



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 312 OF 2012

HON. MOSES MASIKA WETANGULA. APPLICANT/PLAINTIFF

VERSUS

HON. DANSON BUYA MUNGATANA. RESPONDENT/DEFENDANT

RULING

The application before the court is the Notice of Motion dated 19th March, 2013 seeking that

- a. The court strikes out the Defence by the Defendant herein and thereat enter summary judgment for the Plaintiff in the sum of Kshs.12,000,000/-.
- b. An order for costs.

The grounds shown on the face of the record for seeking the above orders are that the defence filed by the Respondent/Defendant is a sham, is scandalous, frivolous, vexatious and amounts to an abuse of court process; and that it is also intended to delay the fair and timely disposal of the suit besides prejudicing and embarrassing the plaintiff.

The Supporting Affidavit of the Applicant/Plaintiff repeats the facts pleaded and contained in the plaint. The facts relied on are that the Defendant Danson Buya Mungatana, approached the Plaintiff Moses Masika Watangula for a friendly personal loan on the Defendants undertaking to repay the same by fourteen instalments contained in (14) cheques drawn for encashment at the Defendants bank on dates shown on the said cheques. The Applicant/Plaintiff further deposed that on presentation of the said cheques to the Defendant's bank for payment on the due or agreed dates, the cheques were dishonored by the Bank on the basis that the Defendant's bank account lacked sufficient funds. That the Applicant thereafter informed the Defendant of the dishonor of the cheques but the Defendant despite further promises to pay, failed to do so, prompting the Plaintiff to file this claim. The Plaintiff annexed the photocopies of the said cheques together with other Defendant's bank documents confirming the dishonor of the cheques for lack of funds in his account at Co-operative Bank of Kenya Limited, Parliament Road Branch.

The Defendant Danson Buya Mungatana, swore a replying affidavit in opposition. He deposed that the Plaintiff's application to strike out is defence was dubious, vexatious, an abuse of court process, devoid of merit and is tainted with untruth and/or falsehoods, contradictions, and irrelevancies. The Defendant also, while admitting that he received the alleged advanced money, nevertheless further stated that the money was for an agreed high-risk business which would mature in six months from the time of advancement of the moneys. That he informed the Plaintiff of the delay to return the moneys as and when such information came to him but the Plaintiff became impatient.

The Defendant further deponed that he gave the cheques to the Plaintiff for the repayment of the amount advanced to him together with agreed interest, but that he did not authorize the presentation of the cheques to his bank at Co-operative Bank of Kenya Ltd, Parliament Road at the time the cheques were presented.

The Defendant also deponed that he had undertaken to the Plaintiff, to repay the claimed amount sometimes in the year 2011 from a sale of his property which he intended to sell at Kshs.40,000,000/- but that the Plaintiff did not co-operate or accept. The Defendant also further deponed that the cheques were not dishonoured on presentation as alleged and that the Plaintiff has no evidence to prove the alleged dishonour.

The Defendant further alleged that he knew that he was not indebted to the Plaintiff and therefore his defence was not a sham or full of mere denials, frivolous, scandalous and vexatious or an abuse of court process as alleged. That the Defence actually raises triable issues and that the application should be dismissed and the suit be allowed to go to trial.

I have examined the Plaintiff and the Defence pleadings. The Plaintiff pleads the allegedly dishonoured cheques showing their numbers, dates and amounts each carried. The Plaintiff pleads that the cheques were presented for payment on the dates(s) thereon and that they were returned unpaid for lack of sufficient funds in the Defendant's Bank account at the material time. The Plaintiff also pleaded that the Defendant having been notified of the dishonor, made no alternative acceptable arrangement to settle the total outstanding sum of the cheques making the filing of the claim necessary.

The Defendant in his defence on the other hand, pleaded that the Plaintiff's suit is based on an illegal unenforceable contract which is against public policy, tainted with misrepresentations, non-disclosure of facts, mistake of fact and lacking in material facts. The Defendant denied receiving the claimed funds but again in the alternative, averred that repayment of the funds had been made in full.

Again the Defendant deponed that the Plaintiff had charged exorbitant interest rates contrary to public policy and that the claimed amount of Ksh.12,000,000/- included profits expected by the parties from the business in which the Defendant invested the borrowed funds. Finally, the Defendant had pleaded that he gave the cheques to the Plaintiff with an assurance from the Plaintiff that the latter would not present them to the Defendant's Bank without clearance from the Defendant.

Both parties filed written submissions which I have carefully perused and considered. I will first deal with the principles that govern cases for striking out defences and entering judgment.

In the case of **GUPTA VS CONTINENTAL BUILDERS (1978) KLR 83** at page 87 Madan, J as he then was, had this to say: -

“... this was an application for summary judgment. If a 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 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 due in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”

To the above end it is trite law that even a single triable issue is sufficient to entitle a Defendant leave to defend (**DT DOBIE & COMPANY KENYA LTD VS MUCHAINA [1982]KLR**). Summary judgment is also unlikely to be entered where serious allegations of fraud, forgery, collusion and other similar illegalities are justifiably alleged. In **Camillers Amin Mohamed Merali [1966]EA 411**, the court reiterated the general principle governing the granting of leave to defend thus: -

“The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham and it must be

more than mere suspicion.”

As put in **Shah v Padmish [1984] KLR 531**

“Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the Defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the Defendant will not succeed at the trial.”

It would appear therefore, that in practice a Defendant may fail to plead his possible defences in his statement of defence but reveal such triable issues in an affidavit or oral evidence or otherwise, including in affidavits in opposition to a Notice of Motion seeking summary judgment or seeking striking out of a filed defence or in a motion seeking leave to defence.

In **Gohil Vs Wamai [1983] KLR 489** at page 494, the court put it as follows: -

“The respondent if he wants leave to Defendant may show he is entitled to it by affidavit or oral evidence or otherwise (order XXXV, rule 2). So if the applicant has set out in his affidavit (s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the respondent must discharge the onus on him of showing his defence(s) raise triable or bonafide issues. They will be ones of law and fact. If they are of fact, then, bare denial by the respondent or his advocate in pleadings or letter will not do because there must be full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule, that those issues are raised.”

In this case before me the facts are clear and the Defendant denies in his defence that he owes the Plaintiff the sum claimed of Kshs.12,000,000/- or any. He claims that the Plaintiff's claim is illegal and against public policy and lacks proper particulars. He first denies receiving any funds from the Plaintiff at any material time and denies any indebtedness to him. Then in the alternative he pleaded that if any indebtedness to the Plaintiff existed it had been fully and finally settled through the Defendant. The two possible defences are clearly combative and not mutually inclusive and one defence statement. They cannot co-exist.

The Defendant also alleges that the claim by the Plaintiff for the sums lent was premature and has not crystallized. Then the Defendant again appears to admit giving the Plaintiff cheques for the principal sum lent to him plus interest at 100% as agreed between the parties. Finally, the Defendant in paragraphs 11-12 admits giving the Plaintiff the alleged cheques but only as security for the repayment of the money lent and profits thereon, pending the maturity of an alleged investment or business for which purpose the amount was advanced to the Defendant.

Clearly, the Defence of the Defendant is rumbling confusedly jumbled. It is unclear and makes no proper sense. Is the court in matters of fact to prima face believed that the Defendant borrowed from the Plaintiff the claimed or any amount of money? He on the one hand denies receiving the amount claimed or any sum from the Plaintiff. He then claims that any such amount lent to him was already fully paid back. He again claims the money lent had not reached the agreed time for repayment back and the claim is premature. He then again admits receiving the claimed money particularly in paragraph (5) of the Replying Affidavit but on exorbitant interest and calls the claim illegal and against public policy. He also again admits giving the pleaded cheques to the Plaintiff not as payment but as mere security for future repayment at the leisure of the Defendant's business.

Do these denials and propositions raise triable issues or are they mere denials and sham references? The final impression left in my mind after going through the gauze of suggested defences and after perusing the Defendant's affidavit in opposition to this application, is that the Defendant was advanced some money by the Plaintiff and he secured the funds with (14) fourteen cheques which would be presented to the Defendant's account at Co-operative Bank, Kenya Limited, Parliament Road for

encashment, on the dates on the cheques. The cheques were presented but dishonored for lack of sufficient funds in the Defendant's account. The Defendant has in the Defence and in the confused and rumbling Replying Affidavits, admitted sufficiently the above facts. He has not denied or refuted the dates on the cheques. He has not claimed that he had adequate funds in his bank account so that the failure to honour the cheques was not his fault. He has not claimed that he did not himself write the details on the cheques including the liquated amounts and the dates. In short it is clear that the Defendant deliberately drew the fourteen cheques in favour of the Plaintiff. Logic and common sense, as well as business practices dictate the conclusion that the only reason the cheques were not honoured was because there were no adequate funds in the Defendant's particular bank account.

Prima facie, on the facts, therefore, I see no triable issues on the face of the Defence or in the Replying Affidavits. If on the face of the two documents the Defendant admits receiving the advanced and now claimed funds as he sufficiently does, introducing possible defences as the Defendant tried to do, would require the full disclosure of the facts forming such defences. For example, the Defendant to rely on illegal contract would require him to introduce sufficient and actual facts showing an illegal contract in which the Plaintiff was a party and in which the money advanced was not to Defendant at his request but an investment or business in which the advanced money was invested by both the Plaintiff and the Defendant independently as a full partners. However, the Defendant was in this respect not bold enough to disclose any reasonable facts upon which the court would make reasonable conclusions.

On the other hand this is a case arising from Bills of Exchange considered under the Bills of Exchange Act, Cap 27 of the Laws of Kenya. In the case **Paresh Bhimis Vs Mrs Nita Jayesh Pattin CA Civil Appeal No. 199 of 2003** (unreported) the court said as follows: -

“A cheque is a bill of exchange drawn on a bank payable on demand (See Section 73 (1) of the Bill of Exchange Act Cap 27). By Section 55(1) the drawer of a bill by drawing it engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonor be duly taken”

Similarly, in the case of **HASSANAH ISSA & CO. VS JERAJU PRODUCE STORE [1967] EA 55**, the East African Court of Appeal said as follows: -

“... the position is therefore that where there is a suit on a cheque and the cheque was admittedly given the onus is on the Respondent to show circumstances which disentitle the applicant to a judgment to which otherwise he would be entitled.”

As earlier stated herein, the Defendant sufficiently admits receiving funds in the form of a personal loan for which he gave the fourteen (14) cheques properly drawn and dated for presentation for encashment on dates thereon of which he was fully aware and responsible. The cheques are shown to have been ordinarily presented to the Defendant's bank account but dishonored for lack of sufficient funds which fact is not denied.

As a matter of law the Defendant in drawing the said cheque as he did, engaged, inter alia, that on due presentation thereof, the cheques would be paid according to their tenor. Since they were dishonoured for lack of funds, the Defendant shall be called upon or compelled to compensate the holder who is the Plaintiff through this proceedings duly taken by the Plaintiff.

This court is not persuaded that the Defendant's explanation if any, have revealed any issue(s) which could be allowed to go to trial. More so because the Defendant is not only an advocate of this court but at the relevant time, a member of the parliament which promulgated the Bills of Exchange Act and others relevant to the issues raised herein.

In the circumstances of this case, this court finds the Defendant's defence raises no triable issue and amounts to mere denial and is a sham. It is hereby struck out and judgment as prayed in the Plaintiff and this

application is hereby entered with costs. Orders accordingly.

Dated and delivered at Nairobi this 20th day of April 2015.

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D A ONYANCHA

JUDGE