



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 1 OF 2016

BETWEEN

KOYANDO INVESTMENTS

suing through JACOB OLOO OGUT PLAINTIFF

AND

B. N. KOTECHA & SONS LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 31st August 2016, the plaintiff has moved the court under **Order 2 rule 15(1),(b), (c) and (d)** and **Order 51 rules 1 and 4** of the **Civil Procedure Rules, Section 1A, 1B and 1C** of the **Civil Procedure Act** for the following orders;

a. The defendant's statement of defence dated 8th February 2016 and filed on 18th February 2016 be struck out and/or final judgment be entered against the defendant for Kshs. 100,000,000/- (Kenya shillings one hundred million) as prayed in the plaint together with interest of Ksh. 40,000,000/- and costs.

b. Cost of this application.

2. According to the grounds set out in the fact of the application, the plaintiff averred that the statement of defence is frivolous and only calculated to delay the fair trial of the suit, that the defendant is truly and justly indebted to the plaintiff for the amount claimed and that the statement of defence filed by the defendant is dilatory and an abuse of the court process.

3. The application is also supported by the affidavit of Jacob Oloo Ogut sworn on 31st August 2016. He deposes that the defendant borrowed from the plaintiff Kshs. 100,000,000/- by an agreement dated 1st November 2014. According to the agreement, the defendant was to pay a sum of Kshs. 2,000,000/- per month as interest and that the interest has now accrued to Kshs. 40,000,000/-. Due to default the plaintiff sent a demand dated 2nd November 2016 and by letter dated 13th August 2016, the defendant admitted through its advocate admitted that it borrowed the money and that therefore the defendant defence is a mere denial, frivolous, vexatious, sham, an abuse of the court process and is calculated to delay the fair trial of the suit and does not raise any triable issue. On the basis of the facts set out, counsel for the plaintiff urged the court to enter judgment against the defendant.

4. The defendant opposed the application through the replying affidavit of Harshil Kotecha, a director of the defendant company, sworn on 30th September 2016. The thrust of the deposition is that the Company

did not enter into any agreement with the plaintiff and if any agreement was entered into, it was without authority of the Company and contrary to its Articles of Association. He also denied that the Company issued the cheques of Kshs. 50,000,000/- which was in any event signed by a person without authority. The Company also stated that it was entitled to a set-off on account of good supplied to the plaintiff between 31st July 2014 and 23rd December 2015 which were not paid for. In reference to the letter dated 13th August 2015, the defendant contends that the same was written on a “*without prejudice*” basis hence it cannot be relied upon as evidence of indebtedness. The Company also contends that the plaintiff was involved in a lending transaction when it was not a licenced financial institution under the **Central Bank of Kenya Act**, the **Banking Act** and the **Micro Finance Act**. The defendant’s position is that there are triable issues that entitled it to defend the suit.

5. It well established the power to strike out a defence is draconian and must be exercised with circumspection. Where the statement of defence raises a bona fide triable issue, then the defendant must be allowed to defend the suit. In **Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & another** [2009] eKLR, the Court of Appeal held that, “*It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.*”

6. In the case of **Blue Sky EPZ Limited v Natalia Polyakova & Another** [2007] eKLR the court held that:

The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.

7. A prima facie reading of the pleading reveals that the transaction between the plaintiff and the defendant is not straightforward. Firstly, the capacity of the plaintiff is not clear from the pleading. Is it a limited liability Company or a firm? If it is a limited liability company, then why would it sue through a real person. Second, in what capacity did the defendant contract? Third, whether in fact, the defendant owes the plaintiff the sum claimed in the plaint. These and other issues mean that this is not a proper case for the court to exercise summary jurisdiction.

8. The Notice of Motion dated 31st August 2016 is dismissed with costs. The matter is now adjourned for pre-trial directions.

DATED and DELIVERED at KISUMU this 27th day of October 2016.

D.S. MAJANJA

JUDGE

Mr Okungu instructed by R.O. Okungu & Company Advocates for the plaintiff/ applicant.

Mr Menezes instructed by Menezes and Company Advocates for the defendant.