



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY COURT
CIVIL SUIT NO 547 OF 2012

KENYA COMMERCIAL BANK LIMITED.....1ST PLAINTIFF

KCB BANK UGANDA LIMITED.....2ND PLAINTIFF

VERSUS

SUNTRA INVESTMENT BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 17th May 2013 was brought under the provisions of Order 2 Rule 15 (1)(b), (c) and (d), Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 3 and 3A of the Civil Procedure Act. It sought the following orders:-
 - a. **THAT the Defendant's Defence filed on 5th October 2012 be struck out and judgment be entered for the Plaintiffs as prayed for in prayers (a), (b), (d) and (f) of the Plaintiff.**
 - b. **THAT alternatively the Defendant's Defence filed on 5th October 2012 be struck out with costs and the matter do proceed for formal proof.**
 - c. **THAT alternatively judgment be entered for the Plaintiffs against the Defendant for the admitted sum of Kshs 24,772,200/= and the rest of the Plaintiffs' claim proceed for trial.**
 - d. **THAT the Defendant do bear the costs of the application and the suit.**
2. The said application was premised on the following grounds:-
 - a. **THAT the Defence filed herein was a sham and a mere denial.**
 - b. **THAT the Defence was frivolous and vexatious.**
 - c. **THAT the Defendant had in the Defence and previous documentation admitted the Plaintiffs' claim.**
 - d. **THAT the continued existence of the Defence herein was an abuse of the court process and amounted to a deliberate attempt to delay the fair trial of the Plaintiffs' claim.**

AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

3. The Plaintiffs' application was supported by the affidavit of Edwina Mulanga, their Manager, Client/ Custodial Services sworn on 17th May 2013. She deponed that by an agreement dated 2nd

- April 2008, the Defendant appointed the 1st Plaintiff as a commission agent to assist the Defendant sell ordinary Safaricom shares in the then Initial Public Offering (IPO). She said that the Plaintiffs handled the application, granted loans to their customers and followed up the allotment of the shares with the Defendant.
4. She stated that on 23rd April 2008, one Dr Sudhir Ruparelia, a customer of the 2nd Plaintiff applied for shares worth Kshs 116,850,000/=. However, due to oversubscription, he was only allotted 79% of the shares he had applied for. The Defendant refunded the said Dr Ruparelia a sum of Kshs 92,077,800/= but retained a sum of Kshs 24,772,230/= to enable him acquire additional shares which amount the Defendant had admitted having retained.
 5. It was her averment that the 1st Plaintiff and the said Dr Ruparelia entered into a Deed of Assignment dated 1st March 2012 whereupon the 1st Plaintiff refunded him the balance of the monies following delays and/or refusal by the Defendant to refund him the monies.
 6. The Plaintiffs' case was that the Defence herein constituted a mere denial, that no material or contentious fact had been pleaded by the Defendant and that the Defendant having admitted retaining the sum of Kshs 24,772,230/= in paragraph 8 of its Defence, the said Defence was not *bona fide* and raised no triable issues.
 7. The Defendant did not file a Replying Affidavit in response to the Plaintiffs' application. Instead, it filed a Notice of Preliminary Objections and Grounds of Opposition dated 27th November 2013 on the same date. The contentions can be summarised as follows:-
 - a. **THAT the application was misconceived, fatally defective for seeking incongruous reliefs or orders in an interlocutory application.**
 - b. **THAT there were no sufficient grounds disclosed to grant the said orders and that the Plaintiffs were avoiding a trial on merit by relying on technicalities.**
 - c. **THAT if the orders were granted, it would offend the principle of a fair trial by condemning the Defendant without any hearing or a fair hearing of its Defence.**
 - d. **THAT the Plaintiffs were avoiding the resolution of the dispute herein through mediation and arbitration.**
 - e. **THAT this court did not have jurisdiction to grant the reliefs sought prior to a hearing and determination of the dispute by the Industry as was prescribed under the Capital Markets Authority Act.**
 - f. **THAT the Plaintiffs were guilty of inordinate delay in fixing the matter herein for full trial.**
 - g. **THAT the remedy or order for judgment to be entered on admission was not available on piecemeal or instalments as it had to dispose all the questions as between the parties.**

LEGAL SUBMISSIONS BY THE PLAINTIFF

8. In its written submissions dated and filed on 19th December 2013 which were orally highlighted in court on 20th March 2014, the Plaintiffs submitted that the Defendant had admitted holding a sum of Kshs 24,772,230/= vide its letter of 22nd June 2009 which was annexed to the Supporting Affidavit and marked "EM 2 (c)".
9. It contended that that despite its proposal to liquidate the said admitted sum in June 2009, the Defendant failed to do so as a result of which the Plaintiffs refunded the said Dr Ruparelia the said sum in US Dollars which translated to USD 585,199.37. The said Dr Ruparelia then assigned the 1st Plaintiff the entire amount.
10. They pointed out that the Defendant's contentions were contradictory as it denied liability on one hand and on the other hand stated that if there were any monies, then the claim was farfetched, inaccurate and was occasioned by the 1st Plaintiff in clear bad faith which could not visited upon the Defendant.
11. The Plaintiffs referred the court to the cases of **D.T. Dobie & Company (Kenya) Limited vs Muchina (1982) KLR** and **Civil Appeal No 50 of 1996 Raghbir Singh Chatte vs National Bank of Kenya Limited** (unreported) to buttress its argument that a defence will be struck out where it discloses no reasonable defence.
12. They argued that their application was not defective for having combined several prayers as the court had held in the case of **HCCC No 101 of 2002 National Bank of Kenya Limited vs Lucy**

- Muthoni Kahia Magelo & 2 Others** (unreported) that an applicant could combine a prayer for judgment on admission and that of Summary judgment.
13. It was also their submission that the Defendant had not been denied a hearing because the court was mandated under the Civil Procedure Rules to enter judgment in deserving cases. They placed reliance on the case of **Civil Appeal No 179 of 1997 J.P Macharia vs Wangethi Mwangi & Another** (unreported) where the court held that a trial did not need to be held just because it was normal to do so but rather a trial had to be based on issues and that judgment, including declaratory reliefs, could be entered summarily as could be seen in the case of **HCCC No 104 of 2006 Kenya Commercial Bank Limited vs Zuwenya Limited & Jayne Wangui Gachoka** (unreported) where Warsame J struck out a defence in a suit that was based on fraud.

LEGAL SUBMISSIONS BY THE DEFENDANT

14. The Defendant's written submissions dated 13th March 2014 were also orally highlighted in court. It submitted that there was no admissible or other direct documentary evidence as to payment and that in its agreement with the 1st Plaintiff, there was no reference either to the 2nd Plaintiff or the said Dr Ruparelia. It also contended that the payment made to it was in Kenya Shillings and that the Plaintiffs' claim for refund to be made in US Dollars was contrary to the law applicable to the contract in issue.
15. It accused the Plaintiffs of causing delays in the determination of this matter. It argued that parties had closed their pleadings and filed their List of Bundle of Documents and that the Plaintiffs' application was a short cut and avoiding a full trial. It stated a perusal of the reliefs sought showed that the Plaintiffs had failed to make a clear and succinct election of what they really wanted and that none of the reliefs sought could dispose of the suit as a result of which they were prosecuting their case in piecemeal.
16. It also pointed out that there was no distinct prayer that sought judgment for Kshs 24,772,230/= and that the Plaintiffs were in essence amending their Plaint which ought to have been under Order 8 of the Civil Procedure Rules. It said that in the absence of such a claim, it would mean that in the existence of the claim of USD 583,199.37, there would be a multiplicity of the claim both under the USD currency and under the Kenyan Shilling. It argued that that the 1st Plaintiff's assignment contract with the said Dr Ruparelia was a distinct contract that the Defendant should not be drawn into the same.
17. It was its averment that the court was obligated to evaluate all the contractual documents executed by the parties in this instant hearing and again at a formal proof hearing but the failure by the Plaintiffs to elect which prayer they wished to pursue was oppressive as it denied it a right to cross-examine and interrogate the Plaintiffs' case on all the issues it had raised. It argued that the questions of whether or not the agency commission of 1% in the sum of Kshs 9,936,657.30 was payable in addition to a refund, whether or not the same was payable for an unsuccessful application and the credibility of the Defendant's employee or servant who authorised the statement of account were pertinent issues that needed to be determined by the court.
18. It was its argument that its letter of 22nd June 2009 was on a without prejudice basis that was not accepted and that any reliance on it to prove indebtedness could not be done as it would offend the admissibility rules of evidence and the public policy of encouraging litigants to settle their differences rather than litigate the same. It referred the court to Section 23 of the Evidence Act Cap 80 (laws of Kenya) in this regard.
19. It stated that the Plaintiffs had not met the test for striking out of its Defence as was in the case of **D.T. Dobie Company (Kenya) Limited vs Muchina** (Supra). It also distinguished the cases of **National Bank Limited vs Lucy Muthoni Kahia Magelo & 2 others** (Supra) as it was not purely a liquidated claim but rather a mixture of liquidated, declaratory and multiple currencies and the case of **Kenya Commercial Bank Limited vs Zuwenya Limited & Jayne Wangui Gachoka** (Supra) which prejudiced the parties from getting an ideal hearing due to the protracted legal proceedings therein. It therefore prayed for the dismissal of the Plaintiffs' application with costs.

LEGAL ANALYSIS

20. In its Notice of Preliminary Objection and Grounds of Opposition, the Defendant appeared to raise objections regarding this court's jurisdiction in two ways. The first was that there were contractual mandatory fora by way of having the dispute herein resolved by way of mediation and arbitration and the second being the forum that was prescribed by the Capital Markets Authority Act. However, it did not espouse these arguments further in its submissions and may have opted to abandon the same.
21. However, the issue of jurisdiction is a fundamental one as it goes to the root of a matter and must be disposed of at the very first instance. The court assumes jurisdiction whenever parties submit themselves to it provided its jurisdiction is not ousted by any law. The dispute herein emanated from a contractual relationship between the Plaintiffs and the Defendant and as stipulated under Article 50 of the Constitution of Kenya, 2010, every person has a right to have any dispute that can be resolved by application of law decided before a court.
22. The Defendant lost an opportunity to ventilate the dispute herein in the manner it would have wished when it did not seek any orders from the court to stay the proceedings herein with a view to having the dispute resolved either under the Capital Markets Authority Act, if at all, or under the Arbitration Act, 1995. This court is therefore properly seized of this matter.
23. In its oral submissions, counsel for the Defendant also objected to the Supporting Affidavit sworn by Edwina Mulanga, who he contended was an unauthorised person, as her name did not appear in the Board Resolution attached to the Verification Affidavit and marked "B". He stated, however, that in the event the court was to find the Plaintiffs' application not to have been defective, the court should only consider prayer 1(c).
24. In response thereto, counsel for the Plaintiff averred that the said affidavit showed that the said Edwina Mulanga was an authorised person to swear the said affidavit and that in any event, the Defendant did not contest this fact in their pleadings or submissions.
25. To get this objection out of the way, the court perused the said resolution and noted that it is correct as counsel for the Defendant stated that the name of Edwina Mulanga does not appear in the said Board Resolution. However, a careful reading of the said Board Resolution shows that the names stated therein were the 1st Plaintiff's staff members who were authorised to swear Verification Affidavits to be attached to Plaintiffs. A Supporting Affidavit cannot be equated to a Verification Affidavit. Indeed, it can be sworn by any authorised person who is aware of the facts of a case.
26. In Paragraph 1 of the said Supporting Affidavit, it has been stated as follows:-

“THAT I am a Manager, Client/Custodial Services with the Plaintiffs well versed with the matters at hand and duly authorized to make this oath.”

27. Unless the Defendant can provide proof to this court that the said Edwina Mulanga was not authorised to swear the said Supporting Affidavit and which it did not provide at the time it canvassed the application herein, this court finds the objection cannot be sustained and that for all purposes and intent, the said Supporting Affidavit is properly on record.
28. The court will therefore proceed to consider the merits of this application with a view to arriving at a just determination of the same.
29. Bearing in mind the objective of Sections 1A and 1B of the Civil Procedure Act, the court is in agreement with the holding of Ringera J in the case of **National Bank of Kenya Limited vs Lucy Muthoni Kahia Magelo & 2 Others** (Supra) that there is no provision in the law that prohibits an applicant from seeking more than one (1) relief in an application particularly where the opposite party would not suffer prejudice or be put to undue hardship in defending such an application.
30. The ultimate objective of the Plaintiffs' application is to obtain judgment against the Defendant. Having sought alternative prayers, only one (1) of the said orders can be granted at any given time provided that the Plaintiffs can prove the same. In view of the fact that no confusion can arise out of seeking various prayers, the court accordingly rejects the Defendant's argument that the Plaintiffs' application was misconceived, fatally defective for seeking what it termed, incongruous reliefs.
31. Evidently, the Plaintiffs were required to satisfy the court that under the said two (2) Orders, the criteria in respect of the reliefs it was seeking was met.
32. It does appear to the court that prayer nos 1 (a) and (b) are premised on the ground that the

Defendant's Defence should be struck out under Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which provides as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is an abuse of the process of the court.”

33. Prayer no 1 (c) is based on Order 13 Rule 2 of the Civil Procedure Rules, 2010 which stipulates as follows:-

“Any party may at any stage of a suit, where the admission of the facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.”

34. The issues relating to the currency in which the payments were made or were to be made, the question of payment of the commissions, the question of whether the commissions were payable and proof of payment were pertinent issues raised by the Defendant. They were not *ad idem* on the currency to be used for the refund as can be seen in the letter of 22nd June 2009 in which the Defendant wrote to the 1st Plaintiff as follows:-

“We also note that the amount referred in your letter differs significantly with what we believe is outstanding for Dr Sudhir Ruparelia. We also note that we did not receive any amounts in US Dollars on behalf of this customer and therefore do not believe the claim for refund should be in US Dollars for Dr Ruparelia...”

35. These issues cannot therefore be termed frivolous, scandalous, vexatious, an abuse of the process of the court or capable of embarrassing, delaying or prejudicing the fair trial of the suit herein. These are triable issues that would need to be ventilated at a full trial as it would be denying the Defendant an opportunity to lead evidence on the same.

36. However, the admission that it had retained a balance of Kshs 24,772,230/= as it awaited the 1st Plaintiff to avail Dr Ruparelia's CDS account cannot be wished away. Whilst the Defendant may not have expressly admitted the same in Paragraph 8 of its Defence as was alluded to by the Plaintiffs, its admissions could be found elsewhere.

37. Indeed in the letter of 22nd June 2009, the Defendant wrote to the Plaintiffs as follows:-

“...Subsequently, a balance of Kshs 24,772,230/= was retained to fund the allotment of shares for Dr Sudhir Ruparelia at 21.3 per cent as we awaited for you to avail to us his CDS account... Thus the amount of kshs (sic) 24.7 million is what remained outstanding for Dr Sudhir. In a letter addressed to your Deputy Managing Director, Peter Munyiri on the 2nd of June 2009, after our board met on this case, we proposed to refund this amount in instalments of kshs (sic) 2 million per month, beginning the month of June 2009. We therefore wish to note that we have not received a response to our proposal to settle the Kshs 24,772,230/= in instalments...”

38. In the letter dated 13th July 2013 to the 1st Plaintiff, annexed to the Supporting Affidavit and marked as “EM 2 (d)”, the Defendant wrote as follows:-

“Kindly note that we wish to complete the reconciliation of the Safaricom IPO and hence the

need the verification (sic) of these payments most urgently. In the meantime, we seek your indulgence in resolving the pending claim of Dr Sudhir Ruparelia which the proposal of our payment you have not responded to...”

39. There could not have been a clearer admission of the sum of Kshs 24,772,230/= by the Defendant than what was contained in those two (2) letters. The Defendant's contention that this was on a without prejudice basis because the Plaintiffs never responded to the same could not be further from the truth. There was nothing in the two (2) letters to suggest that the proposal to liquidate the sum of Kshs 24,772, 230/= in instalments was made or being made on a without prejudice basis. In any event, rejection of an out of court settlement would not automatically render such an offer as one that had been made on a without prejudice basis. It is for this reason that this court rejects the Defendant's submission that the said letters were not admissible as evidence herein by virtue of Section 23 of the Evidence Act. Its rejection of the admission of the said amount in its Defence is thus a mere denial.
40. The Defendant's argument that there was no proof of payment for the reason that the Batch Serial No 030000024 was not exhibited in the proceedings does not find favour with this court. It is not in dispute that the Defendant was at all material times aware of the transaction between the Plaintiffs and the said Dr Ruparelia. This was evidenced in its letters dated 22nd June 2009 and 13th July 2009 mentioned hereinabove and that the Defendant did specifically mention and refer to the said Dr Ruparelia in the said letters.
41. Additionally, the Defendant was estopped from pleading or introducing new facts in its written submissions when it had an opportunity of filing a Replying Affidavit to respond to the Plaintiffs' Supporting Affidavit but instead opted not to do so.
42. As can be seen from Order 13 Rule 2 of the Civil Procedure Rules, 2010, an admission can be either in pleadings or in any other documentation which this court found to have been in the said two (2) letters. The Defendant's argument that the existence of the prayer in US Dollars and the claim for Kshs 24,772, 230/= would lead to a multiplicity of the claim is neither here nor there. There is no principle that the amount cannot be set off from any amounts that may be found to be due at the conclusion of the case, if at all.
43. It is clear from Order 13 Rule 2 of the Civil Procedure Rules, 2010 that the court can enter judgment on admission of a certain sum without waiting for the determination of other questions at the conclusion of the case. As was pointed above, the issue of payment in US Dollars would have to await the determination of the nature of currency that was applicable herein. The amount that was admitted was Kshs 24,772,230/= and it is only this sum that this court can enter judgment for.
44. It is the conclusion of this court that the Defendant will not be denied his Constitutional right to a fair hearing as the provisions of the Civil Procedure Rules, 2010 are clear when a court ought not to await a full hearing and that is when an admissions is so explicit, express, clear and unequivocal. Parties are at liberty to fix the matter for trial in the normal manner to ventilate the questions relating to the amounts claimed for interest on the sum withheld, the interest incurred by the said Dr Ruparelia on his loan account, the bank charges, the sum of Kshs 9,936,957.30, the declaration that the Defendant was not fit to carry on business as a stock broker and any other relevant issues.
45. Accordingly, having carefully considered the pleadings herein, the affidavit evidence, the Notice of Preliminary Objection and Grounds of Opposition, the written and oral submissions and the case law in support of the parties' respective cases, the court has been persuaded by the Defendant's submissions to the extent shown hereinabove but it has also come to a conclusion that the Plaintiffs were able to convince the court that the Defendant had in fact admitted to retaining the sum of Kshs 24,772,230/=. It is not necessary for the court to engage in discourse as to whether or not the Plaintiffs paid the said Dr Ruparelia the same as the Defendant had undertaken to refund the said admitted sum.

DISPOSITION

46. The upshot of this court's ruling therefore is that the Plaintiffs' Notice of Motion application dated and filed on 17th March 2013 is granted in terms of prayer No 1 (c) herein. The Defendant will

meet the costs of this application.
47.It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of May 2014

J. KAMAU

JUDGE