IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 606 OF 2012

ECOBANK KENYA LIMITED….……PLAINTIFF

-VERSUS-

BOBBIN LIMITED .....…….…….. 1ST DEFENDANT

MICHAEL MWONGERA ARIMBI .....……...2ND DEFENDANT

JEAN MUTHONI ARIMBI ……..……3RD DEFENDANT

RULING

Striking out defence

[1] The Plaintiff (hereafter the Applicant) in the Notice of Motion dated 26/6/2013 is asking the Court to: **''Strike out the Defence and enter judgment against the Defendants jointly and severally as prayed for in the Amended Plaint''**. The said Motion is expressed to be brought under orders 2 Rules 15(1) (c) and (d) and 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law. The Applicant has also asked for costs of the application to be provided. The application is grounded on the affidavit on **NOAH NYACHAE** and inter alia the following grounds:-

a. That the plaintiff's claim is a liquidated demand founded on a Loan facility sought and granted to the 1st Defendant and which due performance was guaranteed by the 2nd and 3rd Defendant.
b. The 1st Defendant has in breach of its respective obligations to the plaintiff reneged on its obligation to pay monthly instalments hence the indebtedness.
c. The Defendants are well and truly indebted to the Plaintiff in the sums claimed in the Plaint and were so indebted at the commencement of the suit **AND** has even during the pendency of the same sought an adjournment to enable them make proposals on settlement but are yet to be made as at the time of filing this Motion.
d. The defence filed by the Defendants may prejudice, embarrass or delay the fair trial of this matter.
e. The Defence is otherwise an abuse of the process of this honourable Court as the Defendants do not dispute the debt but seek to cite ulterior reason for avoiding a Contractual claim.
f. Such other and further grounds and reasons as shall be adduced at the hearing hereof.

APPLICANT'S SUBMISSIONS

[2] The Applicant filed submission in elaboration of the above grounds and started by a

declaration that the application is not defended. It went on to recite Order 2 Rule 15(1) (c) and (d) on which the application is premised that;

> **"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; or**
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 otherwise an abuse of the process of the court,**

> **and my order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

[3] The Applicant stated that the requirements under Order 2 rules 15(1) are not inclusive but mutually exclusive, in that, if only one of the grounds is sustained, then the Defence has to be struck out. The Applicant contended that its claim against the Defendants jointly and severally is for a sum of Kshs. 7,252,988.77 with interest thereon at 33% per annum from 1st August, 2012 until payment in full. It gave a brief background: By a letter of offer dated 17th December, 2009 "the agreement', the 1st defendant requested and was granted loan facility by the plaintiff in the sum of Kshs. 4,000,000/- and USD 475,000/= to be used as a working capital. In consideration of the Plaintiff's agreeing to advance the said sum to the 1st defendant under the Agreement, the 2nd and 3rd defendants executed a Deed of Guarantee and Indemnity dated 17th December, 2009 by which they undertook to pay, on demand, all monies and consequently discharge all obligations and liabilities due and owing to the plaintiff from the 1st Defendant. The facility advanced was accepted by the 1st Defendant. The 2nd Defendant and the 3rd Defendants who are Directors of the 1st Defendant also executed the Letter of Offer. Pursuant to the foregoing arrangement, the loan amount was disbursed to the 1st Defendant, which fact is not in dispute.

[4] The loan agreement which governed the loan specifically provided that:;

a. The short term loan – not more than 60 days from the date of its disbursement; and
b. The letter of credit – on maturity with proceeds received from Sinohydro Corporation Limited

According to the Applicant, its claim is simple; a repayment of the amount that was advanced to the 1st Defendant in accordance with the terms of the Agreement on repayments.

[5] The Defendants in their Statement of Defence do not deny that the loan facility was advanced in terms of the Letter of Offer dated 17th December, 2009. The 1st Defendant accepted the Letter of Offer by executing it. This is not in dispute. The Defendants do not claim they have made any repayment(s) as contemplated by the agreement. And have not offered any evidence of any payment. Indeed, the Defendants in para graph 3 of their Statement of Defence admit being indebted to the plaintiff in the following terms;

> **"In reply to paragraph 4 of the Plaint, the Defendant <u>admit</u> that they entered into a credit Agreement with the plaintiff….."(emphasis added)**

The Defendant's statement of Defence contains mere averments that the plaintiff is a stranger to their business which the plaintiff has no interest on. We invite court to look at paragraphs 3, 4, 5, 7, 8, 12, 13 and 15 of the Statement of Defence. Justice Kasango sitting at the High Court in Mombasa ruled in **EQUATORIAL COMMERCIAL BANK LTD v JODAM ENGINEERING WORKS LIMITED & 2 OTHERS (2014) E KLR**- case with almost similar facts as the matter herein thus;

> **"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."

Black's Law Dictionary 8th Edition by Bryan a Garner page 186 defines the word "Bona fide" in the following terms

"[Latin in good faith"] 1. Made in good faith; without fraud or deceit. 2. Sincere; genuine.

[6] Applying the above test to the facts of this case, the Applicant concluded that the defendants do not have a genuine triable issue. The Defendants have in paragraph 3 of the Joint Statement of Defence admitted to entering into the credit agreement. And they should not be allowed not to pay their debts purely because their business dealings did not progress as expected. Whether the Defendants were successful or not with the purpose for which they obtained the money, they are, under the Agreement, obligated to repaying it in the terms set out therein. See the **NATIONAL BANK OF KENYA v DANIEL OPANDE ASNANI (2002) eKLR,** where it was held that;

"The law is now settled and that is that the admission upon which a court of law will act to strike out a Defence and enter judgment must be clear and unambiguous. The same admission need not be in the pleadings only. It can be discerned in any other way…. I am satisfied that the debt herein had been admitted…. I do allow the application."

Therefore, the Defence herein consists of mere denials and is only calculated at prejudicing, embarrassing or delaying the fair trial of this suit. The defence is otherwise an abuse of the process of the court and should be struck out. The court in the **Equatorial Commercial Bank case (supra)** further went ahead to state as follows:

"It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which 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."

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''.

[7] The positions taken by Courts in the above cases, is now enshrined in the Constitution which provides under Article 159(2) (b) that; ''...**in exercising judicial authority, the courts and tribunals shall be guided by the following principles-...b) Justice shall not be delayed.** Of importance also is that the Defendants have severally sought to have this matter amicably settled by payment of a disclosed sum. See the email of 29th May, 2012 found at page 25 of the Plaintiff's Bundle of Documents and it is clear the Defendants are defaulters. This court should NEVER BE A HAVEN of defaulters. See the case of **MRAO LTD v FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** at page 125, Kwatch JA stated thus;

> **"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times…. Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters."**

[8] The Applicant stated that the admission by the Respondents is sufficient to allow the application and portends that the defence is a mere sham. And entertaining such defence is a waste of judicial time. They relied on the cases of **BANK OF BARODA (K) LIMITED v ALTEC SYSTEMS LIMITED (2013) eKLR** where the court held that;

> **"Being faithful then to the overriding objective e of the court at Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act, I will strike out the statement of defence. Valuable judicial time should never be wasted investigating a bogus defence. See Churanjilala & Company Vs Adam (1950) 17 E.A.C.A 92. There is absolutely no rebuttal put forth on the overdrawn principal sum of Kshs. 3,854,217.50. I will thus enter judgment in favour of the plaintiff for Kshs. 3,854,217.50 together with interest at court rates from 23rd May, 2012 till full payment."**

And the case of **BAKEX MILLERS LIMITED v EAGLES INDUSTRIES LIMITED (2014) eKLR** which similarly held as follows;

> **"In the result, I find that the entire defence is a sham. Valuable judicial time should not be expended investigating a bogus defence. That is the persuasive wisdom of Sir Graham Paul V.P in Churanjilala & Company Vs Adama (1950) 17 EACA 92. The defence does not raise even one triable issue. I find on the authorities and available evidence that this is a suitable case to strike out the defence. I order that the statement of defence dated 2nd July, 2013 and filed on 5th July, 2013 be and is hereby struck out. I enter judgment in favour of the plaintiff against the defendant in the sum of Kshs.13,104,750."**

For the foregoing reasons, The Applicant submitted that its notice of motion dated 26th June, 2013 should be allowed with costs.

The Defendants had something to say

[9] The Defendants in the Grounds of Opposition dated 10th of October 2013 argued, that:

a. The application did not satisfy the threshold under Paragraph 2 Rule 15 (1) (c) and (d);
b. There was no admission of indebtedness on the part of the Defendant/Respondents; and
c. The application is incompetent and amounts to gross abuse of the court process.

They were emphatic that the Defence raises pertinent issues which ought to be determined by this court. They invited the Court to look at paragraph 3 of the said Defence which states:-

> **"In reply to paragraph 4 of the Plaint the Defendants admit that it entered into a credit agreement with the Plaintiff but avers that the plaintiff delayed, failed and/or reused to complete the credit advancement process within the stipulated time frame as per the conditions of the credit agreement which delay made the 1st defendant.**

i. **Lose credibility in the eyes of its customers.**

ii. **Be denied the opportunity to supply the 2000MT bitumen product on a contract worth USD 1,090,000 which had already been signed.**
iii. **Lost the opportunity to be granted a promised contract for supply of approximately 33,000 MT worth USD 17,975,000 over a period of years for Thika Road Project."**

[10] The Respondent stated that was the essence in this transaction yet the plaintiff failed to play their part as evidenced by the email communication between the 2nd Defendant and the Plaintiff including the one dated the 7th of January, 2010 wherein the 2nd Defendant complained to one Kemunto Gladys that:

> **"We have talked to the Saudi Arabia at 4.30 Saudi time and they have not received your bank guarantee. It has started worrying us. Please see what you can do about it."**

The Plaintiff was aware that the reason the Defendants sought financing was to contract a project which failed to kick off due to the Plaintiff's delay. They also incurred loss as a result. All these issues are raised in the Defence. Therefore this suit ought to be heard conclusively and be determined on its own merit. The principles of striking out a defence are set out in the case of **D.T DOBIE & COMPANY LTD v MUCHINA & ANOTHER (1982) KLR 1)** where the Court held that the test for striking out a pleading is:

a. If the pleading does not disclose any reasonable cause of action or defence; or
b. That the pleading may prejudice, embarrass or delay the fair hearing of the suit, or
c. That it is an abuse of the process of the court, then it ought to be dismissed.

The Honourable court further stated that no suit ought to be summarily dismissed unless it appears so hopeless that plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it. The defendants have not disputed this debt but the bone of contention is the laxity with which the plaintiff handled the 1st Defendant's transaction which caused them to lose out on a deal which they had already injected the money in. This drove the 1st defendant into an abyss of debts from which they have never recovered. The court should allow this suit to proceed to trial. The Court was referred to the decision of **NAIROBI HCC CIVIL CASE 517 OF 2012 CARTON MANUFACTURERS LIMITED v PRUDENTIAL PRINTERS LTD** where the court held that the matter ought to go for full hearing so that an informed decision can be made.

COURT'S RENDITION

Striking out defence

[11] On this subject, I am content to quote a work of the Court in **NBI HCCC NO 79 OF 2013 SAUDI ARABIA AIRLINES CORPORATION v PREMIUM PETROLEEUM COMPAANY LIMITED** that:

> **I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies *mutatis mutandis* to a statement of defence and counter-claim. Secondly, and directly related**

to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ‘’Sword of the Damocles’’. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no *bona fide* triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that“…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.

[12] The policy considerations of the above approach are that; 1) on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who has filed a defence which is a sham for the purpose only of temporizing on the case as long as possible; and 2) on the other hand, a defendant who has *bona fide* issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case.

[13] I will apply the above test here. The Defendants do not deny the Plaintiff’s claim except they claim that the Plaintiff delayed in making the loan advances in the stipulated time and as a result the Defendants lost credibility in the eyes of customers; opportunities to perform a contract it had signed and to procure another project it had been promised; thus, incurred loss. They were emphatic that these are pertinent issues raised in the Defence and ought to be determined by this court. The specific paragraph they are relying on is paragraph 3 of the Defence which states:-

“In reply to paragraph 4 of the Plaint the Defendants admit that it entered into a credit agreement with the Plaintiff but avers that the plaintiff delayed, failed and/or reused to complete the credit advancement process within the stipulated time frame as per the conditions of the credit agreement which delay made the 1st defendant.

i. **Lose credibility in the eyes of its customers.**
ii. **Be denied the opportunity to supply the 2000MT bitumen product on a contract worth USD 1,090,000 which had already been signed.**
iii. **Lost the opportunity to be granted a promised contract for supply of approximately 33,000 MT worth USD 17,975,000 over a period of years for Thika Road Project.”**

[14] The Respondents have not raised any specific counter-claim or set-off against the Plaintiff’s claim, and paragraph 3 of the Defence is not such cross-action or set-off as required by law, which is a substantial omission. From the record and the tone in the documentation by the Defendants, what seems to emerge is that they were just infuriated by the alleged breach of contract by the Applicant until they felt justified; 1) to take the loan even when it was very clear that the purpose for which the loan was intended had been frustrated or overtaken due to the delay in disbursing the money; and, then, 2) refuse to pay the sum advanced. That is quite startling and problematic when it is measured against the scales of bona fides, honesty, sincerity and good faith. I should emphasize that any response a Defendant provides in answer to an application to strike out the defence is measure on only one yardstick; the *bona fides* of the triable issues the Defendant claims to have in the defence. The *bona fides* of the Defendant is expressed in the issues within the context of the entire standpoint and conduct of the Defendants. The Defendants have approached the Court in a rather injudicious manner that portrays a person who has filed a defence just to temporize on the case for as long as possible in order to punish the Plaintiff. The Plaintiff advanced the loan and the Defendants received it and used it up. The Defendants do not deny the debt except they insist they lost on some other opportunities as a result of the delay in

disbursement of the loan. And they blame all their financial woes on the Plaintiff, and use those difficulties to justify non-payment of the debt herein. Such, to say the least, is a defaulter who has no intention of paying its just debts, which brings me to the point where I find the words of Kwach JA (as he then was) in the case of **MRAO LTD v FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** at page 125, to be quite apt in the circumstances of this case. The Solomonic words are, that;

> **"...If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times…. Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters."**

[15] The Defendants, especially the 2nd and 3rd Defendants are the Directors of the 1st Defendant and they signed as such Directors and also as guarantors of the loan advanced to the 1st Defendant. That relationship is important. Even more crucial is that they have been sued as guarantors on a contract of guarantee which is a separate contract from the loan agreement. These are the same people who are Directors of the 1st Defendant when the money was advanced to and drawn by the 1st Defendant and they claim the money was nonetheless received even after the purpose for which the loan was applied had been frustrated. But they are now refusing to pay up without any justifiable reason. Given the nature of a contract of guarantee, the conduct of the 2nd and 3rd Defendants shows absolutely no good faith and this is reflected in the kind of defence they have raised against the Plaintiff's claim which is for full payment of the loan advance. The two guarantors admit the loan has not been paid at all. The purpose of the guarantee is to ensure the loan is repaid, and, therefore, the two guarantors cannot be released from their obligations under the guarantee unless they can show the debt has been paid in full. Their defence does not allege full payment of the loan which casts doubt whether their defence can be said to raise any *bona fide* triable issue. It is also worth of note that the 1st Defendant has not paid a single penny out of the entire sum advanced herein. In such circumstances, there cannot be any *bona fide* triable issue in the defence which is worth going for trial. The purported issues are inflated allegations in the hope they will pass for *bona fide* triable issue, and hopefully, from my analysis, temporize the case for as long as possible, which, in the meantime, will avail the Defendants relief from paying the debt herein. I insist that courts are not a haven for defaulters who have no intention of paying their just debts. In this case, there is enough reason to strike out the defence which is a mere sham and a source of delay for the Plaintiff to reach the fruits of legitimate expectation in form of a judgment. This is underpinned by the long standing legal adage ''justice delayed is justice denied'' which is never worn-out notion for overuse, for, it will always excite constitutional delight and has even found expression in Article 159 of the Constitution as a principle of justice. In the spirit of the said constitutional principle of justice, I accordingly strike out the defence herein and enter judgment in favour of the Plaintiff and against the Defendants jointly and severally as prayed for in the plaint. It is so ordered. The upshot is that the application dated 26th June, 2013 is allowed with costs.

Dated, signed and delivered in open court at Nairobi this 26th day of September, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

Ondati for Luseno for Plaintiff

M/s Yagomba for defendant