REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 13 OF 2012

EQUITORIAL COMMERCIAL BANK LTD.....PLAINTIFF

-V E R S U S-

JODAM ENGINEERING WORKS LIMITED.....1ST DEFENDANT

SHADRACK KIEMA MUTUA.....2ND DEFENDANT

ESTHER NDUKU KIMULI.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's claim against the Defendants jointly and severally is for Kshs. 5,396,017.85 plus interest thereon at the rate of 31% per annum from 6th July 2010 until payment in full. The Plaintiff claims that the 1st Defendant applied for and was granted by the Plaintiff an overdraft facility to the tune of Kshs. 6,600,000.00. As part of the securities for the overdraft facility, the 1st Defendant provided, *inter alia*, the following:

a. Board of Directors Resolution for the total amount of the facility.

b. Chattels mortgage of motor vehicle KAJ 864R registered in the name of the 2nd Defendant.

c. Chattels mortgage of motor vehicle KAB 033C registered in the name of the 3rd Defendant.

d. Joint and several guarantees for Kshs. 6,600,000.00 duly executed by the directors.

2. The Plaintiff claims that the 2nd and 3rd Defendants each provided guarantees for Kshs. 6,600,000.00 under documents of Guarantee and Indemnity dated 15/8/2008. The Plaintiff avers that the 1st Defendant defaulted in repayment of the overdraft facility hence this suit.

3. The Defendants filed a Statement of Defence dated 28th August 2012 in which they denied the Plaintiff's claim.

4. The Plaintiff then filed a Notice of Motion dated 10th July 2013 in which it is seeking to strike out the

Statement of Defence on the basis that it fails to raise a reasonable defence or at all and that judgment be entered in favour of the Plaintiff. **It is that Application that is the subject of this legal opinion**.

5. The Defendants claim to have filed Grounds of Opposition to the Plaintiff's application but I haven't seen the same in the court file.

6. On 18/9/2013, the court directed that the Notice of Motion application be heard by way of written submissions on 30/10/2013. Both parties filed their written submissions. The Plaintiff's written submissions were filed on 16th July 2013 while the Defendants filed theirs on 20/11/2013.

THE ARGUMENTS

The Applicant's Case

7. The Applicant's case is that the Defence failed to respond adequately, traverse and/or give any proper defence to the claim/indebtedness of the Defendants to the Plaintiff; that the Statement of Defence as filed bears no reasonable defence; and that the same contains mere denials which cannot amount to a defence in law.

8. The Applicant submits that the only question in issue is the indebtedness of the Defendants to the Plaintiff which indebtedness has been overwhelmingly brought out under the Plaintiff's claim and which the Defendants have failed to supply evidence to controvert. Further that were the court to allow the Defendants' defence as filed, the Plaintiff will be prejudiced as its case would take long to conclude.

The Response by the Defendants

9. In their written submissions, the Defendants admit that the relevant funds were availed to them on 7th August 2008. The Defendants, however, seem to be saying in their written submissions that the amount advanced to them was Kshs. 4,349,884.30 and not Kshs. 6,600,000.00 as claimed by the Plaintiff. That, however, was not pleaded in the Statement of Defence.

10. The Defendants also submit that they have raised in their defence that the Plaintiff's claim of the security of motor vehicle valued at Kshs. 890,000/= to guarantee the facility of Kshs. 6,600,000.00 is not realistic.

11. What the Defendants seem to be saying in a nutshell, therefore, is that those two issues namely; that the amount advanced was less than what is claimed and that the value of the motor vehicles was less than the amount the Plaintiff claims to have advanced, constitute their defence.

THE ISSUES

12. The issue for the court's determination is whether the Defendants' Statement of Defence as filed raises no reasonable defence and is a sham to warrant the striking out as prayed by the Plaintiff.

ANALYSIS

13. I will critically analyse the Statement of Defence paragraph by paragraph. Paragraphs 1, 2, 9, 10 and 12 are what I may call 'routine paragraphs', often found in all statements of defence. Paragraphs 3, 5, 7 and 11 are general denials of the respective paragraphs of the Plaint. That leaves me with paragraphs 4, 6 and 8 which are discussed below. I will start by discussing paragraphs 4 and 8 together and later paragraph 6.

Paragraphs 4 & 8

14. The Plaint consists of concise and specific claims against the Defendants. The Plaintiff makes specific allegations, detailing how the 1st Defendant applied for and was advanced the overdraft facility and how

the facility was secured.

15. However, the Defendants instead of responding to those specific allegations, opted to make mere general denials. At paragraph 4 of the Defence, it is stated as follows:

> **4. Without prejudice to the foregoing the Plaintiff (sic) avers that if at all the defendant made any request for funds (which is hereby denied) the plaintiff did not avail those funds (Kshs. 6,600,000/-) to the 1st defendant; and further denies providing securities as is alleged in paragraph 5 of the plaint and the plaintiff is put to strict proof thereof.**

16. At paragraph 8 of the Defence, it is stated as follows:

> **8. The defendants deny the contents of paragraph 12 of the plaint and in particular that they were advanced the sum of Kshs. 6,600,000/= and the plaintiff is put to strict proof thereof. In the alternative, the defendants aver that if any money was advanced to them (which is hereby denied) the same was not in the tune of Kshs. 6,600,000/=.**

17. As already observed, the Defendants, in their written submissions, claim that the amount of money advanced to them was Kshs. 4,349,884.30 and not Kshs. 6,600,000.00. In my opinion, if that was the case, nothing would have stopped them from pleading the same in their Defence. It would have been appropriate for the Defendants to state so categorically and especially at paragraph 8 where they deny that the facility advanced was to the tune of Kshs.6,600,000.00. Instead, they made general statement of denial without specific particulars of the amount allegedly advanced to them.

18. It appears, the Defendants are adding flesh to their Defence through written submissions. This does not remedy the Defence because what this court is required to do at this stage is to just look at the pleadings (the Plaint and the Statement of Defence) and decide whether a reasonable defence is raised. I say so on the strength of the provisions of Order 2 Rule 5 (2) which provides that no evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made. That, in essence, implies that the court is not under any obligation to look at the evidence but only at the pleadings as filed.

19. In the case of **Co-operative Merchant Bank of Kenya Ltd –Vs- Benson W.K. Muigai [2005] eKLR**, the High Court stated as follows:

> **"Rule 13 (1) empowers the Court at any stage of the proceedings to order to be struck out or amended any pleading on the ground that –**
>
> **(a) It discloses no reasonable cause of action or defence; or**
>
> **(b) .....**
>
> **(c) It may prejudice, embarrass or delay the fair trial of the action: or**
>
> **(d) it is otherwise an abuse of the process of the Court.**
>
> **Rule 13 (2) of Order VI, prohibits the admission of any evidence on application under sub rule 1 (a), but that the application shall state concisely the grounds on which it is made. The Plaintiff has jumbled the current application as if the Defendant's Defence is all those things set out in rule 13 (1). A careful reading of that rule requires that the Court may strike out a pleading on any of the four grounds. The grounds are clearly disjunctive, and Counsel should be careful in their pleading as to which ground the party wishes to rely upon in seeking to strike out a pleading. For instance <u>if the application is</u> <u>that the pleading discloses no reasonable cause of action or defence, then evidence by</u> <u>Affidavit is not admissible. It is a matter to be determined purely on law upon</u> <u>examination of the pleadings, the Plaint, the Defence as amended if that is the case</u>."** (underlining mine)

20. Rule 13 (2) of Order VI of the repealed Civil Procedure Rules was the equivalent of Order 2 Rule 15 (2) of the current Civil Procedure Rules.

21. The instant Application is substantively under Order 2 Rule 15 (1) which provides for the striking out of a pleading on the basis that it raises no reasonable cause of action or defence. No evidence is admissible. This court is therefore only mandated to make a decision based on the Plaint and the Defence as filed. The submission by the Defendants that they were only advanced Kshs. 4,349,884.30 does not, in my view, have any bearing at this stage since the same is not raised in the Statement of Defence. This court is under no obligation to consider such submission since it does not form part of the Defence as filed.

22. I am guided by the decision of **ERF KENYA LIMITED –Vs- BUSTRACK LIMITED & ANOTHER [2005] eKLR** in which the High Court quoted with approval the decision in **Magunga General Stores –Vs- Pepco Distributors Ltd [1987] 2 KAR 89** that mere denial is not sufficient defence. L. Njagi, J. stated as follows:

> **"It is to be remembered that the plaintiff has demonstrated clearly the amount of money owed per month. The defendants merely deny owing that money. They don't deny the existence of the contract for the supply of vehicle spare parts, nor that these were supplied. Their denial is therefore a general one which does not specifically traverse the allegations of fact in the statement of claim. In MAGUNGA GENERAL STORES v. PEPCO DISTRIBUTORS LTD [1987] 2 KAR 89, where the defendant used such generalised denial, Platt, J.A., said-**
>
> **"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."**
>
> **These observations are applicable to this case. In the correspondence exchanged between the parties, the defendants quite frankly admitted liability. Upon being sued, they deny liability generally without advancing any explanation therefor. Did they discharge their liability in the intervening period? This is not explained. From the foregoing, it seems clear to me that the defence is a mere, general denial which does not raise any triable issues. It is not a reasonable defence."** (underlining mine)

23. In the case of **NAIROBI FLOUR MILLS LIMITED -Vs- JOHNSON KITHETE T/A FARMERS GENERAL STORES [2005] eKLR**, I had occasion to hold as follows:

> ***"On the issue of whether the draft defence raises any triable issues. In paragraph 4 of the draft defence the defendant state: -***
>
> > ***"The defendant admits having been supplied with some goods by the plaintiff which he fully paid for but avers that they did not amount to Kshs 4, 77, 255.70"***
>
> ***To reiterate the defendant admits having been supplied by the plaintiff with some goods. The defendant did not give particulars of the said "some goods" and that just exposes the draft defence to be a mere denial. I accept the plaintiff's submission that it was incumbent upon the defendant to give details of the payments, if any, of the goods supplied and I would add that the defendants ought to have given value to "some goods" he acknowledges were supplied to him. I find and I hold that the defendants defence does not raise triable issues to the plaintiffs claim."***

24. Although in the above two cases there was admission by the Defendants of the claim against them, either through correspondence or in the Defence, the ratio established by the two cases is that mere, general denial without reason is not sufficient defence.

25. In the instant case, the Defendants start by generally denying that the 1st Defendant ever applied for and was advanced the loan facility by the Plaintiff but subsequently aver that if at all the request for the funds was made, then the same was either not advanced at all, or a lesser amount than Kshs. 6,600,000/= was advanced.

26. In my opinion, the Defendants cannot blow hot and cold at the same time. It is either the money was advanced or not. And if it was advanced at a lesser amount than applied for, it was incumbent upon the Defendants to state how much was advanced. Just like in the **Nairobi Flour Mills case** (**supra**) where the court held that the Defendant ought to have specified the particulars of 'some goods' supplied to them, the Defendants in this case ought to have specified the lesser amount of money they claim to have received. The Defendants did not do so in their Defence. They are seeking to do so through their written submissions, which to me does not help them in any way because the court is only obliged to consider the Plaint and the Defence at this stage.

Paragraph 6

27. I now turn to paragraph 6 of the Statement of Defence. It states as follows:

5. **Without prejudice to the foregoing the 1st Defendant avers that the purported security being the motor vehicles were at all the time valued at approximately 890,000/= amount which would not have been adequate for any reasonable bank to take as security against a loan of 6,600,000/= and the plaintiff is put to strict proof thereof.**

28. Paragraph 6 forms the other aspect of what the Defendants claim to be their defence, that is, that the value of the motor vehicles was less than the amount the Plaintiff claims to have advanced. This paragraph, does not, in my opinion, raise any triable issue. In fact, it amounts to admission that chattels mortgages over the subject motor vehicles were created. It is immaterial that the motor vehicles had lesser value than the amount advanced. Paragraph 6 of the Plaint is very clear that the chattels mortgage over the subject motor vehicles was just part of the security which included, *inter alia*, joint and several guarantees executed by the directors. The low value of the motor vehicles is not, in my considered view, sufficient defence to warrant trial as it is clear from the Plaint that the chattels mortgages were just part of the security. If the chattels mortgages were the only security for the loan facility, then the question as to the sufficiency or otherwise of such security would have formed a reasonable defence.

Should the Defence be Struck Out?

29. The Application is brought under Order 2 Rule 15 of the Civil Procedure Rules. Specifically, the Applicant is relying on the ground outlined in Order 2 Rule 15 (1) (a) which provides as follows:

> **"15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**
>
> **(a) It discloses no reasonable cause of action or**
>
> **defence in law."**

30. A statement of defence is said to raise reasonable defence if that defence raises a *prima facie* triable issue. In the case of **OLYMPIC ESCORT INTERNATIONAL CO. LTD. & 2 others –Vs- PARMINDER SINGH SANDHU & another [2009] eKLR**, the Court of Appeal held that for an issue to be triable, it has to be *bona fide.* The court stated as follows:

> **"It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."** (underlining mine)

31. The Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** held as follows:

"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham." (underlining mine)

32. In the case of **BLUE SKY EPZ LIMITED –Vs- NATALIA POLYAKOVA & ANOTHER [2007] eKLR** the court held that:

"The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue." (underlining mine)

33. It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which is to be resorted to in very clear and plain cases. However, it should be noted that while the Defendant is entitled to have his defence proceed to trial, the Plaintiff is equally entitled to efficacious and speedy determination of his claim. This was the position adopted in the case of **DIAMOND TRUST BANK (K) LTD –Vs- MARTIN NGOMBO & 8 OTHERS [2005] eKLR** where W. Ouko, J. held that:

"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence."

34. The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out.

CONCLUSION

35. The general principle is that if the Defence shows *bona fide* triable issue, the defendant should be allowed to defend. The substance of the Defendants' Defence in the instant case has already been discussed above. In my considered view, it does not raise *bona fide* triable issue. It consists of mere denials and general traverse, without reasons why the money is not owing. It is lacking in merit and raises no reasonable defence. It is for striking out.

36. I therefore order the Defence be struck out and judgment be and is hereby entered in favour of the Plaintiff for the amount claimed plus costs of the suit and costs of the Notice of Motion dated 10th July 2013. However, a careful scrutiny of the Facility Letter dated 1st August 2008 shows that the interest rate agreed upon was 24% per annum and not 31% as prayed in the Plaint. (See Clause 4.7 of the Facility Letter). Judgment is therefore entered for the Plaintiff for interest at 24% per annum from 6th July 2010 until payment in full.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE