE**