REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE NO. 343 OF 2011

LAWRENCE C. NJERU.....…...PLAINTIFF

VERSUS

DANSON BUYA MUNGATANA…….....DEFENDANT

RULING

1. The Plaintiff's claim against the Defendant is for the sum of US $ 193,000 plus interest thereon at the rate of 15% per annum from 26th April, 2011 until payment in full. The Plaintiff claims that by an oral agreement made on or about 20th April, 2011, the Plaintiff loaned the aforesaid sum of US$ 193,000 to the Defendant. That the Defendant agreed to repay the same on or before 26th April, 2011 by virtue of a letter dated 20th April, 2011. The Plaintiff avers that the Defendant defaulted in repayment of the loaned amount and hence the institution of this suit. The Defendant thereafter filed a Statement of Defence dated 23rd September, 2011 in which he denied the Plaintiff's claim.
2. On being served with the Defence the Plaintiff then filed a Notice of Motion dated 7th November 2011 in which he sought to strike out the Statement of Defence on the basis that it fails to raise a reasonable defence or at all and that judgment be entered in favour of the Plaintiff. The application was brought under Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules and is the subject of this ruling. The application is supported by the Plaintiff's affidavit sworn on 7th November, 2011.
3. Through the affidavit in support, it was contended that the Defendant is still indebted to the Plaintiff and has refused to repay the loan of the sum of US$ 193,000. That the Defendant's defence does not raise any triable issues and the same is scandalous, frivolous and an abuse of the court process. Through the written submissions of the Plaintiff that were orally highlighted by learned counsel, it was argued that the Statement of Defence failed to respond adequately or give any proper defence to the indebtedness of the Defendant to the Plaintiff. Ms. Ngania, Learned Counsel for the Plaintiff further pointed out that the Statement of Defence as filed bears no reasonable defence and that the same contained mere denials aimed at unnecessarily delaying the Plaintiff's just claim. That further, the Defendant was abusing the court process by filing a statement of Defence which consists largely of renunciations despite his acknowledgement of the debt and undertaking to repay the same on or before the 26th April, 2011. The Plaintiff therefore urged the court to allow the application and strike out the Defence and enter Judgment in his favour.
4. The Defendant on his part opposed the Application by filing a Replying Affidavit sworn on 16th April, 2012. He maintained that he has raised a reasonable defence with triable issues. He

deponed that the Plaintiff was introduced to him by one Mr. Njuguna who was his acquaintance. That Mr. Njuguna was interested in investing in a venture initiated by the Defendant, but was not in a position to do so. That in his place, Mr. Njuguna suggested that the Plaintiff invest in the venture in which the Defendant described as **"high risk**, with "**high returns**". That thereafter, the Plaintiff invested in the said venture by paying several installments to the Defendant totaling about US$ 96,500 in which he expected a 100% return totaling to US$ 193,000. The Defendant therefore asserted that the sums given to him by the Plaintiff were not a loan as claimed but an investment to the Plaintiff's venture abroad. It was further contended that the Plaintiff being apprehensive that the transaction was oral and there was no assurance on the investment returns, the Defendant authored a letter dated 20th April, 2011 admitting that the Plaintiff invested a sum of US$193,000 with him. It was further claimed that the said letter was written under duress as the Plaintiff had threatened the Defendant of dire consequences if he refused to write an assurance of repayment of the said sum. It was the Defendant's contention that it was against public policy, unconscionable and unenforceable for the Plaintiff to allege that the sums invested were a debt of the Defendant and ask for a refund of the same within six (6) days with interest of 15%. He asserted that the transaction was at all times carried out in utmost good faith and this was well explained to the Plaintiff, hence his release of the sum of US$ 69,500 to the Defendant without any formal written contract or agreement. It was also the Defendant's contention that the returns of the invested funds have just been delayed as explained to the Plaintiff and that this suit was instituted prematurely.

5. In his submissions, Mr. Deya Learned Counsel for the Defendant, stated that the Statement of Defence filed in the suit raises triable issues that should be ventilated in full trial. It was argued that striking out of pleadings was a radical remedy that should only be resorted to in clear and plain cases. According to Mr. Deya, there was a triable issue before the Court on whether or not there was a loan of US$ 193,000 advanced to the Defendant by the Plaintiff. That this fact has been denied by the Defendant. It was also the contention of Mr. Deya that the amount alleged to have been borrowed was advanced on 20th April, 2011 as per the Plaint but that the letter in paragraph 2 indicated that the same was advanced on various dates. According to Mr. Deya, this amounted to a triable issue. The Defendant therefore maintained that he had raised a prima facie defence to which he is entitled to unconditional leave to defend the Plaintiff's claim. Mr. Deya therefore urged the court to sustain the suit and allow the parties to explain the nature of business they were engaged in at trial. He asked the court to dismiss the application with costs.
6. I have considered the Affidavits on record and the submissions by Counsel. I have also considered the various authorities relied on by Counsel. The issue for the court's determination is whether the Defendant's Statement of Defence as filed raises any reasonable defence or is a sham to warrant the striking out as contended by the Plaintiff.
7. The instant Application has been anchored Order 2 Rule 5 (b), (c) and (d) of the Civil Procedure Rules. That provision donates the power to the court , in an appropriate case, to strike out any pleading on the grounds that it is "**scandalous, frivolous or vexatious**", or **"it may prejudice, embarrass or delay the fair trial of the action"**, or **"it is otherwise an abuse of the process of the court"**. Put differently, the court must be persuaded that the defence is "without substance and is fanciful", "lacking in bona fides and hopeless or offensive" and would "embarrass or delay a fair trial or misuse the court process".
8. In the case of **D.T. DOBIE & COMPANY V MUCHINA, (1982) KLR 1**, Madan J.A (as he then was) eloquently expounded on the approach to be adopted in exercising the power to strike out pleadings, and I quote him at some length:

> ***"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 evidence tested by cross-examination in the ordinary way]. Sellers, JA [supra]. As far as possible, indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in***

disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

9. The same sentiments were expressed by Danckwerts L.J when the House of Lords considered a similar Rule in **WENLOCK V MOLONEY, [1965] 2 All E.R 871** at page 874, as follows:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

10. Bearing the above in mind, it is critical to analyze the nature of the Statement of Defence on record. Paragraph 1, 2, 3, 4, 13 and 14 are paragraphs commonly found in all statements of defence. This leaves me with Paragraph 5 to 12. The same are in response to the Plaintiff's concise claim of the amount of US $ 193,000 owed to him by the Defendant. In paragraph 5 the Defendant asserts that if there was any agreement between the parties herein, whether oral or written, the same was tainted with mistake and misrepresentation or fundamental facts which were agreed upon by the parties. This was in response to the Plaintiff's claim that there existed an oral agreement made on or about 20th April, 2011 where he advanced the sum of US$ 193,000 to the Defendant. In response to the claim by the Plaintiff that the Defendant had acknowledged the debt through a letter dated 20th April, 2011, the Defendant in paragraph 7 stated that the same was made under duress and that the parties were not at ad idem. Further, the Defendant denied being indebted to the Plaintiff. In my view, these allegations or issues are based on contested facts which can only be resolved through tested oral testimony.
11. Though the Defendant outlines a more detailed account of the history of the transaction in his Replying Affidavit as opposed to the Defence, I find that the issues in the Defence are prima facie triable since the answers to the issues raised by the Plaintiff are not plain and obvious. The issue of whether or not a debt of US $ 193,000 existed is therefore, not an issue that can be determined based on affidavit evidence. Further, the letter dated 20th April, 2011 relied upon by the Plaintiff illustrate that the Defendant admitted his indebtedness to the Plaintiff has been impeached on the grounds that the same was written under duress. Whether the same is true or not, should be a subject of trial and this court cannot go into the rigors of trying to establish whether the same holds any water or not at this state. Whereas the statement of the claim allege that the sum of US $193,000 was advanced on or about 20th April, 2011, the letter of 20th April, 2011 talks of advances made on various dates before the said 20th April, 011 and the Replying Affidavit expands on the circumstances and purpose of the advances.
12. In the foregoing, my evaluation of the matter is that the defence on record is not without substance or fanciful. The same could only be vexatious if it was lacking in bona fides or is hopeless or offensive, but there is no firm basis laid for such conclusions. I also find that it would be an abuse

of court process to deny a party to civil proceedings access to a fair ventilation of his case in accordance with the Rules. In my assessment, the Defendant ought to be given his day in court where he can ventilate his case in oral evidence and test the Plaintiff's claim through cross examination before a final decision is made. What comes out of the Replying Affidavit is that the claim by the Plaintiff is not as clear as he suggests. The alleged claim of US $193,000 was made in circumstances that need to be investigated, that it was not whole sum of US$ 193,000 that was advanced, that the letter of 20th April, 2011 may have been written under duress.

13. In the result, I find that the Plaintiff's Notice of Motion dated 7th November, 2011 is for dismissal with costs to the Defendant. The matter should however be listed for hearing at the earliest to expedite its conclusion.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of January, 2015.

A MABEYA

JUDGE