REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 61 OF 2015

BESTA COURT LIMITED.....PLAINTIFF

VERSUS

ALICE NJERI KAMAU

T/A ALIBRA ENTERPRISES.....DEFENDANT

RULING

1. On 18th February, 2015, the Plaintiff Besta Court Limited, a limited liability company instituted this suit against the defendant Alice Njeri Kamau t/a Aliba Enterprises claiming for recovery of Kshs 5.4 Million being a friendly loan advanced by the plaintiff to the defendant during the month of May 2013 at the defendant's own request. The said sum of money was refundable on or before 1st day of April, 2014. It was claimed that the Defendant despite the agreement to refund signed by the defendant on 2nd May, 2013, the Plaintiff has declined to refund the money advanced.

2. The defendant entered appearance on 18th March, 2015 and filed defence on 7th April, 2015 denying the plaintiff's claim and contending that if at all there was any agreement advancing any money to her by the plaintiff, then the said agreement is illegal, void and or unenforceable against the defendant on account that the loan advanced was prior to the agreement made on 11th December, 2013 thus amounting to past consideration; the plaintiff is not authorised to conduct banking business; there is no board of directors' resolution to sanction advancement of the said loan to the defendant; and that therefore the suit is scandalous, frivolous and does not in fact disclose any actionable cause of action and seeks reliefs which are not maintainable against the defendant in law.

3. By a notice of motion dated 16th June, 2015 brought under the provisions of Order 2 rule 15 (b((c) and Order 51 rule 1 of the Civil Procedure Rules, the plaintiff seeks that the defence filed on 7th April, 2015 by the defendant be struck out and judgment be entered for the plaintiff against the Defendant for a sum of Kshs. 5.4 Million.

4. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Stanley Richard Macharia who is the Plaintiff's Director. He deposed that the Defendant who was his friend and a neighbour approached the Plaintiff to lend her Kshs. 5.4 Million. That on 2nd May, 2013, the Plaintiff acceded to the request and lent the Defendant the said sum being Kshs. 5 Million through Real Time Gross Settlement (RTGS) to the Defendant's account at Barclays Bank Account Number 1915726 and handed over to her Kshs. 400,000/= in cash. That the said agreement was formalised by a written agreement dated 11th December, 2013 in which the Defendant undertook to refund the said money on or before 1st May, 2014.

5. Mr Macharia on behalf of the plaintiff laments that the defendant did not pay as undertaken but made another undertaking on 26th May 2014 to pay the said money within sixty (60) days of the said date but that the Defendant has since declined to refund the said money despite a demand letter dated 8th September, 2014 send to her. That later, the plaintiff convened an arbitration with the defendant through one Mr Ben Wafula but the defendant had adamantly refused to refund the said the said sums of money which has never attracted any interest.

6. The defendant contends that the defendant is unjustly enriching herself by claiming that the there was no company resolution to advance her the money and or that the plaintiff company cannot lent money.

7. The Defendant filed a preliminary objection to the plaintiff's application on the grounds that:-

i. The Plaintiff did not authorize or sanction the filing of this suit.

ii. The directors of the Plaintiff did not pass a resolution authorising the filing of this suit.

iii. There is no resolution or valid resolution by the Plaintiff appointing D.K. Thuo Advocates to institute the suit for and on behalf of the Plaintiff.

iv. The filing of this suit by the said firm of advocates is invalid for want of authority from the Plaintiff.

v. Stanley Richard Macharia was not authorised by the Plaintiff to swear neither the verifying affidavit nor the supporting affidavit in support of the application dated 16th June, 2015.

8. The application was heard on 29th September, 2015 by way of oral submissions. Mr Thuo counsel for the applicant reiterated the grounds on the face of the application and supporting affidavit sworn by Mr Macharia. he submitted that there was clear evidence that the defendant transferred money which was a friendly loan into the defendant's Bank account and also advanced her cash of shs 400,000 as shown by the annexed letter of undertaking to pay the money but that to date the defendant has adamantly refused to refund the said money. Further, that albeit the defendant raises technical issues that the plaintiff was not a bank and neither did it have authority to lend her money, she has never denied receiving the said money which is a debt had and received from the plaintiff. Mr Thuo further submitted that equity does not allow a party to unjustly enrich themselves and that the authorities relied don by the defendant relate to disputes arising within a company, raising issues of whether one director has acted ultra vires the Articles and Memorandum of Association.

9. In opposition to the plaintiff's application, the defendant relied on the preliminary point of law filed and dated 13th March, 2015. Mr Rono advocate for the defendant submitted that the plaintiff being a limited liability company, authority to swear the affidavit by Mr Macharia was mandatory yet it was not filed which is contrary to the provisions of Order 4 of the Civil Procedure Rules that where a party is a company, authority under seal must be filed for the deponent to swear an affidavit on behalf of the company. in addition, Mr Rono submitted that the suit was filed without the company resolution authorising such filing of suit or sanctioning the filing of suit hence there is no party before this court at all. He relied on the case of **Kenya Commercial Bank V Stage Coach Management Limited [2014] eKLR**.

10. Mr Rono further submitted on behalf of the respondent defendant that there was no Memorandum or Articles of Association annexed to show whether the deponent Mr. Macharia was one of the directors of the plaintiff company. In addition, Mr Rono submitted that the defence denied any such advancement of money to the defendant and that there are triable issues to be determined only at a hearing which include issues of illegality of the alleged agreement, lack of company resolution and sanctioning of filing of this suit which all go to the root of the matter and which this court cannot ignore. He prayed that the application by the plaintiff be dismissed and the suit be dismissed or struck out for having been filed without seeking authority from the company.

11. In a brief rejoinder, Mr Thuo advocate reiterated his earlier submissions and contention that the authorities filed related to a situation where one director files suit against another director without a company resolution which was not the case here. He stated that since the defendant was not a director or member of the plaintiff's company she could not raise such issues.

12. I have carefully considered the application by the plaintiff seeking to strike out the defendant's defence, the preliminary objection, and the able brief submissions by both counsels for the parties hereto and the cited authorities. The Only issue for determination is whether this court should strike out the defendant's defence and if not, whether the plaintiff's suit should be struck out for reasons set out in the defendant's preliminary objection.

13. Order 2 Rule 15 of the Civil Procedure Rules, 2010 provides circumstances under which pleadings can be struck out thus among others; if it discloses no cause of action; if it is scandalous, frivolous or vexatious; if it may prejudice and embarrass or is likely to delay fair trial of the action or otherwise an abuse of the process of court.

14. The power of the court to strike out pleadings has been held to be employed only as a last resort and even then only in the clearest of cases. Since the enactment of Section 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, courts strive to sustain rather than to strike out pleadings. It follows that no pleading should be struck out unless it is so hopeless and plainly discloses no reasonable cause of action and is so weak beyond redemption.

15. To succeed in this application, the Plaintiff must demonstrate that the defence is frivolous and vexatious or that it may prejudice, embarrass a fair trial. Ringera J (as he then was) in **Mpaka Road Development Limited v. Kana (2004) 1 E.A. 124** stated as follows:-

> ***"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."***

16. In **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499,** it was held that a pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details.

17. And in **J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997** it was stated that the word "scandalous" for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

18. Again, in **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186** it was stated that a matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. In addition, it has been held that a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

19. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

20. Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies.(Emphasis mine). See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

21. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

22. A pleading is an abuse of the process where it is frivolous or vexatious or both.

23. I have taken the liberty to carefully examine the defendant's statement of defence. At paragraph 4, the defendant contend that the agreement between it and the Plaintiff as executed was illegal, void and unenforceable for among other reasons that; the said loan was advanced prior to the agreement made on 11th December, 2013 amounting to past consideration; that the plaintiff was bot a banking institution and that there was no Board of Directors' resolution to sanction the advancement of the said loan to the Defendant. In my view those are serious triable issues that go to the root of illegality or otherwise of the agreement between the parties and ought to be tried on merit. That being so, the defence cannot be said to be so hopeless to warrant striking out.

24. On the points raised in the preliminary objection, I am minded of the Court of Appeal position in ***D.T Dobie* & Company Ltd v. *Muchina* & Another (1982) KLR 1** that 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.

25. Further, the court in **Ndungu Mugoya & 473 others v. Stephen Wangombe & 9 others [2005] eKLR** stated as follows:-

> ***"The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."***

26. This court is minded of the fact that it is mandated by Article 159(2) (d) of the Constitution to determine matters before it without undue regard to procedural technicalities. in addition, **Section 1A** of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made the reunder and provides as follows:

> **1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

27. It is therefore clear that in the exercise of the powers conferred upon the court under the Civil Procedure Act and the Rules there under, the Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid to ensure **the just determination of the proceedings and the efficient disposal of the business of the Court.** In my view these provisions require the court to adopt a more pragmatic approach in dealing with matters that come before the it.

28. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the Court of Appeal expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable... Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and

is so weak as to be beyond redemption and incurable by amendment."(emphasis added).

29. The above position is applicable in cases where the plaintiff is the one seeking to have the defence struck out as justice is for both parties to a case. In Danish **Mercantile Co. Ltd v Beaumont & Ano. [1951] 1 All ER 925** (supra) the Court of Appeal set out the principles to be considered in a situation where an action was commenced in the name of a company without authority. In this case the company went into liquidation and the liquidator adopted the proceedings on behalf of the company. The Court held:

> ***"I find nothing in any of those cases to constrain me to hold that the issue of a writ and the commencing of an action without authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the solicitor concerned. So to hold would be to introduce, as I see it, an entirely novel doctrine into the ordinary law of principal and agent, and to make a new exception to the general rule that every ratification relates back, and is deemed equivalent, to an antecedent authority.'***
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> ***'It is common practice in such cases to adjourn any motion brought to strike out the company's name with a view to a meeting being called to see whether the company desires the action to be brought or not.'***
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> ***'I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying he had proper authority to do so, or under an erroneous assumption as to the authority, does so as at his own peril, and, so long as the matter rests there the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, provided the aggrieved party does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor, who started the action, to adopt the proceedings, and say: 'I approve of all that has been done in the past and instruct you to continue the action.' When that has been done then in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority.****" (emphasis added).*
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> ***It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear. Here is what Palmer states: -***
>
> ***"If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholder's be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant's costs."***

30. Concerning an advocate acting for a company without authority of the Company sanctioning such representation and or filing of suit on behalf of the company, the Court of Appeal more recently in **East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR** held that:

> *"**Cordery's Law Relating to Solicitor** states that:*
>
> ***"Proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent's act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance, and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant."***

31. The Court of Appeal in the above case further stated:

> ***"It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear. Here is what Palmer states****: -*
>
> *"**If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholder's be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant's costs."***

32. I have no reason to differ with the above decision of the Court of Appeal. In the premise it would be a travesty of justice to make a determination based on submissions and documents which are not even properly before the court. It is bad enough to try a case by affidavits. It is worse to do so basing on documents filed by parties to be relied upon at the trial which documents are neither on oath nor have been tested by cross-examination. to strike out this suit or defence without hearing both parties on merit will be ousting the parties from the judgment seat since there are triable issue s capable of being ventilated at the full trial.

34. Accordingly, I decline to strike out the defendant's filed statement of defence. In equal measure, I decline to allow the preliminary objection by the defendant seeking to strike out the plaintiff's suit. I dismiss both propositions taken by both parties to this suit.

35. I order that the suit herein shall be heard on merit upon both parties complying with pre-trial requirements under Order 11 of the Civil Procedure Rules.

36. Each party shall bear their own costs of the application and preliminary objection.

Dated, signed and Delivered in open Court at Nairobi this 12th day of November, 2015.

R.E.ABURILI

JUDGE