REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 518 OF 2012

BAYPLAN CREDIT LIMITED……..…...…..……PLAINTIFF

VERSUS

GESA BUILDING & CIVIL ENGINEERING……..…...….....…….1ST DEFENDANT

GEORGE NGURE CHIRA…..…...……..…2ND DEFENDANT

IRENE WANJIRU NGURE……...……..……..3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 20th November 2013 and filed on 21st November 2013 was brought under the provisions of Order 50 Rule 1, Order 2 Rule 15 (1) (a), (b), (c) (d) of the Civil Procedure Rules 2010, Section 3A & 3B (sic) of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-

a. **THAT the Honourable Court be pleased to strike out the defence herein filed on 2nd October 2012.**
b. **THAT alternatively Summary Judgment be entered against the Defendant/Respondent for the sum of Kshs 32,274,583/=.**
c. **THAT the costs of this application be provided for.**

THE PLAINTIFF'S CLAIM

2. The Plaintiff'sapplication was supported by the Affidavit of Alice Wahito Ndegwa, its Director. It was sworn on 20th November 2012. Its written submissions were dated and filed on 30th January 2013.
3. The Plaintiff entered into a Loan Agreement with the 2nd and 3rd Defendants who were directors of the 1st Defendant herein on 3rd May 2010 in which it advanced to them a sum of Kshs 7,500,000/=. The Defendants defaulted in making the payments as had been agreed upon as a result of which the outstanding sum due to it from the Defendants now stood at Kshs 32,274,583/=.
4. Its case was that the Defendants were estopped from denying the Plaintiff's claim as the Defendant had plainly admitted the same. It therefore sought that the Defendants' Defence be

struck out and summary judgment be entered in its favour.

THE DEFENDANTS' CASE

5. On behalf of all the Defendants herein, George Ngure Chira, the 1st Defendant's Managing Director swore a Replying Affidavit that was filed on 19th December 2012. It was undated. The court will address this issue later on in the Ruling herein. The Defendants' written submissions were dated 25th January 2013 and filed on 29th January 2013.
6. The Defendants also filed Grounds of Objection that were dated 18th December 2012 and filed on 19th December 2013. The said grounds could be summarised as follows:-

a. **THAT the application was not merited and was an abuse of the court process.**
b. **THAT this was not a suitable matter for summary disposal by way of affidavit evidence as there were several triable issues.**
c. **THAT the application was meant to circumvent the course of justice as the evidence would need to be tested after hearing of the parties.**

LEGAL ANAYLSIS

7. The court wishes to address the question of the undated Replying Affidavit right at the outset. Section 5 of the Oaths & Statutory Declarations Act Cap 15 (Laws of Kenya) is set out in mandatory terms. The same provides as follows:-

"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under the Act shall(emphasis court) **state truly in the Jurat or attestation at what place and date**(emphasis court) **the oath is taken or made."**

8. It must be understood, that whereas Article 159 (2) (d) of the Constitution of Kenya, 2010 comes to the aid of litigants to cure procedural technicalities, it cannot cure substantive issues. This was a conclusion that was arrived in the case of **Raila Odinga vs IEBC & Others [2013] eKLR** where the Supreme Court held that Article 159 (2) (d) of the Constitution of Kenya, 2010 simply meant that a court shall not pay undue regard to procedural technicalities at the expense of substantive justice but that the same was not intended to oust the obligations by litigants to comply with procedural imperatives.

9. It may well be that the copy of the Replying Affidavit that was served upon the Defendants was dated as they did not raise the issue. However, the copy in the court record is the one that the court would consider. For the reason that the said Replying Affidavit did not comply with the statutory and mandatory provisions of the law, the court will not have regard to the same. The court therefore considered the Defendants' Grounds of Objection only.
10. The Plaintiff relied on all the grounds under Order 2 Rule 15 of the Civil Procedure Rules, 2010 seeking to strike out the Defendants' Defence and for entry of judgment. The same stipulates that:-

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 is scandalous, frivolous or vexatious; or**
    c. **It may prejudice, embarrass or delay the fair trial of the action; or**
    d. **It may be otherwise an abuse of the court process of the court,**

    And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case may be.

2. **No evidence shall be admissible on an application under subrule (1) (a) but the application**

shall state concisely the ground on which it is made.

11. It referred the court to the cases of **Southern Credit Bank Limited vs Haren Mandavia t/a Fidelity Timber & Hardware Ltd & Another [2012] eKLR** and **Beatrice Wanjiku Muhoho vs Honourable Attorney General [2012] eKLR** where the court struck out defences based on the aforementioned grounds as the aim of Section 1B of the Civil Procedure Act was amongst other objectives to timely dispose of proceedings before the court.
12. On the other hand, the Defendant submitted that this was not a straight forward matter to be decided, at the interlocutory stage, on affidavits. It placed reliance on the cases of **DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR** in which the court held that the power to strike out pleadings should only be exercised after the court had considered all the facts but it must not embark on the merits of the case because that was solely reserved for the trial judge.
13. It also referred the court to the case of **HCCC No 504 of 2010 Touchstone Developers Limited vs Moses Nguchine Kirima** (unreported) in which Odunga J declined to strike out a defence because doing so would be:-

> **"…to engage in a minute and protracted examination of the documents and facts of the case…a function which is reserved for the Trial Court."**

14. It was evident from the grounds on the face of the Plaintiff's application that it was asking the court to strike the Defendants' Defence on the basis that it had failed to disclose any reasonable cause of action against it. It was not required to file any affidavit in support of this ground as none was required under the Rules. When relying on this ground, the Plaintiff was essentially inviting this court to look at the Defence without considering the merits of the case and immediately find that no reasonable cause of action had been set out against it.
15. To persuade the court to strike out the Plaint on this ground, the Plaintiff was required to demonstrate, without relying on affidavit evidence, that there were sufficient reasons to show that the Defence filed herein disclosed no reasonable defence or triable issues. The evidence had to be so cogent so as not to prejudice the Defendants' case. This is because the court would ideally be proceeding to strike out the suit without hearing the merits of the Defendants'case.
16. The fact that the Plaintiff supported this ground by way of affidavit evidence was misplaced as it was clear that it had to justify in great detail why the Defendants' Defence ought to be struck out. The Plaintiff would therefore not succeed on this ground.
17. The Plaintiff was required to adduce evidence that the Defendant's Defence was filed with intention of annoying or vexing it and that it ought not to have been filed in the first place. It, however, did not demonstrate how the Defendants' Defence was scandalous, frivolous, vexatious or how it would prejudice, embarrass or delay the fair trial of the action or that it was an abuse of process of court as was contemplated under Order 2 Rule 2 (b), (c) and (d) of the Civil Procedure Rules.
18. The Defence did not also appear to contain mere denials. Contending that the Defendants' Defence contained mere denials was not enough. The Plaintiff had to demonstrate how the same were mere denials. There was the question of whether or not the lending agreement was varied by an agreement dated 3rd May 2010, whether or not the amount that was advanced was Kshs 7,500,000/=, whether or not the agreed amount was repaid in full, whether or not the penalties and interest charged were illegal and usurious and unrecoverable and/or whether the Defendant was indebted to the Plaintiff in the sum of Kshs 32,274,583/= amongst other issues.
19. Whereas the Plaintiff averred in its Supporting Affidavit that the Defendants instructed M/S I & M Bank Limited, Wilson Airport Branch to make certain payments to the Plaintiff and that after the variation of the Loan Agreement, the Defendants failed and/or declined to honour their obligations, the court did not find the Defendants to have made an admission of the outstanding amounts.
20. The court could not close its eyes to the *duplum* rule where the maximum that a financial institution could recover by way of interest was the equivalent of the principle sum. This was a position that was held in the cases of **Vijay Morjaria v Harris Horn Junior & Another [2012] eKLR**, **Barclays Bank of Kenya Ltd v Farmers Partner Limited & 2 Others [2012] eKLR** and **Commercial Bank of Africa Limited v Paul S Imision & Another [2012] eKLR.**

21. Save for Statement of Accounts marked Exhibit "AWN 16" annexed to the Supporting Affidavit showing the sum of Kshs 32,274,583/=, there was no historical background of how the said sum was arrived at. The court noted that whereas a sum of Kshs 7,500,000/= was said to have been advanced to the Defendants, the outstanding sum appeared to have accrued to Kshs 32,274,583/= which was many times more than the principle amount. There was therefore need to interrogate this issue further at the time of trial with a view to a just determination in this matter.
22. It must be kept in mind that an act of striking out of pleadings by the court is a draconian step which must be used as a last resort. Indeed, a party must be given a fair and reasonable opportunity to present its case. This is to afford such party that fair and reasonable opportunity to ventilate its case**.**
23. Striking outshould therefore be exercised cautiously and with a lot of restraint. The main aim is to sustain rather than terminate a suit. This was a position that was espoused in **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR**whereMusinga J (as he then was) had the following to say:-

"**It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."**

24. The seriousness with which the court takes as regards the striking out of pleadings was also considered in the case of **DT Dobie & Co (Kenya) Ltd vs Muchina** (Supra).In that **case,** the Court of Appeal held as follows:-

"a cause of action will not be considered reasonable if it does not state such facts as to support the claim…. "cause of action" means an act on the part of the defendant which gives the plaintiff his cause of action. As the power to strike out pleading is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. The court should aim at sustaining rather than terminating a suit…As long as a suit can be injected with life by amendment, it should not be struck out…"

25. Having considered the pleadings herein, the affidavit evidence and the written submissions and case law in respect of the parties' respective case, the court found and held that the averments in the Defendants' Defence could not in any way be deemed to have been mere denials. Indeed, making a determination at this juncture would not only be pre-empting the parties' respective cases but the court would also be analysing affidavit evidence when it was quite clear to the court that therewere weighty and triable issues that would require to be ventilated in a full trial.

DISPOSITION

26. Accordingly, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated 20th November 2013 and filed on 21st November 2013 was not merited and the same is hereby dismissed with costs to the Defendants.
27. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 19th day of January, 2015

J. KAMAU

JUDGE