



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 59 OF 2010**

**EQUITY BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**WESTLINK MBO LIMITED ..... DEFENDANT**

**RULING**

1. The application herein is a Notice of Motion dated 1<sup>st</sup> July 2010 brought under Order XXXV rule (1) and (2), Order VI rule 13 (1) (b), (c) and (d) of the Civil Procedure Rule, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law].

2. The Application is seeking for orders that:-

***1. Summary judgment be entered against the Defendant as prayed in the plaint.***

***2. In the alternative and without prejudice to the foregoing, the Defendant's Statement of defence dated 27<sup>th</sup> April, 2010 be struck out.***

***3. The costs of this application be provided for.***

3. The Application is based on the grounds therein and the affidavit sworn by PURITY KINYANJUI dated 1<sup>st</sup> July 2010 and opposed vide the replying affidavit sworn by MUSTAFA ADEN GEDI dated 22<sup>nd</sup> May 2014.

4. The Applicant's case is that on or about the 20<sup>th</sup> June 2008, the defendant approached and requested the Plaintiff, and the Plaintiff agreed to execute a bank guarantee in favour of Safaricom Limited, guaranteeing/securing the indebtedness of the Defendant to the said Safaricom Limited, to the tune of Kshs.6,000,000/=. Similarly on the 10<sup>th</sup> July 2008 or thereabouts, the Defendant further approached and requested the Plaintiff, and the Plaintiff agreed to execute a further bank guarantee in favour of Safaricom Limited, guaranteeing/securing a further indebtedness of the Defendant to the said Safaricom Limited, for a further sum of Kshs.4,000,000/=. Both guarantees were to be secured by a cash deposit of Kshs.400,000/= and 615,900 Safaricom shares.

5. That by a letter dated the 18<sup>th</sup> December 2008, Safaricom Limited wrote to the Plaintiff, advising that the dealer was in breach of its obligation to Safaricom Limited under the dealer agreement dated 1<sup>st</sup> April 2007 and demanded the payment of the total sum of Kshs.10,000,000 secured by both guarantees. The

Plaintiff duly complied with the demand as per the terms of the guarantee and paid the amount demanded of Kshs.10,000,000 to Safaricom Limited on the 5<sup>th</sup> of January 2009.

6. Subsequent the Plaintiff wrote to the Defendant on the 23<sup>rd</sup> December 2008, informing it of the invocation of the guarantees by Safaricom Limited and asking it to fund its accounts in reimbursement of the sums paid to Safaricom Limited amounting to Kshs.10,000,000.00 as per the letters of indemnity the Defendant executed in favour of the bank.

7. The Applicant deponed that, as at the time the guarantees were called up, the available balance in the Respondents account number 0180292062194 was of Kshs.2,030,576.75 as initial deposit and Kshs.1,049,485.35 as the cash cover build up. The above Kshs.3,080,062.10 was applied to the said account hence reducing the whole debt to Kshs.11,336,793.60 which amount continues to accrue interest at the rate of 18% and a further default rate of 6%. The balance outstanding has accumulated to a total of Kshs.13,389,781.00 as at 28<sup>th</sup> May 2009.

8. The Applicant is now claiming claims indemnity in the said sum of Kshs.13,389,781.00 paid on behalf of the Defendant for breach of its contract with Safaricom Limited, plus interest at the rate of 18% and a further penal rate of 6% till payment in full. A demand has been made but in vain.

9. The Applicant thus submits that the defence raises no triable issues but it is rather a bare denial, a sham, evasive, frivolous and will only embarrass or delay the fair trial of the action. The Application should thus be allowed as prayed with costs.

10. The Respondent opposed the application on the grounds that it is an abuse of the court process, in that it aims at circumventing justice by denying the Defendant an opportunity to ventilate its Defence and bring out pertinent triable issues. The Respondent submitted the court that the bank guarantees were fully and adequately secured by a fixed deposit amount of Kshs.2,000,000/=, there (3) monthly instalments of Kshs.350,000/= aggregating to Kshs.1,050,000/= and 615,900 Safaricom Limited shares.

11. That on the 19<sup>th</sup> August 2008, they approached the Plaintiff for a further facility of Kshs.12,000,000/= and on the 22<sup>nd</sup> of August 2008, the Plaintiff Bank offered the Defendant a further facility of Kshs.12,000,000/= after being satisfied that the previous facility of Kshs.10,000,000/= had been fully secured and that the Defendant was financially credible for additional/further credit aggregating to Kshs.22 Million.

12. However, the Defendant elected to decline the offer by the Plaintiff for a further facility of Kshs.12,000,000/= upon discovering massive irregularities in the Defendant's bank account. The said irregularities included the fraudulent, unlawful and unauthorized withdrawals of monies aggregating to Kshs.4,485,000/= as of the 8<sup>th</sup> September 2008 from the Defendant's account.

13. The Respondent submitted further that upon the aforesaid discovery, the Defendant instituted HCCC No. 142 of 2009 against the Plaintiff Bank and secured judgment in the sum of Kshs.39,720,000/= from the superior court on the 4<sup>th</sup> of February 2010, when the court struck out the Plaintiff Bank's Statement of Defence. Although the Plaintiff Bank being dissatisfied with the decision of court preferred in the Court of Appeal, Civil Application No. Nai 78 of 2011 and subsequently Civil appeal No. 91 of 2014 on the 25<sup>th</sup> April 2014.

14. The Respondent states that the amounts unlawfully withdrawn purportedly as errors when the same had been deposited in the Plaintiff's account with the Defendant had the net effect of overdrawing the said account. The Defendant unknowingly but in good faith, drew several cheques on its account with the Plaintiff, only for the same to be returned unpaid. Thus, the subject matter in the present suit, was caused by the Plaintiff and its employees and the present suit is not only tainted with gross mala-fides but an attempt to demonstrate that the securities provided by the Defendant were never sufficient to cover the said bank guarantees.

15. The Applicant deponed that fraudulent acts of the Plaintiff's employees caused the Defendant not only to suffer massive losses in business and revenue but also to be listed with the Credit Reference.

16. The Respondent further, submitted it is without doubt that the Plaintiff is still holding the Defendant's 615,900 Safaricom shares, a fact admitted in their pleadings. That the plaintiff's claim for the sum of Kshs.13,389,981/= plus interest at the rate of 18% and a further default rate of 6% is not only non-contractual but also not supported by any documentary evidence.

17. The Applicant submitted that, the striking out of a pleading is a radical remedy and a court of law should be slow in resorting to such procedure which can only be applicable in plain, clear and obvious cases and that summary judgment is not applicable when the judge is satisfied that, not only that, there is no defence but even if is present, is so helpless and cannot be cured by amendment but also there is no fairly arguable point to be argued on behalf of the Defendant. The Applicant stated that, If a single bona-fide triable issue is raised, the Defendant must be granted unconditional leave to defend unless the court is of the view that the defence is a mere stratagem or sham. That the Defendant's Statement of Defence raises several triable issues, and does not constitute mere denials nor is the sham a mere stratagem, evasive, scandalous, frivolous or vexatious.

18. In my considered opinion the issues for determination are whether:-

- This is an appropriate case where the court can order for summary Judgment to be entered
- The defence raises or does not raise any triable issues, and/or
- The defence is a sham, evasive, scandalous, frivolous, and may embarrass or delay the fair trial of the action.
- The court should strike out the defence and enter judgment in favour of the Plaintiff, or
- The Defendant should be granted leave to defend the suit.

19. The law on summary Judgment is stipulated under order 36 Rule of Civil

Procedure Rules 2010 and stipulates that:-

**1. (1) In all suits where a Plaintiff seeks Judgment for;**

***a) a liquidated demand with or without interest; or***

***b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but has not filed a defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***

**2. The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.**

**3. Sufficient notice of the motion shall be given to the Defendant which notice shall in no case be less than seven days.**

20. Law on the striking out of the pleadings is found under order 2 Rule 15 of Civil Procedure Rules; it states:-

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

***(a) it discloses no reasonable cause of action or defence in law; or***

**(b) it scandalous, frivolous or vexatious; or**

**(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.**

**(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made”.**

21. In addition, the case law has substantially developed on these issues. I refer to the following cases:-

***Diamond Trust Bank (K) Ltd Vs Martin Ngombo & 8 Others [2005] eKLR***, W. Ouko, J. held that:

*“This summary procedure is intended to give quick remedy to the Plaintiff which is being delayed in realizing his claim against the Defendant by what is generally described as sham defence”.*

***Coast Project Ltd v M R Shah Construction (K) Ltd [2004] KLR 119***, the Court of Appeal, at page 122, stated that:

*“A Plaintiff is entitled to proceed with an application for striking out a defence with the consequent entry of judgment for liquidated claim in situations where the defence is frivolous and /or vexatious. It is a procedure, which is intended to give quick remedy to a party which is being denied its claim by what may be described as a sham defence. This is, however, a procedure which is to be resorted to in very clear and plain cases”.*

***Vaiwin Ltd v Rasikbhai Manibhai Patel, Civil Appeal No. 248 of 1999, [2000] eKLR***, cited with approval ***Gupta v Continental Builders Ltd, [1976-80] 1 KLR 809***, where it was stated that:

*“In a summary judgment application if the defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go for trial, just as sham or bogus defence ought to be rejected peremptorily”.*

***D. T. Dobie & Co. (K) Ltd v Muchina, [1982] KLR 1***, the court stated inter-alia:

*“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 a 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 without discovery, without oral discovery tested by cross-examination in the ordinary way”*

***Magunga General Stores Vs Pepco Distribution Ltd (1987) 2 KAR 89*** Platt, J. A said;

*“First of all a mere denial is not a sufficient defence 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 not sufficient therefore simply to deny liability without some reason given”.*

***Kensan Insurance Brokers Ltd and another Vs Kenida Assurance Company Ltd Civil Application number 94 of 1997 (Omolo, Akiwumi and Lakha JJA***

*“Striking out is a strong summary remedy that must be granted in clearest cases with extreme caution”*

***East African Foundry Works [K] Ltd Vs Kenya Railways Co-Operation Nairobi (Milimani) High Court Civil case number 82 of 2000 (Onyango – Otieno, J***

*“A mere denial by the Respondent cannot, in law be treated as a proper defence and where it is plain and obvious that no case is made, the defence is to be struck out”.*

***Francis Kamonde Vs Vanguard Electical Services Ltd. Civil appeal number 152 of 1996; [1996] LLR 4914 (CAK) (Tunoi, shah, and Pall JJA***

*“No suit can be dismissed unless it is so hopeless and it is plainly and obvious that it discloses no cause of action and is so weak and to be beyond redemption and incurable by amendment”.*

***Ngurumani Ltd Vs Shompole Group Ranch and others Civil Appeal number 73 of 2004 [2007] 2 EA 353 (O’Kubasu Waki and Onyango – Otieno JJA on 9 March 2007)***

*“The power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realisation that the court must not drive away any litigant however his case may be from the seat of Justice. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter”.*

***Joseph Okumu Simiyu v Standard Chartered Bank (Hanyanga J ) HCCC No. 899 of 1994*** dealt with the issues as to what constitute pleadings that are scandalous, frivolous, vexations and which tends to prejudice embarrass or delay fair trial.

***Trevendi and Trivendi Vs Njeri Ngiru Civil Appeal number 129 of 1984 (Nyarangi, Gachuhi and Apaloo JJA***

*A pleading should only be struck out in clear cases and if the matters in the plaint are not clear, the Defendant should ask for particulars.*

22. In considering and applying the facts herein as deponed and/or submitted by the parties and the issues for determination which I have referred to herein. I make my final findings on the application herein. However, I warn myself that at this stage of considering this application for summary judgment, I should not go into the merits and comprehension of the case.

23. I find the following issues may require to go for trial. They include:-

- The issue of fraud. That is, whether the same has fully been dealt with in HCCC No. 142/2009 and resultant Appeal No. 91/2014, and whether the two cases have any relationship with this matter.
- Whether the Bank Guarantees were adequately secured by cash of Kshs.2,000,000, 615 Safaricom Ltd Shares, and three monthly deposit of Kshs.350,000 (Totalling Kshs.1,050,000) and/or what has become of those shares?
- The issue of interest rate of 18% chargeable and disputed by the Defendant.

24. I therefore find that the defence does raise at least some triable issues.

The authorities cited herein support the preservation of a defence for trial where it raises at least a triable issue and no prejudice will be suffered by the other party. It is therefore not a sham or a mere

denial and no prejudice will be occasioned to the other party.

In that regard, I therefore make the following orders.

- **The Application dated 1<sup>st</sup> July 2010 is dismissed.**
- **Costs to the Respondents.**

Ordered accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 21<sup>st</sup> DAY OF JUNE 2016.**

**G. L. NZIOKA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Kimikicha for Munyala for Plaintiff

Tebino for Defendant

Teresia – Court Clerk