



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL CASE NO 549 OF 2011

PATEKA ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

ORIENT GROUP CO LIMITED.....1ST DEFENDANT

WESLEY KIPROTICH KIPKORE.....2ND DEFENDANT

PAUL K. MUTIRO3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 20th November 2012 was filed under the provisions of Order 2 Rule 15 (b), (c) and Order 13, Rule 2 of the Civil Procedure Rules, Chapter 21 (Laws of Kenya) and all enabling provisions of the law. It sought the following orders:-
 - i. **The 2nd and 3rd Defendant's defence be struck off.**
 - ii. **Judgment be entered against the 2nd Defendant in the sum of Kshs 3,000,000/=.**
 - iii. **Judgment be entered against the 3rd Defendant in the sum of Kshs 6,000,000/=.**
 - iv. **Costs of this application be provided for.**
2. The said application was premised on the following grounds:-
 - a. **The defences stated by the 2nd and 3rd Defendants were frivolous and would prejudice, embarrass and delay the fair trial of this action.**
 - b. **In their statement of defence, the Plaintiff's claim was not denied as there existed a valid agreement made on the 7th day of October 2009 between the parties herein.**
 - c. **In the said agreement the 2nd and 3rd Defendants/Respondents were and are bound as guarantors for the purpose of security for the loan advanced to the 1st Defendant/Respondent.**
 - d. **Further to the above the Respondents indeed gave their personal guarantee that the amount advanced shall be paid on the given dates failure to which the Plaintiff applicant was at liberty to demand the above sum for him.**

e. **The 2nd and 3rd Defendants made admissions relating to the Judgment Debtor.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of Joseph Nzoka Mutua which was also sworn on 20th November 2012.
4. The Plaintiff's case is that by an agreement dated 7th October 2009, it advanced the 1st Defendant a sum of Kshs 6,000,000/= which sum was due for payment on or before 30th November 2009.
5. The deponent stated that he entered into agreements, on behalf of the Plaintiff, with the 2nd and 3rd Defendants whereat the said 2nd Defendant, who was a director of the 1st Defendant, undertook to pay the said sum while the 3rd Defendant undertook to be a guarantor. This application was necessitated by the 2nd and 3rd Defendants failure to pay the said amounts as they had agreed with the Plaintiff on 29th December 2009 and 30th December 2009 respectively.
6. The 1st Defendant did not file any affidavits or grounds in opposition to the Plaintiff's said Notice of Motion application. This is despite the directions given by Mabeya J on 13th March 2013 that parties were to exchange their Replying Affidavits and written submissions by 12th February 2013.
7. In response thereto, on 7th February 2013 Wesley Kiprotich Kipore swore the Replying Affidavit on his own behalf and that of the 3rd Defendant. The same was filed on 11th February 2013.
8. It was the 2nd and 3rd Defendants' case that the 1st Defendant had informed them that the sum of Kshs 6,000,000/= was never advanced to it and that the undertaking and guarantee executed between the parties was a condition precedent that the Plaintiff was to release the said sum to the 1st Defendant and which it failed to do.
9. He further deponed that the 1st and 2nd Defendants had stated that the Plaintiff wanted to unjustly enrich itself for funds which were never received by the 1st Defendant and that this was a triable issue which could only be canvassed during a full trial. The 2nd and 3rd Defendants therefore prayed that the Plaintiff's said application be dismissed and that they be heard on their defence on merit.

LEGAL SUBMISSIONS BY THE PLAINTIFF

10. In its written submissions dated and filed on 14th February 2013, the Plaintiff submitted that the 2nd and 3rd Defendants' contentions that the Plaintiff did not advance the 1st Defendant the sum of Kshs 6,000,000/= were mere denials, frivolous and intended to embarrass and delay the fair trial of this action as the Defendants had not denied the existence of a valid agreement made on 7th October 2009.
11. The Plaintiff was categorical that the 2nd and 3rd Defendants actually acknowledged receipt of the loan by the 1st Defendant as was indicated in the personal guarantee dated 30th December 2009 as follows:-

“WHEREAS ORIENT GROUP CO LTD was advanced a sum of Kshs 6,000,000/= by PATEKA ENTERPRISES LTD which was supposed to be paid on or before 30th day of November 2009 but which Orient Group Ltd has failed to pay us.”

12. It relied on the case of **Shah vs Shah 2001 1 All E.R. 138** in which it was held as follows:-

“Having regard to the purposes for which deeds are used and indeed in some cases required, and the long term obligations which deed will often create, there are policy reasons for not permitting a party to escape his obligations.”

13. The Plaintiff also referred the court to the cases of **HCCC NO 3 of 2000 The National Bank of Kenya Ltd vs Daniel Opande Asnani** (unreported), **Choitram vs Herta E. C. Nazari [1982-88]**

1 KAR 437 and Dancan Njathi Macharia vs Richard Marigu Wamae (2012) eKLR where the common thread of the cases was that where admissions are obvious, and which need not only be in the pleadings only, and contentions by Defendants are mere denials, the court will strike out a pleading for being embarrassing, frivolous, scandalous or vexatious.

LEGAL SUBMISSIONS BY THE 2ND AND 3RD DEFENDANTS

14. The 2nd and 3rd Defendants filed their submissions dated 11th March 2013 on 12th March 2013. They reiterated that the Plaintiff did not advance any monies to the 1st Defendant and that the 1st Defendant had categorically denied receipt of the sum of Kshs 6,000,000/= in its pleadings. It was their argument this court ought to consider their defence where they had denied knowledge of such monies being advanced to the 1st Defendant and the Plaintiff's claim therefore ought to be strictly proven.
15. The 2nd and 3rd Defendants relied on the cases of Provincial Insurance Co Ltd vs Diners Club Africa Ltd and Another [2005] eKLR and HCCC NO 496 of 2011 Mohammed Hassin Rondor and Another vs Twin Buffaloes Safaris Ltd (unreported) where the courts declined to strike out the respective defences and enter judgment as the defences had raised triable issues.

LEGAL ANALYSIS

16. The court has noted from the 2nd and 3rd Defendants' submissions that the Plaintiff did not file a Replying Affidavit in response to their application dated 23rd November 2013 but it has not found such an application in the court file. The court will therefore not consider or allow the said application as prayed for the said reason and the fact that it was not the matter that was scheduled for hearing by the court on 4th December 2013.
17. When the matter came up for hearing of the Plaintiff's Notice of Motion application dated 20th November 2012, counsel for the 1st, 2nd and 3rd Defendants did not attend court despite having been served with the Hearing Notice dated 22nd October 2013. The Affidavit of Service sworn on 24th October 2013 by Kennedy Ochieng and filed on the same date evidenced the said service.
18. Counsel for the Plaintiff highlighted its submissions. The 2nd and 3rd Defendants did not highlight their said submissions but the same were already on the court record. It is only the 1st Defendant who did not appear to have filed a Replying Affidavit and written submissions.
19. It is trite law that striking out of pleadings is a very draconian step that should only be undertaken sparingly. This is because it denies a party to a suit an opportunity to fully canvass its case during trial.
20. At the time of striking out, the court proceeds without considering the merits of a party whose pleadings are to be struck out. The court must therefore only proceed to strike out a pleading in the clearest of the cases. A single triable issue is sufficient for a court to find that the matter should proceed for full hearing.
21. The converse is also true. The duty of a court is to dispense justice expediently and without unnecessarily forcing parties to proceed for full trial where it is clear that a pleading is vexatious, scandalous, abuse of the court, it discloses no reasonable cause of action or defence in law and is intended to embarrass or delay the fair trial of a matter.
22. The Plaintiff brought its application on the basis that the Defences filed by the 2nd and 3rd Defendants were scandalous, frivolous or vexatious.
23. This court has carefully considered the pleadings, written submissions by the parties' counsel and the oral submissions by the Plaintiff's counsel and notes that the existence and validity of the Agreement between the Plaintiff and the 1st Defendant of 7th October 2009 was not disputed. Neither were the two (2) other agreements between the Plaintiff and the 2nd Defendant and 3rd Defendant respectively. What is in contention, however, is whether or not the 1st Defendant was advanced any monies by the Plaintiff.
24. The legal position is that an admission by a party can be discerned from pleadings, affidavits or any correspondence or documentation exchanged between the parties having a dispute. The loan

agreement dated 7th October 2009 and marked as “JNM 1” states as follows:-

“This is to confirm that today 7th October 2009, PATEKA ENTERPRISES LIMITED of P O Box 12874 Nairobi, has loaned to ORIENT GROUP CO LIMITED P O Box 6716 00200 Nairobi Kshs 6,000,000.00.

ORIENT GROUP CO LIMITED binds itself to pay PATEKA ENTERPRISES LTD once they receive proceeds of generators they have supplied to CONCERN WORLDWIDE via LPO No 032 serial No DSL235 invoice No 001024 dated 29th September 2009.

ORIENT GROUP CO LIMITED will make the payments to PATEKA ENTERPRISES LTD as follows:

Kshs 5,000,000 on or before 30th day of October 2009

Kshs 1,000,000 on or before 30th day of November 2009.”

On behalf of orient Group Co Ltd.

Signed

Paul K Mutiro

Operations Director

ID No 7544866

Signed

Witness

Wisely Kiprtotich Kipkole

ID No 4503654

On behalf of Pateka Enterprises Ltd

Signed

Terry Krieger

Financial Director

ID No 358241

Signed

Witness

Karani Kinyua

Director

ID No 92150331

25.The Agreement dated 29th December 2009 and marked as “JNM 1A” stipulated as follows:-

“This agreement is made further to the one made on 7th October 2009 between PATEKA ENTERPRISES LIMITED and ORIENT GROUP COMPANY LTD whereby it is agreed as follows:-

WHEREAS ORIENT GROUP CO LTD was advanced a sum of Kshs 6,000,000 by PATEKA ENTERPRISES LTD which sum was supposed to be paid on or before 30th day of November 2009 BUT WHICH ORIENT GROUP LTD has failed to pay as agreed:-

AND WHEREAS one WESELY KIPROTICH KIPKORE the holder of I.D Card Number 4503654 has agreed and is willing to pay a half of the amount to the PATEKA ENTERPRISES LTD”.

Now this agreement is WITNESSED as follows:

1. **THAT a sum of Kshs 1,500,000/= shall be paid on or before January 30th 2010 without fail.**
2. **THAT the balance of Kshs 1,500,000/= shall be paid on or before 28th February 2010 without fail.**
3. **THAT failure to pay the amount as agreed, PATEKA ENTERPRISES LTD shall be at liberty to take any legal action to ensure the recovery of the money.**
4. **THAT it is also expressly herein agreed that MR PAUL K. MUTIRO the holder of I.D card Number 7544866 and who has countersigned this agreement has given his personal guarantee that the above amount shall be paid on dates indicated as above and in case the same is not paid as above indicated the lender i.e PATEKA ENTERPRISES LTD shall be at liberty to demand the above sum from the said PAUL K. MUTIRO.**

Signed

WESELY KIPROTICH KIPKOLE

I.D NUMBER 4503654

IN PRESENCE OF:

Signed

KARANI KINYUA, DIRECTOR

I.D NUMBER 92150331

For and on behalf of

PATEKA ENTERPRISES LTD

IN PRESENCE OF:

Stamped

26.In addition, the personal Guarantee by the 3rd Defendant executed on 29th December 2009 and 30th December 2009 marked as “JNM 3” and “JNM 2” respectively states as follows:-

“PAUL K MUTIRO do hereby bind myself and I hereby give my personal guarantee that the above amount shall be paid as above stipulated and in case of failure by the debtor to pay as above stated I shall personally step in to pay and the lender/creditor shall be at liberty to take any

action either against me singularly and/or will jointly with the debtor/borrower to recover the sum.

THAT this guarantee is given on strength that I am/I was a Director of ORIENT GROUP CO LTD the initial borrower of the money herein vide agreement dated 7th of October 2009.”

Dated this 30th day of 12 2009

Signed by: PAUL K. MUTIRO – Signed

I.D NUMBER 7544866

GUARANTOR

In presence of:

Stamped

G.R MUTHURI

ADVOCATE & COMMISSIONER FOR OATHS

P O BOX 7744- 00200

NAIROBI

27.The aforesaid admissions are unambiguous. They are clear as to the intention of the parties being that:-

- i. The 1st Defendant was loaned by the Plaintiff a sum of Kshs 6,000,000 on 7th October 2009.**
- ii. In default, the 1st Defendant was to pay the sum of Kshs 6,000,000 by 30th November 2009.**
- iii. The 2nd Defendant agreed in writing to undertake to pay the sum of Kshs 6,000,000 by 28th February 2010.**
- iv. The 3rd Defendant gave personal guarantees that the said amount would be paid as had been stipulated in the agreements of 29th December 2009 and 30th December 2009.**
- v. All the agreements and personal guarantee were dully executed by the parties and attested by witnesses.**

28.This court is of the view that the Defendants’ defences are mere denials. They are vexatious, frivolous, an abuse of the process of the court and are intended to delay the fair trial of this action.

29.The court is satisfied that the sum of Kshs 6,000,000/= was clearly admitted in the annexures contained in the Plaintiff’s affidavit in support of its Notice of Motion application. The 2nd and 3rd Defendants’ deposition that the 1st Defendant was not advanced the said monies holds no water. It is neither here or there and appears to this court to have been misleading.

30.Notably, the 1st Defendant did not swear any affidavit to deny that it received any money from the Plaintiff and the averments by the 2nd Defendants in this matter are not supported by facts. The 2nd Defendant set out averments without disclosing the source of his information. He could also not purport to adduce evidence on behalf of the 1st Defendant as it was represented by a different firm of advocates who opted not to participate in the hearing of the application herein.

31.In the premises foregoing, this court finds that the defences by the Defendants are a sham. However, the court is alive to the fact that parties are bound by their pleadings. No party can depart from his pleadings or plead allegations contrary to its previous pleadings as provided in Order 2 Rule 6 of the Civil Procedure Rules, 2010.

32.Evidently, the Plaint dated and filed on 5th December 2011 indicates that the Plaintiff had sought

the following Orders:-

- a. **Judgment against the 1st Defendant for the sum of Kshs 6,000,000/=.**
- b. **Judgment against the 2nd Defendant for the sum of Kshs 3,000,000/= based on the letter of admission dated 11th February 2010.**
- c. **Judgment against the 3rd Defendant for Kshs 3,000,000/= based on guarantee dated 29th December 2009.**
- d. **Interest on (a), (b), and (c) at court rates until payment in full.**
- e. **The costs of this suit.**
- f. **Any other relief this Honourable court deems fit.**

33. Judgment can only be entered either for prayer (a) or prayers Nos (b) and (c) separately as the amount loaned was Kshs 6,000,000/=. Entry of judgment as sought by the Plaintiff would be to unjustly enrich it. Most importantly, there would be no legal basis for granting prayers (a), (b) and (c) at the same time. It is also for the same reason that the court cannot enter judgment against the 3rd Defendant for a sum of Kshs 6,000,000/= as sought in the Notice of Motion application dated 20th November 2012 as the Plaintiff shows that the Plaintiff was seeking a sum of Kshs 3,000,000/= from the 3rd Defendant.

DISPOSITION

34. The upshot of this ruling is that the Plaintiff's Notice of Motion application dated 20th November 2012 is allowed in the following terms; this court hereby strikes out the 2nd and 3rd Defendants' Defence and enters judgment against the 2nd and 3rd Defendants for Kshs 3,000,000 each plus interest at court rates from the date of filing suit until payment. Costs in the cause.

35. Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th day of January 2014

J. KAMAU

JUDGE