



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 270 OF 2014

CFC STANBIC BANK LIMITED.....PLAINTIFF

VERSUS

ECHUKA FARM LIMITED.....1ST DEFENDANT

ALBERT THUO CEGE.....2ND DEFENDANT

RULING

1. By a **Notice of Motion** application dated **28th May 2015** the Plaintiff seeks that the Defence herein be struck out and judgement be entered for the Plaintiff as prayed in the Plaint. The Plaintiff also seeks cost of the suit and of this application.
2. The Application is premised on the grounds set out therein, and is supported by affidavit of **Ann Kaswii Muli** sworn on **28th May 2015**. In brief, the Plaintiff's case is premised on the Plaint filed herein on 20th June 2014 in which the Plaintiff claims against both Defendants a sum of Kshs.8,318,744.28 plus interest at the rate of 20.5% per annum from 1st April 2014 until payment in full.
3. The claim is based on the allegation that on or about 2nd July 2007, the 1st Defendant took out an overdraft facility with the Plaintiff's in the sum of Kshs.4,000,000/= with an understanding to repay the same on or before 30th September 2007. On or about 27th July 2007, in consideration of the said overdraft facility, the 2nd Defendant entered into a Guarantee and Indemnity Agreement with the Plaintiff, as the personal guarantor of the 1st Defendant for the said facility. It is now alleged that both the Defendants have refused or neglected to repay the said facility, and that there is no good defence to the suit.
4. The Defendants filed a joint defence on 28th August 2014 and denied knowledge of the Plaintiff. The Defendants further allege that the Plaintiff's cause of action is time barred under the Limitation of Actions Act, Chapter 22. The Defendants further allege that the Kshs.500,000/- paid towards the repayment of the debt was paid by an entity know as Echuka Country Estates Limited and not Echuka Farm Limited, and therefore there is no issue of the 1st Defendant having acknowledged the debt. Further the Defendants' defence is that the sum claimed of Kshs.8,318,744.28 is contrary to the express provisions of Section 44A of the Banking Act Chapter 488 of the Laws of Kenya.
5. The Defendant filed Grounds of Opposition to the application on 26th June 2015.
6. Parties filed written submissions to the application, which I have considered. The only issue I raise for determination is whether or not the defence filed herein is scandalous, vexatious and frivolous, and a mere defence intended to prejudice, embarrass and delay the fair trial of the Plaintiff's suit, and whether the same amounts to an abuse of the process of this court.

7. To my mind for a pleading to be scandalous, vexatious or frivolous, it must be a kind of pleading which, if it were to be heard on trial, would embarrass either one or both the parties, and cause them to desire to fight each other in public or in the court. It is a kind of pleading which a reasonable mind cannot take to court since the court is composed of reasonable people, the unreasonableness of the pleading would cause public odium and vex the mind of reasonable people so that they think less of either one or both, or all of the parties in the matter. For a defence to be a mere defence, it is a defence which lacks merit, and is put forth against the Plaintiff for the purposes of holding the proceedings in place, but when put to trial, must collapse. When we have a frivolous, scandalous, vexatious and a mere defence, the same, if correct, amounts to what we may call an abuse of the process of the court.
8. I have considered the defence herein filed by the Defendants. The Defendants first of all deny any knowledge that CFC Stanbic Bank Limited is one and the same with Stanbic Bank Limited. This is not a frivolous scandalous or vexatious claim, but a good and relevant point of law to be considered by the court. The Defendant also alleges that the Plaintiffs' cause of action is time barred under the statute of Limitation. That also is a legal point or consideration, given that the alleged loan facilities were given in 2007 and this suit was filed in 2014. The Defendant further alleges that the Kshs.500,000/= paid in part acknowledgment of debt was done by an entity known as Echuka Country Estates Limited, and not Echuka Farm Limited, who is the 1st Defendant in this matter. This allegation also is a valid legal issue for determination by this court in a full trial. Lastly the Defendant has raised the legal issue that the Plaintiff's claim is contrary to provisions of Section 44A of the Banking Act, Cap 488 of the Law of Kenya. That Section deals with the maximum amount that a lender can recover for facilities which have been declared non performing by lending institutions. This allegation is a valid issue for determination by this court.
9. I am therefore of the view that the allegation by the Plaintiff/ Applicant that the defence is a mere defence, or that the same is scandalous, frivolous and vexatious is not correct at this stage, and that a determination of the correctness of those allegations must be made upon a finding of fact in full trial.
10. More than that the act of striking out pleading is so draconian, that unless the issues are so clear and admit no doubt whatsoever, a court will, and must take great caution before striking out pleadings. In the current matter, I have noted that the Plaintiff has completed pre-trial processes. It is now the Defendants turn to concluded pre-trial, and then the suit would be set down for hearing.
11. From the foregoing paragraphs of this ruling, the Plaintiffs application dated 28th May 2015 is dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI

THIS 4TH DAY OF DECEMBER 2015.

E. K. O. OGOLA

JUDGE

PRESENT:

N/A for the Plaintiff

M/s. Kiduduhuu for the Defendants

Teresia – Court Clerk