REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 501 OF 2014

QUAKER VENTURES LIMITED……..…………………………PLAINTIFF

VERSUS

EQUITY BANK LIMITED……………...…………………..…DEFENDANT

RULING

Summary judgment

[1] The Plaintiff's application is one for summary judgment against the Defendant in the sum of Kshs. 17,000,000 and interest thereon at 25% or such other rate as may be found to be fair by your Ladyship. The Application is premised upon the Affidavit of **Qs Patrick Sagwa Kisia MCIArb** and a director of the Plaintiff Company. Qs Kisia is a member of the Chartered Institute of Arbitrators and a long standing Quantity Surveyor and Dispute Resolver.

Applicant's gravamen

[2] According to the Applicant, the following matters are either expressly conceded to by the Defendant or are uncontested or uncontroverted:

a. That by way of a letter dated the **29th day of January 2013** Ms Burrel International Limited (the Defendants Customer) gave the Defendant an **"irrevocable letter of authority"** for the Plaintiff's benefit and directing the Defendant to pay **Kshs. 17,000,000** to the Plaintiff upon receipt of proceeds of an award from the Ministry of public works. The pertinent letter of Authority is exhibited at page 20 of the Plaintiff's bundle, and to the affidavit in support of the Application as **"PSK 1"**

b. The aforesaid award was a result of Arbitral proceedings undertaken before Qs Festus Litiku and which the Plaintiff's director Qs Patrick Sagwa Kisia had successfully prosecuted. The fact of receipt of this letter of authority is readily conceded to by the Defendant at paragraph 4 of its Defence. It therefore follows that it is not in issue that the Defendant received from its customer, Burrell International Limited, the irrevocable letter of authority as asserted by the Plaintiff.

c. It is also not in issue that an Award in favour of the Defendant's said customer was made on the 26th day of March, 2013 in the sum of **Kshs. 248,286,548.32.** A copy of the award is exhibited at page 38-73 of the Plaintiff's bundle. This fact is uncontroverted and is indeed incontrovertible.

d. Further, it is not contested at all, and it is indeed admitted at paragraph6 of the Defence, that the sum of **Kshs. 216,534,505.30** was received into the Defendant's aforesaid customer's account **No. 0180290902987**named in the irrevocable letter of authority on the10th day of January, 2014, as anticipated in the said letter of authority. A copy of the Defendant's statement of Account for its client, Burrel International Limited, clearly showing that the sum of Kshs. 216,534,505.30 was paid into the account named in the irrevocable letter of authority is annexed to the Supporting Affidavit of Patrick Sagwa Kisia, and is marked "PSK2" at page 21 of the Plaintiff's bundle. In any event receipt of the funds from the Ministry of Public Works as anticipated is conceded to by the Defendant.

[3] The Applicant urged that, the Defendant in keeping with its obligations under the irrevocable letter of authority was, therefore, on the said 10th day of February, 2013, upon receipt of funds from the aforesaid Ministry obligated to deduct Kshs. 17 million and pay out the same to the Plaintiff in the fulfilment of its obligation under the irrevocable letter of authority.

[4] The Applicant could not agree with the argument by the Respondent that the Plaintiffs application has been overtaken by events because the Defendant has filed its Defence. The Applicant submitted that, unlike previous procedural regime, the new order 36 Rule 1(b) of the Civil Procedure Rules, 2010 require an application for summary judgment to be filed before defence is filed. Previously one had to await the Defence to be filed before seeking summary judgment. Now, the application should be filed before Defence but after the memorandum of Appearance has been filed. The Applicant lamented the varied interpretations by the High Court on this matter but found comfort in the case of ***Kenafric Diaries vs IEBC (2015) eKLR*** that whichever way one looks at the rule, the interest of Justice militates towards considering an application for summary Judgment on its merits and that a defence shall be looked at even if filed after the application for summary judgment has been moved. In essence, filing of a defence after an application for summary judgment has been filed does not render the application incompetent. Otherwise to accept the Defendant's interpretation of the law on filing applications for summary judgment, will mean that a party will avoid summary Judgment by simply filing a defence. This will fatally kill the essence of summary procedure and render the same extinct.

[5] According to the Applicant, there is not triable issue raised in the defence. They relied on Richard Kuloba in his book, ***Summary Judgment,*** law Africa 2nd Edition at page 167, on what triable issue is where he wrote that:-

> **"Where the triability of an issue depends on law, the position is this. If a Judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there is a triable issue of law. The result would be that another Judge would have to consider the same arguments and decide that issue one way or another"**

Therefore, a pure point of law that can be determined by way of legal arguments or submissions cannot be said to be a triable issue. Different interpretations of the law based on undisputed facts cannot be triable. The question here is whether an irrevocable letter of authority can be revoked by the giver thereof without the consent of the beneficiary, which is not a triable issue but a point which should be decided on legal submissions. It is not a matter which requires calling of witnesses to tender evidence at trial. An instrument of irrevocable authority cannot be revoked at the instance of one party on its own or unilaterally. This is the essence of its very nature, it is ***irrevocable***. The said instrument confers a right or debt upon its beneficiary and is analogous to a professional undertaking by an Advocate or a banker's cheque. It establishes **legal nexus between the creditor (herein Ms Quaker Ventures Ltd) and the bank so instructed (Equity Bank)**. A party to the instrument cannot resign from obligations created under a legally binding instrument. To allow a party to so renege will be unjust and unconscionable. **The effect of an irrevocable letter of authority, as the name suggests, is meant to guarantee its recipient that the same is not capable of unilateral revocation or digression**. It is meant to insulate the instrument from unilateral revocation and to give comfort to its recipient or a creditor providing goods or services that it will not be withdrawn and that payment will certainly ensue. **It guarantees payment**. A party cannot be allowed to derogate therefrom, least of all seek this Court's intervention in sanitizing its

misadventure. On this, see **Black's Law Dictionary 9th Ed at page 907 and 987** that an irrevocable letter of authority confers rights to its beneficiary which rights include damages should it or its terms be breached. Black's law dictionary defines *"Irrevocable"* and *"irrevocable Letter of credit"* as follows:

> **"Irrevocable, unalterable, committed beyond recall…**
>
> **Irrevocable letter of credit, a letter of credit that the issuing bank guarantees will not be withdrawn or cancelled before the expiration date…. A letter of credit that cannot be modified or cancelled without the consent of the parties" (emphasis added)**

[6] See also Pramantha Aiyar, ***The Major lawlexicon*,** at page 386 where irrevocable credit and irrevocable letter of credit has been defined thus:

> **"Irrevocable credit. A credit that cannot be amended or cancelled without the agreement of the issuing bank, confirming bank (if any) and the beneficiary(emphasis added)"**
>
> **"Irrevocable letter of credit. Letter of credit that an issuing bank is obliged to an pay exporter, when all conditions and terms (which cannot be changed except by agreement of all parties) have been met" (emphasis added).**

[7] The Applicant appealed to the court's sense of justice to stop the defendant bank from reneging from its obligations which they are acutely aware they are bound by. According to the Applicant any decision which countenances the practice of reneging on irrevocable letters of credit by banks will **mark the death of the instruments of irrevocable authority, including bankers' cheques, professional undertakings, letter of credit and guarantees. The court should reject the Defendant's argument to the effect that an irrevocable letter of authority can be supplanted or revoked by a subsequent, undisclosed, unilateral instruction by its giver**. In any event, even the purported revocation was not copied to the Plaintiff; it is a unilateral act in every sense of the word. Curiously it is not mentioned at all in the two letters/responses to the Plaintiff's demands (both demands and the response are produced in the Plaintiff's bundle). It is reasonably discernible that the same was only recently contrived or created for purposes of raising a defence, however, misconceived, against the Plaintiff herein. It is a belated afterthought. For those reasons, they urged the court to allow the Plaintiff's Application as prayed with costs.

Defendant's Submissions

[8] The Defendant opposed the application. It filed Affidavit of John Njenga sworn on 23rd January 2015 and submissions. The Defendant argued that the Plaintiff's Application is incompetent, an abuse of court process, entirely lacking in merit and ought to be dismissed or struck out with costs to the Defendant. They gave an account of brief facts of the case. On or about 30th January 2013 the Defendant received instructions vide a letter dated 29th January 2013 from its Customer Burrel International Limited to transfer the sum of Kshs.17,000,000 to the Plaintiff's Bank account with Transnational Bank Limited upon receipt of the then anticipated final award. On 1st February 2013 the Defendant received a letter of even date from its said Customer, Burrel International Limited cancelling its instructions contained in its letter dated 29th January 2013. The Defendant was not privy to the arbitral proceedings between the Plaintiff and its Customer, Burrel International Limited and its role in the entire transaction between the Plaintiff and its Customer was limited to that of a Banker. It is the Defendant's submission that in view of the revocation of the instructions of 29th January 2013 the Defendant stood discharged from its obligation to transfer the sum of Kshs. 17,000,000 to the Plaintiff's Bank account.

[9] The Plaintiff filed the instant suit in Court on 4th November 2014 seeking to recover Kshs. 17,000,000 from the Defendant. The Defendant entered appearance in the noted matter on 1st December 2014 and filed Defence on 16th December 2014. Copies of the said Memorandum of Appearance and Defence are annexed to the Defendant's Replying Affidavit and marked as annexure **1.** The Plaintiff filed

the instant application on 8th December 2014 before the time for the Defendant to file defence had lapsed. The Plaintiff then filed a Reply to the Defendant's Defence on 20th January 2015.

[10] The Law on Summary Judgment is set out under Order 36 rule 1 of the Civil Procedure Rules 2010 and provides as follows:

(1) In all suits where a plaintiff seeks judgment for

(a a liquidated demand with or without interest; ……………………….……….. where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest"

The Defendant submitted that before the Court can grant a prayer for Summary Judgment, the court has to verify the following;

i. Whether the Defendant has entered appearance and
ii. Whether the Defendant has failed to file their Defence.

As the Plaintiff filed the current application on 8th December 2014 seven days after the Defendant had entered appearance and before the time for filing a defence had lapsed, it is premature and incompetent. The provisions of Order 7 rule 1 of the Civil Procedure Rules 2010 are very clear that;

> **"Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within <u>fourteen days</u> after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service"**

The Defendant, therefore, posits that the strict wording of Order 36 rule 1 should be observed. See the ruling by Justice J.B. Havelock in **Commercial Bank of Africa Limited V David Njau Nduati (2012) Hccc 231 of 2012** that:

> **"However, unfortunately for the Plaintiff, it filed the current Application before court on 29th June 2012, three days before the Defence was due. For that reason alone, I feel that the Application before court was premature. Further and with regard to strict wording of rule 1 (1) of order 36, it has now been overtaken by events in that the Defendant has filed his Defence albeit one day late………**
>
> **……………… However in this matter, I am concerned that the Application was filed before the time for filing the Defence had expired and such does not amount to a mere technicality, it goes to the whole substance of the Plaintiff's Application. To my mind, that prejudices the Defendant. Further, and as pointed out by the Defendant's counsel, a Defence has now been filed which, in my view, now takes the Application outside the purview of Order 36 rule 1.**

[11] The Defendant further relied on the case of **James Juma Muchemi & Partners Limited v Barclays Bank of Kenya & Another Hccc 339 of 2011** wherein the learned judge held that;

> **"It is clear that the sub rule provides that the application is to be made where a defendant has appeared "<u>but not</u> filed a defence." this particular provision as read together with Rules 2 and 4 of Order 36, shows that the intention of the drafters of that Order was that no application may be made for Summary Judgment after a defence has been filed. The mischief sought to be addressed is quite clear, that a Plaintiff who has a genuine and bona fide claim against a defendant does not have to wait until he sees the defence filed by the Defendant to decide that the Defendant has no defence to his claim. Under the new Rules, the proviso to Order 36 Rule 1 (1) is very clear unlike the previous rule which did not have the words "... but not filed a defence...". This means that the drafters of the Civil Procedure Rules 2010**

intended to completely bar applications under Order 36 being brought after the defence has been filed."

[12] It is also the Defendant's submission that the issues raised in the Plaintiff's written submissions on whether an irrevocable letter of authority can be revoked are in effect submissions from the Bar. They are not contained in the Plaintiff's instant Application or Supporting Affidavit. They are therefore matters outside the province of the instant Application and demonstrate that this is indeed NOT a straight-forward case where the Court ought to enter summary judgement in favour of the Plaintiff. According to the Defendant, the issue of whether an irrevocable letter of authority can be revoked is not a pure point of law that can be determined summarily as suggested by the Plaintiff in its submissions. The irrevocable letter of authority herein was not issued to the Plaintiff **BUT** to the Defendant. It is their submission, therefore, that in view of the revocation of the instructions of 29th January 2013 the Defendant stood discharged from its obligation to transfer the sum of Kshs. 17,000,000 to the Plaintiff's Bank account. It is also their submission that this issue can only be determined at trial particularly in the current circumstances when the party who issued the said letter has NOT been enjoined in these proceedings as a Defendant. To the Defendant, the Plaintiff's recourse in this case lies against the Burrel International Limited and not the Defendant. They argued that the Plaintiff is not the Defendant's Customer and there is no contract of any nature relating to the cause of action herein subsisting between the Plaintiff and the Defendant. Further, the Plaintiff was not the intended recipient of the said letter neither is it copied on the said letter. It is therefore doubtful whether there exists a duty of care owed by the Defendant to the Plaintiff. They submitted that, in the absence of privity of contract no such duty exists.

[13] The Defendant urged that the Letter of authority issued to the Defendant's by its customer, Burrel International Limited, does not amount to a Bank Guarantee or an irrevocable letter of credit as suggested by the Plaintiff. In the instant case, the said letter constitutes mere instructions from a Customer to its Banker which could be modified, altered or cancelled at any time. The Defence filed herein raises several substantial triable issues which should proceed for trial. These include:-

a) Whether the Defendant received instructions vide a letter dated 1st February 2013 from its Customer, Burrel International Limited cancelling its instructions contained in its letter dated 29th January 2013 to transfer the sum of Kshs. 17,000,000 to the Plaintiff's Bank account.

b) Whether the Defendant in view of the revocation of the instructions of 29th January 2013 stood discharged from its obligation to transfer the sum of Kshs. 17,000,000 to the Plaintiff's Bank account.

c) Whether the said instructions amount to a bill against the Defendant

d) Whether in the event that the instructions were indeed deemed as a bill, which they are not, would the same be payable after six months had elapsed

e) Whether there is privity of contract between the Plaintiff and the Defendant.

f) Whether the Defendant was bound by the Law and/or the general terms and conditions governing the operation of the account bound to honour the instructions of its Customer Burrel International Limited or those of the Plaintiff.

g) Whether the Plaintiff's recourse lies as against the Defendant or the said Burrel International Limited.

[14] On the basis of the above reasons, the Defendant urged the court to find that the issues in dispute in this suit cannot be determined by way of summary procedure as proposed by the Plaintiff. There is no sufficient cause shown why the Defendant should be deprived of the right to defend itself. Therefore, the court should dismiss the Application with costs to the Defendant.

DETERMINATION

[15] There is one issue which stands out and requires prompt judicial discussion. The Law on Summary Judgment is set out under Order 36 rule 1 of the Civil Procedure Rules 2010 and provides as follows:

> **(1) In all suits where a plaintiff seeks judgment for**
>
> **(a a liquidated demand with or without interest; ……………………….……….. where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest"**

There are varied positions or interpretations taken by courts on this provision. These words in Order 36 rule 1 of the Civil Procedure Rules, to wit, *''**where the defendant has appeared but not filed a defence''*** have particularly borne out the kind of a squirm I have alluded to and has elicited serious interpretations. Some commentators posit that the rule departed from the earlier one. Therefore, an application which is filed after defence has been filed would be seen to be in violation of the said rule. However, there are those who argue that the words **where the defendant has appeared but not filed a defence** are strict and deliberate, and showed be read together with Order 7 rule 1 of the Civil Procedure Rules. See for instance the perspective taken by J.B. Havelock J (retired) in the case of **Commercial Bank of Africa Limited V David Njau Nduati (2012) Hccc 231 of 2012** that:

> **"However, unfortunately for the Plaintiff, it filed the current Application before court on 29th June 2012, three days before the Defence was due. For that reason alone, I feel that the Application before court was premature. Further and with regard to strict wording of rule 1 (1) of order 36, it has now been overtaken by events in that the Defendant has filed his Defence albeit one day late…………………… However in this matter, I am concerned that the Application was filed before the time for filing the Defence had expired and such does not amount to a mere technicality, it goes to the whole substance of the Plaintiff's Application. To my mind, that prejudices the Defendant. Further, and as pointed out by the Defendant's counsel, a Defence has now been filed which, in my view, now takes the Application outside the purview of Order 36 rule 1.**

[16] And also the position taken in the case of **James Juma Muchemi & Partners Limited v Barclays Bank of Kenya & Another Hccc 339 of 2011** that;

> **"It is clear that the sub rule provides that the application is to be made where a defendant has appeared "but not filed a defence." this particular provision as read together with Rules 2 and 4 of Order 36, shows that the intention of the drafters of that Order was that no application may be made for Summary Judgment after a defence has been filed. The mischief sought to be addressed is quite clear, that a Plaintiff who has a genuine and bona fide claim against a defendant does not have to wait until he sees the defence filed by the Defendant to decide that the Defendant has no defence to his claim. Under the new Rules, the proviso to Order 36 Rule 1 (1) is very clear unlike the previous rule which did not have the words "... but not filed a defence...". This means that the drafters of the Civil Procedure Rules 2010 intended to completely bar applications under Order 36 being brought after the defence has been filed."**

[17] My view is that Order 36 of the Civil Procedure Rules has bred various interpretations by judges, legal counsels as well as other commentators. I believe the source of contention is the words **"... but not filed a defence...".** It is not; therefore, surprising that counsel for the Plaintiff has taken the view that the rule envisages filing of an application for summary judgment before defence is filed. In other words, you apply immediately upon filing of the memorandum of appearance and before the Defence is filed. But,

trouble will be found where the Defendant files both the memorandum of appearance and the defence as some litigants would do. Again, when I look at Order 36 rules 2, 4, 5, 6 and 7 of the Civil Procedure Rules, the order envisages that an application for summary judgment should be made where there is default of defence in the sense of order 7. But, it is also true that the summary procedure provided for under order 36 of the Civil Procedure Rules is available to a plaintiff who has genuine and bona fide **liquidated claim with or without interest** against the Defendant. Such plaintiff does not need to wait to see the defence before he can say to the Defendant that; ***''my claim is a liquidated one; it is clear, obvious and plain to which you have no defence. I am, therefore, asking the court to enter summary judgment against you''***. I should also say that there are other summary procedures such as Order 2 (15) for striking out pleadings, Order 10 on judgment in default of defence and Order 13 on judgement of admissions which will come to bear on this discourse. One may say that where a defence has not been filed, the plaintiff has options to pursue and could apply for summary judgment under Order 36 or judgment in default of defence under Order 10 of the Civil Procedure Rules. Yet another angle to the discussion; where a defence has been filed, the plaintiff may also apply to have the defence struck out or for judgment on admission to be entered. There are many angles to this argument except the party applying should choose the most appropriate and indomitable method to apply for judgment. But, the mix arising from the things I have discussed above portend one thing. I should think that courts should now follow after the Constitution and the overriding objective with the zeal of serving substantive justice in judicial proceedings by taking a much wider view of justice before they can declare an application to be redundant or barren. The ultimate test should be whether the defence filed raises any bona fide triable issue worth trial in the sense of the Sheridan J test. In a properly argued case, the option of striking out the defence will also be available and could be achieved within the summary process under Order 36 of the Civil Procedure Rules. Otherwise, a Defendant who files a belated defence will be afforded an opportunity to frustrate the efforts of a vigilant plaintiff. My view is that, it will be dangerous to prescribe as a rule of law that a belated defence should make a properly filed application under Order 36 of the Civil Procedure Rules to be incompetent or barren. I think in such scenario, the court should examine the belated defence within the framework of Order 36 to discern whether it raises any bona fide triable issue worth trial. Indeed, Order 36 rule 2 of the Civil Procedure Rules envisions a situation where a belated defence is filed after the application for summary judgment has been made. Such defence should be treated within rule 2 and be seen only as a means to…***show…that he should have leave to defend the suit***. In that manner I am convinced the court will have served substantive justice in line with the Constitution as the plaintiff will have been given an opportunity to avoid protracted litigation and reap his judgment without delay, whilst at the same time, the defendant is given an opportunity to show that he should have a day in court on the merit of his case. I should think also that a party who files a defence just to delay a case should never be allowed the luxury to do so, lest the court should be assisting a belligerent defendant to temporize the case for no good reason. The court should be able to enter summary judgment on clear and plain cases which do not require a trial to prove.

[18] This case revolves around letter dated 29th January 2013 which is marked as ''Irrevocable letter of Authority'' given by a customer to its bank. And, I am certain that it is a kind of case which will have tremendous bearing upon or great significance in the commercial world as well as on jurisprudence on this subject. The court should be careful to make a reasoned and properly grounded decision especially on whether the letter in contention is irrevocable letter of authority or mere instructions which can be revoked without reference to the beneficiary. If at all the letter is found to be irrevocable letter of authority creating legal responsibility on the bank, then I agree with counsel for the Applicant that it would be most dangerous a practice in commercial world to allow parties to give irrevocable authority for payment of money in mutually agreed transaction only to turn back and revoke it without any reference to the other party. But, now that there is a defence filed, I find the following issues to be triable:

a) Whether the said letter herein marked as ''Irrevocable latter of Authority'' is an irrevocable legal instrument which binds the bank; or mere instructions by a customer to the bank which could be revoked without reference to the beneficiary.

b) Whether the said letter was revoked by the letter dated 1st February 2013.

[19] I wish to give these issues opportunity for in-depth discussion, except I hope parties will consider

canvassing the two issues through legal arguments rather than a full trial. None of the issues will require calling of witness in order to prove. They are issues that are capable of resolution through legal arguments. Meanwhile, with a lot of trepidation, I dismiss the application herein for being premature. I will not make any order for costs given the observations I have made as well as the circumstances of the case. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of July 2015.

F. GIKONYO

JUDGE