



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 152 OF 2013**

**PRIME BANK LIMITED.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**PAUL OTIENO NYAMODI t/a V.A.**

**NYAMODI & COMPANY ADVOCATES.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff herein, **Prime Bank Limited**, filed this suit on 22<sup>nd</sup> April, 2013 seeking judgment in its favour against the Defendant for the sum of Kshs. 7,578,262/25 together with interest and costs. A perusal of the Court records shows that the Plaintiff along with Summons to Enter Appearance and other requisite documents were served on the Defendant **Paul Otieno Nyamodi, t/a V.A. Nyamodi & Company Advocates** on the 10<sup>th</sup> May, 2013. Accordingly, the Defendant thereby had 15 days from the date of service to enter appearance and thereafter 14 days to file his statement of Defence along with his bundle of documents, by dint of Rules 1 and 5 of Order 6 and Order 7 Rule 1 of the Civil Procedure Rules.

2. By 28<sup>th</sup> May, 2013 no action had been taken by the Defendant to indicate his desire and/or intent to contest the claim against him as required. Accordingly a Request for Judgment was made by Counsel for the Plaintiff with the result that a default judgment was entered on the record in favour of the Plaintiff as against the Defendant in the liquidated sum of **Kshs. 7,578,262/25** together with interest (at the rates then prevailing) and costs, pursuant to Rule 4(1) of Order 10 of the Civil Procedure Rules. Thereafter, a Decree dated 29<sup>th</sup> May 2013 was drawn and signed with a view of execution. However, before the Decree could be issued, the Defendant purported to file a Memorandum of Appearance on 7<sup>th</sup> June, 2013 and thereafter a Statement of Defence on the 24<sup>th</sup> June, 2013. The Defendant then moved the Court under a Certificate of Urgency filed on 10<sup>th</sup> July, 2013 for stay of execution and the setting aside of the default judgment dated 9<sup>th</sup> July, 2013. That application was heard and disposed of on the 30<sup>th</sup> May, 2014 by Kamau, J to the following effect:-

a) The default judgment entered herein against the Defendant was set aside only to the extent relative to the aspect of accruing interest. Otherwise the interlocutory judgment in respect of the principal sum of **Kshs 7,578,265/25** was to remain intact.

b) The Memorandum of Appearance and Written Statement of Defence filed by the Defendant after the entry of interlocutory judgment were expunged from the record for the reason that they were

filed out of time without leave of the court.

c) The Defendant was directed to file his pleadings in response to the Plaintiff's claim within 14 days from the date of the Ruling.

d) The Defendant was further ordered to pay to the Plaintiff thrown away costs in the sum of Kshs. 30,000/= within 14 days from the date of Ruling, failing which the Plaintiff would be at liberty to apply for appropriate orders.

3. Despite the express orders of the Court, the Defendant did not file his pleadings within the timelines stipulated by the Court. Indeed, it was not until 20<sup>th</sup> June, 2014 that the Defendant's Memorandum of Appearance and Written Statement of Defence were filed by his advocates, M/s Muthaura Mugambi Ayugi and Njonjo, Advocates. It has been ascertained from the record that in filing his Written Statement of Defence, the Defendant did not comply with the mandatory provisions of Order 7 Rule 5 of the Civil Procedure Rules. Thus he did not attach a list of witnesses to be called at the trial, written statements or copies of documentary exhibits. Moreover, the thrown away costs of Kshs. 30,000 remain unpaid to date.

4. Consequent to the foregoing, the Plaintiff took the liberty granted by the court on 30<sup>th</sup> May 2014 to apply for appropriate orders herein by filing the instant application dated **13<sup>th</sup> November, 2014**. The application was filed pursuant to Order 10 Rule 3 and Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules, 2010 for orders that the Court be pleased to strike out the Defendant's Memorandum of Appearance and Statement of Defence dated 13<sup>th</sup> June, 2014, both of which were filed in Court on 20<sup>th</sup> June, 2014. The grounds raised in support of the application are:-

**a. That the Defendant's Memorandum of Appearance and Statement of Defence amount to an abuse of the process of Court.**

**b. That the Defendant had deliberately chosen to ignore the express orders given by the Court on 30<sup>th</sup> May, 2014.**

**c. That the Statement of Defence raises no triable issues and is comprised of mere denials.**

**d. That the Statement of Defence is a sham, scandalous and vexatious calculated to embarrass the Court and prejudice fair trial of this matter.**

**e. That the Statement of Defence is hopeless and only meant to delay and/or defeat the Plaintiffs claim.**

**f. That the Statement of Defence was filed without the requisite documents and witness statements mandatorily required by Order 7 Rule 5 of the Civil Procedure Rules to be filed therewith.**

5. The application is based on the Affidavit of **Alka Shahi** in which it was deponed that despite being granted a second chance by the Court to defend the suit, the Defendant failed to act with due dispatch and ended up filing his Memorandum of Appearance and Statement of Defence way outside the timeliness given by the Court. In the same vein, the Defendant has to date totally failed and/or neglected to pay the Kshs 30,000/=, being thrown away costs, which he was ordered to pay within 14 days of the Ruling.

6. In its Written Submissions, the Plaintiff urged the court to find that the Defendant/Respondent having failed to adhere to the timelines and conditions set by the court for the filing of his pleadings, and for the payment of thrown away costs, he is not entitled to any further leniency as his conduct smacks of indolence and lack of seriousness. In the alternative, the Applicant's Counsel submitted that the Written Statement of Defence be struck out for being frivolous and vexatious and, granted that the principal sum as well as interest upto 31<sup>st</sup> January, 2008 had already been paid. It was the Plaintiff's contention that in

the premises, there would be no basis for the Defendant to deny the Plaintiff accrued interest from 31<sup>st</sup> January, to date.

7. In addition to the foregoing, it was the argument of Counsel for the Plaintiff/Applicant that the Defendant did not comply with the mandatory provisions of Order 7 r. 5 of the Civil Procedure Rules by failing to file witness statements and documentary exhibits along with his Written Statement of Defence.

8. On his part, the Defendant/Respondent submitted that his defence raises several triable issues which deserve a full trial and due interrogation by the Court, namely;

- a. Whether the suit was filed prematurely and if there was a valid cause of action against him.
- b. Whether the Plaintiff's claim for interest is unconscionable, illegal and/or against public policy.
- c. Whether indeed the Plaintiff did inform the Defendant of an alleged debt due and owing to it.

9. He relied on the case of **DT Dobie & Company (Kenya) Limited V. Muchina (1982) KLR 1** and urged Court to remind itself that the power to strike out pleadings is one that should be exercised sparingly and cautiously. He urged the court to be concerned about administering justice without undue regard to procedural technicalities in line with the provisions of Article 159 (2) of the Constitution of Kenya by exercising its discretion in his favour.

10. I have carefully considered the Notice of Motion, the Supporting Affidavit as well as the Replying Affidavit and submissions by either side. It is apparent that the question of the Defendant's liability to pay the principal sum as well as interest up to 31<sup>st</sup> January, 2008 was dealt with and settled in the court's Ruling of 30<sup>th</sup> May 2014, and that the Defendant has indeed paid the principal sum and some portion of the interest due. This aspect is conceded to not only in the affidavits but also in the submissions filed herein. Of particular note is the letter dated 19<sup>th</sup> November, 2013 by the Defendant's Advocates to the Plaintiff's Advocates (marked "AS 2" and annexed to the Supporting Affidavit) which confirms that payment was done by way of RTGS.

11. What appears to remain in contention therefore is whether the Defendant is liable to pay interest at the prevailing rates and/or as computed by the Plaintiff. This is apparent from the Court's Ruling delivered herein on 30<sup>th</sup> May, 2014 at paragraph 34 thus:

***"...This Court has come to the conclusion that it would be fair, equitable and just for the Defendant to be given an opportunity to present his case. In this regard, it will therefore exercise its discretion in favour of the Plaintiff herein and vary the Interlocutory Judgment that was entered on 29<sup>th</sup> May, 2013 and all the consequential orders thereon to the extent that the same relates to the interest accruing at the prevailing interest rates from 1<sup>st</sup> February, 2008 only. The entry of Interlocutory Judgment in respect of the sum of Kshs 7,578,265/25 will remain unchanged as the said sum was not in dispute and had in fact been secured by the Plaintiff."***

12. Having ruled that only the issue of accruing interest was triable I find it unnecessary to belabour the point of whether or not there are triable issues raised by the Defendant's proposed Statement of Defence, a point that was submitted on at length by the Defendant/Applicant's Counsel. Accordingly, the only issue raised by the instant Notice of Motion, as I see it, is whether the Defendant, having failed to file his pleadings within the timelines set by the Court on 30<sup>th</sup> May, 2014 after his application to challenge the question of accrued interest was granted, is entitled to be given another chance to ventilate his grievance in respect of the question of interest.

13. As noted herein above, whereas the Defendant had 14 days from 30<sup>th</sup> May, 2014 to file Memorandum of Appearance and Written Statement of Defence, it was not until 20<sup>th</sup> June, 2014 that his lawyers took action. The documents were therefore belated by some 8 days. Additionally, whereas the Defendant had

14 days to pay thrown away costs of Kshs 30,000/=, it was not until 15<sup>th</sup> May, 2015 almost one year later that that sum of Kshs 30,000/= was tendered to Counsel for the Plaintiff (See Annexure PON 1 attached to the Defendant's Replying Affidavit).

14. As rightly pointed out by the Plaintiff's Counsel in his submissions, there appears to be no justification at all in the Replying Affidavit as to why the pleadings were not filed within 14 days. As for the thrown away costs the only averment given by the Defendant is that ***"the delay was in no way malicious and/or a deliberate attempt by me to ignore Court orders."*** The Defendant did not explain why it took about one year for him to tender the aforesaid sum. It is noteworthy that this money was tendered 6 months after the instant application had been filed. It is plain therefore that the Defendant has not only shown utter disregard for not only the rules of procedure but also timelines set by the court. He now argues that under Art. 159 of the Constitution of Kenya and Sections 1A and 1B of the Civil Procedure Rules, the Court should be minded to look at the substance of the matter, and that notwithstanding such failure on his part as aforementioned, he should be accorded an opportunity to contest the accrued interest, as opposed to this point being determined on the basis of procedural technicalities.

15. It is now well settled and I agree entirely with the submissions by Counsel for the Defendant that that the remedy of striking out pleadings is one to be employed very sparingly and that unless a Written Statement of Defence is entirely hopeless, a party should be given a hearing. This is in line with the decision of the Court of Appeal in ***DT Dobie & Company (Kenya) Ltd vs. Muchina [1982] KLR 1*** that:

***"...As the power to strike out pleadings 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."***

It was precisely for this reason that the Defendant was, on the 30<sup>th</sup> May 2014 granted leave, on terms, to file his pleadings herein. The court made it clear that ***"...the Plaintiff will be at liberty to apply for the appropriate orders..."*** in the event of the Defendant's failure to comply with the conditions given by it.

The Defendant herein having failed to comply with the court's order as aforementioned and there being no plausible reason for such failure, I am far from persuaded that he is deserving of the court's further indulgence. In this respect I fully subscribe to the view expressed by Kiage, JA in the case of ***Nicholas Kiptoo Arap Korir Salat Versus IEBC & Others [2013] eKLR*** in which he stated thus:

***"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen principles which both command Courts to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for all in the administration of justice. This Court, indeed all Courts, must never provide succour and cover to parties who exhibit scant respect for rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

16. The Defendant, having shown in the instances aforementioned that he has scant respect for the rules of procedure and timelines set for his compliance, is not, in my considered finding, entitled to any further indulgence by the court. In the premises, the Memorandum of Appearance and Written Statement of Defence that he filed herein out of time and without leave of the court on 20<sup>th</sup> June 2015 are hereby struck out with costs pursuant to Order 10 Rule 3 of the Civil Procedure Rules as prayed in Prayers 1 and 3 of the Notice of Motion dated 13<sup>th</sup> November 2014.

17. Orders accordingly.

**RULING SIGNED, DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of September 2015**

**OLGA SEWE**

**JUDGE**