REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 30 OF 2013

KENYA COMMERCIAL BANK LIMITED..PLAINTIFF

-V E R SU S-

BLUESHED FREIGHTERS LIMITED...DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's claim against the Defendant is for **Kshs. 9,692,065.20** and **US Dollars 76,678.02** plus accrued interest from 30th September 2012 until the date of the judgment. The Plaintiff claims that at the request of the Defendant the Plaintiff extended credit facilities to the Defendant on the Defendant's two accounts being Kenya Shilling Account Number 1121185134 and US Dollar Account Number 1121185223. That the Defendant defaulted in repayment of the credit facilities advanced to it by the Plaintiff resulting in the debt as claimed above.

2. The Defendant filed its Statement of Defence dated 6th May 2013 on 8th May 2013, outside the 14 days after it had entered appearance as required by Order 7 Rule 1 of the Civil Procedure Rules, 2010. Judgment in default of defence was entered for the Plaintiff on 6th May 2013. However, following an application by the Defendant, which application was heard *inter partes*, this court, in its ruling delivered on 27th February 2014, set aside the *exparte* judgment and ordered that the Defendant's Statement of Defence be deemed as properly filed.

3. The Statement of Defence is made up of four (4) paragraphs but paragraph 1 merely gives the Defendant's address while paragraph 4 simply admits the court's jurisdiction. The substantive parts of the Defence are paragraphs 2 and 3 which I reproduce as hereunder:

> 2. **The Defendant in answer to paragraph 3 and 4 of the Plaint states that the Defendant does owe the Plaintiff some monies in both Kenya Shillings and US Dollars but not the sum of Kshs. 9,692,065.20 and the sum of US Dollars 76,678.02 and the Defendant states that these figures are exaggerated due to legal interest and charges imposed by the Plaintiff.**
>
> 3. **The Defendant in answer to paragraph 5 of the Plaint states that the interest and penalties imposed by the Plaintiff is illegal and against the agreement of the parties and the Defendant states that once the said illegal interest and penalties are removed on the amount owing and agreed, the Defendant shall apply to pay the same by agreeable installments.**

Although the Defendant pleads at paragraph 2 that the "**figures are exaggerated due to legal interest and charges,**" it appears to me, based on paragraph 3 and the Defendant's submissions as will be discussed below, and without appearing to amend the Defence for the Defendant, that the intention was to aver in that paragraph that the interest and charges are illegal. This, however, has not been explained by the Defendant and I wish to leave it at that. The Defendant concludes its Statement of Defence by praying that the accounts be taken and the amount due and owing to the Defendant (again, I presume this should have been "**to the Plaintiff**") be determined and the same be paid by installments and the balance of the Plaintiff's claim be dismissed with costs.

4. Meanwhile, on 28th June 2013, the Plaintiff had filed a Notice of Motion dated the same day under the provisions of **Order 2 Rules 15 (1) (d), Order 51 Rule 1 of the** *Civil Procedure Rules, 2010* **Section 1A, 1B and 3A** of the *Civil Procedure Act*, Cap. 21 Laws of Kenya. In that Application, the Plaintiff seeks orders that the Defence filed herein be struck out on the ground that it is an abuse of the process of the court. The Plaintiff also prays that judgment be entered for the Plaintiff against the Defendant for Kshs. 9,692,065.20 and US Dollars 76,678.02 plus accrued interest from 30th September 2012 till the day of the judgment.

5. The Application is based on the following grounds reproduced verbatim:

> **a. The prayer sought by the Plaintiff herein is for a straight forward liquated sum.**
>
> **b. The Defendant is well and truly indebted to the Plaintiff for the sum of Kshs. 9,692,065.20 and US Dollars 76,678.02 and was so indebted at the commencement of this suit.**
>
> **c. That the Defence filed herein dated 6.5.2013 is otherwise an abuse of the process of the court.**
>
> **d. That there is no clear or fair arguable case or point to be argued on behalf of the Defendant/Respondent as to entitle it to defend this action.**
>
> **e. That the Defendant's Defence is a mere sham and unmeritorious advanced simply for the sole purpose of delaying the conclusion of this case.**

6. The Application is supported by the affidavit of JOHN ORINGO who describes himself as the Senior Manager, Credit Support Unit of the Plaintiff's. It is that Application that is up for the court's determination.

THE PLAINTIFF'S CASE

7. The Plaintiff's case is that the sole ground of defence advanced by the Defendant is that the Defendant disputes the amounts of charges and interest imposed by the Plaintiff. The Plaintiff annexed bank statements in respect of the Defendant's two bank accounts to demonstrate that the Defendant owed the amounts claimed as at 30.9.2012.

8. The Plaintiff annexed various correspondences exchanged between the parties to prove that the Defendant had expressly admitted the debt. The correspondences were highlighted by the Plaintiff as follows:

- **The Defendant's letter dated 25/7/2011 in which the Defendant stated that: "This is to bring to your attention that we are aware the above captioned account is overdrawn by a substantial amount of Kshs. 1,478,070 and USD 83,570.86."**
- **The Defendant's letter dated 28/8/2011 in which the Defendant stated that: "Our failure to honour our proposal was due to delayed payment from our debtors. We hereby undertake to channel payments due from our debtors to the company to the account to the tune of Kshs. 1,500,000 per month..."**

- **The Defendant's letter dated 20/10/2011 in which the Defendant wrote: "...And wish to return our sincere apology for not fulfilling our promise as stated in our correspondence letter dated 22/8/2011... We undertake to channel to the tune of Kshs. 1,500,000 to the account by 30/11/2011..."**

- **The Defendant's letter dated 15/2/2012 in which the Defendant stated under the sub-heading "3% Commission on Uncleared Effects" that: "Perusal of our account statement from December 2011 to date shows a total of Kshs. 1,500,000 being commission charged on withdrawal against uncleared effects... We are willing to repay the debt. However, we are humbly requesting your good office to consider waiver of part of these charges."**

9. The Plaintiff's submitted that the Defendant ought to demonstrate how much of the debt it has paid and how much is still outstanding. That instead of doing so, the Defendant filed a general defence.

10. To support its application for the striking out of the defence, the Plaintiff relied on the case of **Fremar Construction Co. Ltd v Minakshi Navin Shah, Court of Appeal at Nairobi Civil Appeal No. 85 of 2002, [2005] eKLR** where the Court of Appeal stated that:

> **"This Court has stated many times before, and the learned Judge of the superior court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules, and exists inherently, for the court in the interests of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process. A defence which is a sham should not be left to remain in the record otherwise it will cause undue delay and expense in the determination of the suit."**

11. The Plaintiff also relied on the case of **Mugunga General Stores versus Pepco Distributors Ltd (1987) KLR 150 where the Court of Appeal held that:**

> **"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."**

12. Further, the Plaintiff relied on the case of **Nairobi Flour Mills Limited v Johnson Kithete t/a Farmers General Stores, Nairobi HCCC No 689 of 2004 [2005] eKLR** where the court stated that:

> **"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."**

13. On interest and bank charges, the Plaintiff submitted that it was entitled to charge interest and other charges on unpaid debts since that was the custom and practice of a banker. The Plaintiff in that regard relied on the case of **IDB CAPITAL LIMITED (Formerly Industrial Development Bank Limited v Sarkish Flora Limited, Nairobi HCCC No. 290 of 2006 [2008] eKLR** where it was stated as follows:

> **"The Plaintiff bank, being a commercial bank performing banking business, and as is the normal trade and banking practice, was entitled to levy interest on the sums due to it from the Defendant. That interest should suffice for the period between the time the sums became due and the time the case was filed in court. I will allow interest to be charged at the court rates from the date of filing suit to the date of full and final payment of the outstanding sum."**

However, the Plaintiff did not indicate what the rate of interest was or demonstrate that parties had agreed upon such interest.

14. Finally, the Plaintiff relied on the case of **Diamond Trust Bank Kenya Limited v. Elsek & Elsek Construction Limited Mombasa HCCC No. 109 of 2011** where this court stated that:

> **"The defendant received money from the plaintiff equivalent to the amount in the cheques in this case. The defendant therefore did receive that money. That money is recoverable from the defendant. To hold otherwise would be to allow the defendant to enjoy an unjust enrichment."**

15. The Plaintiff urged the court to apply the above decisions in the instant case and find in favour of its Application.

THE RESPONSE BY THE DEFENDANT

16. The Defendant filed a Replying Affidavit sworn by its director, MOHAMED IBRAHIM ALI, on 7th April 2014. The defendant admitted being indebted to the Plaintiff but denied that the quantum of the debt was Kshs. 9,692,065.20 inclusive of bank charges and USD 76,678.02.

17. The Defendant's case is that the amount demanded by the Plaintiff are way above the debt it owes the Defendant because the same include interest and penalties which were imposed by the Plaintiff illegally and against the agreement of the parties. The Defendant claimed that it had disputed the charges levied by the Plaintiff and even requested for a waiver of the same. The Defendant relied on its letters to the Plaintiff dated 15th February 2012 and 13th November 2012 to demonstrate that it had raised concern over the interest and charges levied by the Plaintiff.

18. The Defendant claimed that it had requested vide its letter dated 13th November 2012 for the conversion of the USD Account into Kenya Shillings account and that the Plaintiff in its letter dated 10th January 2013 acceded to that request. That due to the conversion of the USD account into Kenya Shillings account, the Plaintiff cannot now make claim in respect of the USD account. This, however, was not pleaded in the Defence.

19. The Defendant further averred in its Replying Affidavit that it had paid the Plaintiff a total of Kshs. 1,770,000/- towards offsetting the debt. This too was not pleaded in the Defence.

20. The Defendant submitted that its Defence does not amount to an abuse of the court process. The Defendant relied on the case of **D.T Dobie & Company Limited v. Muchina [1982] K.L.R** to support its argument that the power to strike out pleadings should be used sparingly and cautiously because it is exercised without the court being fully informed of the merits of the case through discovery and oral evidence. The Defendant urged that the power to strike out should only be exercised after the court has considered all facts.

21. The Defendant also relied on the case of **Nuru Chemist Ltd & Another v. National Bank of Kenya Nairobi Civil Appeal No. 219 of 2002 [2008] eKLR** to buttress its argument that the power to give summary judgment is intended only to apply to cases where there is no reasonable doubt that the Plaintiff is entitled to judgment and where it is inexpedient to allow the defendant to defend for mere purposes of delay.

22. The Defendant submitted that its Defence does not consist of mere denials because the Defendant expressly denied owing the amount claimed by the Plaintiff on the basis that the sum claimed consists of illegal charges and interest. That the Defence raises *bona fide* triable issues that ought to be allowed to go for full trial.

23. The Defendant, therefore, while relying on the case of **Shah v. Padamshi [1984] KLR 531,** urged that where a triable issue is found to exist, the court must order a trial even if the court strongly feels that

the defendant is unlikely to succeed at the trial.

THE ISSUE FOR DETERMINATION

24. The issue for the court's determination is whether the Defendant's Statement of Defence as filed is an abuse of the court process, raises triable issues to warrant full trial or is a sham with no reasonable defence to warrant the striking out as prayed by the Plaintiff.

ANALYSIS

25. The Application is substantively brought under Order 2 Rule 15 (d) of the Civil Procedure Rules, 2010 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) ….**
>
> **(b)...**
>
> **(c)...**
>
> **(d) it is otherwise an abuse of the process of the court."**

26. Most of the authorities cited by the Plaintiff are relevant to the extent that they set the jurisprudence on what should guide the court in an application to strike out a Statement of Defence. However, the general principles must be applied to the peculiar circumstances of each case.

27. In its Replying Affidavit and the submissions filed in opposition to the Application herein, the Defendant appears to have raised three main defences to the Plaintiff's claim: that the amounts claimed by the Plaintiff are exaggerated due to illegal interest and charges imposed by the Plaintiff; that the Plaintiff is not entitled to make claim in respect of the USD account because the same had been converted to a Kenya Shilling account; and that the Plaintiff failed to factor in a total of Kshs. 1,770,000/- which the Defendant claims to have paid towards the debt. As already observed, the latter two issues were not pleaded in the Defendant's Statement of Defence and therefore do not lie for consideration by this court.

28. The only defence raised by the Defendant, therefore, is that the amount claimed by the Plaintiff is beyond what the Defendant actually owes the Plaintiff due to illegal interest and charges levied by the Plaintiff.

29. The Plaintiff asserted that the Defendant has never disputed the amounts demanded or raised any objection to the penalties and interest charged. That the Plaintiff was entitled to charge interest and other charges on unpaid debts.

30. The Defendant on the other hand stated that it raised its concern with the interest and charges levied by the Plaintiff in its letters dated 15th February 2012 and 13th February 2012.

31. I have carefully analyzed the pleadings before court, the Application herein and the Affidavit in support thereof, the Replying Affidavit and the documents filed in court. It is clear that the agreement to advance credit facilities by the Plaintiff to the Defendant was not reduced into writing. There is no telling what the rate of interest and charges was. At paragraph 5 of the Plaint, the Plaintiff pleads as follows:

> **"The Plaintiff shall aver and contend that as from 30.09.2012, the debt has continued to attract interest and penalties for which the Defendant is also liable to pay."**

32. At paragraph 10 (d) of the Plaint, the Plaintiff prays for "**any accrued interest from 30.09.2012 till**

the date of the judgment." In both paragraphs, the Plaintiff does not indicate what the rate of interest was.

33. It is also not clear whether the parties had agreed on the rate of charges or penalties to be levied on the debt. In its letter of 15th February 2012, the Defendant seems to have suggested that there was to be "**3% commission on uncleared effects**." It is not clear whether that was the rate applied by the Plaintiff in arriving at its claim against the Defendant or not.

34. There is annexed to the Affidavit in support of the Application the Defendant's letter dated 31st March 2012 in which the Defendant wrote in part as follows:

> **"We wish to register our disappointment on the manner in which you are handling this matter...**
>
> **Without prejudice, please be reminded that you are the cause of all this mess to our account. If the past is anything to go by, you know very well that if you had stuck to the agreement we had made on 13/01/12, the debt would be cleared by now. I guess it was in your bid to exercise your managerial powers that you woke up one morning and decided to disregard our agreement without notice. It was because of you (sic) decision that subsequently led our company to an uncalled for indebtedness not to mention the loss of lucrative business and money."**

35. The above letter expressed the Defendant's disappointment with the manner in which the Plaintiff was running the Defendant's account and indicated that the "**mess**" to the account was caused by the Plaintiff. The letter seems to suggest that the Plaintiff mismanaged the account the result of which was the large claim over and above what the Defendant ought to have paid.

36. It may well be appropriate that the Plaintiff, being a banking institution is entitled to levy interest and other charges on credit facilities advanced to the Defendant. However, it should be clear what the rate of interest the Plaintiff is entitled to charge or what rate the parties had agreed on. It is not clear what the interest rate and the extent of penalties or other charges the Plaintiff was entitled to levy. In light of the fact that the Defendant blamed the Plaintiff for mismanaging its account, I do not think that the Defendant's defence touching on legality or otherwise of the interest and charges levied by the Plaintiff is frivolous. It is to be remembered that the Plaintiff itself has not pleaded any rate of interest to be applied and therefore its prayer on interest may not be calculable if the court does not get an opportunity to investigate the matter at full trial. It is my considered view that the Defence is not an abuse of the court process but raises a *bona fide* triable issue touching on the legality or otherwise of the interest and charges levied by the Plaintiff which should proceed to full trial.

37. The Court of Appeal in the case of **Ramji Megji Gudka Ltd V 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.'

<u>In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient</u>." (underlining mine)

38. In the case of **<u>Shah v. Padamshi [1984] KLR 531</u>**, the Court of Appeal (Madan, Potter JJA & Kneller Ag JA) held as follows at page 535:

> **"Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial."**

39. I will therefore decline the Plaintiff's prayer to strike out the Defence. Accordingly the Notice of Motion dated 28th June, 2013 is dismissed and the costs thereof shall be in the cause.

DATED and delivered at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

<u>JUDGE</u>