



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 502 of 2010

**TOUCHSTONE DEVELOPERS LIMITED ..... PLAINTIFF**

**VERSUS**

**MOSES NGUCHINE KIRIMA ..... DEFENDANT**

**R U L I N G**

1. The Application for determination by this Court is the Plaintiff's Notice of Motion dated 12 January 2012 brought under the provisions of **Order 2 Rule 15 (b), (c) and (d), Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as **sections 1A and 3A** of the *Civil Procedure Act*. The Application seeks to have the Defence herein dated 18 August 2010 struck out and judgement to be entered in favour of the Plaintiff as prayed in the Plaint. The Application is brought on the grounds that the arguments that form the basis of the Defence were considered and dismissed by this court in a Ruling delivered on 14 December 2011. Further, the Defence is scandalous, frivolous and vexatious and amounts to an abuse of the process of this court.
2. The Application is supported by the Affidavit of **Barnabas Mwangangi** dated 20 December 2011. In the said Affidavit, the deponent described himself as the Operations Manager of the Plaintiff and that he had instructions from the Plaintiff's Board of Directors to swear the said Affidavit. He noted that on the 1 December 2007, the Defendant had applied for a loan facility of Shs. 15 million from the Plaintiff which was duly approved on the same date and duly disbursed to the Plaintiff. He attached to his said Affidavit, copies of the letter of offer and acceptance, the loan advancement forms and cash acknowledgement voucher duly executed by both parties hereto. By way of security for the loan, it had been agreed between the parties that the Defendant would tender postdated cheques equivalent to the amount advanced and that such cheques would be banked by the Plaintiff as and when they fell due. The deponent went on to say that the Plaintiff had duly banked some of the cheques when they fell due but that 8 of them had been dishonoured by the Defendant's bank. He attached copies of the returned cheques to his said Affidavit. He noted that the Defendant had refused and/or neglected to replace the dishonoured cheques and/or the terms of repayment of the loan despite numerous requests and reminders sent to him by the Plaintiff.
3. There has been no response to the Application by the Defendant herein. The court had not been satisfied by perusal of the Affidavit of Service sworn by one **Joseph H. Otieno Odundo** on the 4 June 2012 that copies of the Hearing Notice for the Application were served on the Defendant's advocates on record, Messrs. Meenye & Kirima, Advocates on 24 April 2012 as there would seem to be a mistake as to date in paragraph 1 of the said Affidavit. Thereafter, the court was again not satisfied by the second Affidavit of Service sworn by the same deponent on 30 November 2012 that a Mention Notice dated 5 November 2012 was served upon the said advocates as the process server had indicated that he had forwarded the Mention Notice through the postal address of the said advocates. On 3 December 2012, I directed that the Plaintiff do contact the Law Society of Kenya so as to ascertain the physical address of Messrs. Meenye & Kirima in order to effect personal service on that firm. I directed that the Notice of Motion dated 12 January 2012 would come for hearing before court on 21 January 2013. Finally, the said process server Mr. Odundo swore an Affidavit of Service on the 16 January 2013 and I am satisfied from the contents thereof that proper service has been effected upon the said firm of advocates on 4 December 2012 at its premises at Equatorial Business Centre, Wood Avenue, Kilimani, Nairobi.
4. The Plaintiff had filed its submissions as regards the said Notice of Motion on 8 October 2012. In those submissions the advocates for the Plaintiff set out the brief facts of the case. They recounted how the Defendant had filed an Application dated 14 October 2010 in which he had sought to strike out the

Plaintiff's suit on the grounds that the Plaintiff was an illegal entity and that one of the Plaintiff's directors was an undischarged bankrupt. The submissions noted that the said Application was heard and dismissed by Justice Odunga on 14 December 2011. Thereafter, according to the Plaintiff's submissions, it had filed this Application to which the Defendant had filed Grounds of Opposition dated 5 July 2012. Those Grounds of Opposition do not appear on the Court file. However the Plaintiff detailed in its submissions that the Defendant had alleged therein 4 issues for trial namely:

- “a. Whether or not the plaintiff is a legally established legal entity**
- b. Whether one of the plaintiff's directors is an un-discharged bankrupt**
- c. Whether the plaintiff was legally capable of lending Kshs 15,000,000**
- d. Whether the plaintiff's was engaged in gaming exercise.”**

The Plaintiff maintained that these issues raised by the Defendant were the same issues raised by him in his aforesaid Application which was dismissed. It considered that the issues were *res judicata*. Finally, the Plaintiff maintained that the Defence was a mere denial and did not answer the Plaintiff's claim. It noted that most of the issues raised in the aforesaid grounds of opposition were not detailed in the Defence and consequently could not be considered as triable issues. It maintained that the Defence did not answer and/or plead to the Plaintiff's claim and that the same was frivolous and vexatious and ought to be struck out.

5. I have perused the Ruling of my learned brother Odunga J. dated 14 December 2011. He has quite clearly found that the allegation that one of the promoters of the Plaintiff Company was an undischarged bankrupt was not backed up by evidence and, in any event, that it was incumbent upon the Defendant to show that the person concerned was a director and not just a shareholder of the Plaintiff. He went on to find that the mere fact that a person against whom a receiving order is made is a shareholder of a company does not render that company illegal and/or a nullity in law. To my mind, the learned judge dealt with grounds a. and b. of the Defendant's Grounds of Opposition as set out by the Plaintiff above. However, at paragraph 8 of the Defence the Defendant denied any knowledge of the loan arrangements as between the Plaintiff and himself stating that any such agreement would be illegal and void as the alleged interest to be charged would amount to usury contravening the Banking Act. Further, at paragraph 9 of the Defence, the Defendant detailed that he had discovered that the future venture/undertaking (presumably of the Plaintiff) was an illegal activity which was going to contravene the provisions of the Betting Control Act. For this reason, he had recalled and countermanded payment of all the cheques. In this regard, I have perused the copies of the various cheques that were tendered by the Defendant in favour of the Plaintiff annexed to the Affidavit in support of the Application and marked “B M 2”. If what the Defendant says is correct in that he recalled and/or countermanded payment of those cheques, then I would have expected to find endorsed thereupon some notification from the Defendant's bankers such as “Refer to Drawer” or “Payment Countermanded by Drawer”. There is no such notification thereon but there are a large number of the same bearing the stamp of the African Banking Corporation, Westlands Branch which I would assume is the Plaintiff's bank.

6. As stated by my learned brother Odunga J in his said Ruling dated 14 December 2011, no case enumerates the principles of striking out pleadings better than the case of **D. T. Dobie & Company (Kenya) Ltd versus Muchina (1982) KLR 1**. Those principles are that the power to strike out a pleading should be exercised only after the court has considered all the facts before it. A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases. The jurisdiction conferred on the court to strike out pleadings should be exercised with extreme caution. In this Application, the court must investigate whether the Defendant has any defence at all to the Plaintiff's claim. To this end, there is one issue raised in the Defence which I considered pertinent to whether the same should be struck out or otherwise. That issue relates to whether there has been any contravention of the Banking Act by the Plaintiff in the lending of money to the Defendant. Firstly, there is the statutory necessity for the Plaintiff to hold a licence for lending either under the Banking Act or the Moneylenders Act. Secondly, I have perused the Memorandum of

Association of the Plaintiff Company as attached to the Affidavit of the Defendant dated 14 October 2010. I may stand to be corrected but I cannot see that anywhere in the Memorandum is the Plaintiff empowered to lend monies to third parties. To my mind, these are issues that necessitate canvassing before court at a full hearing of the suit. Further, try as I may and in reference to the Defendant's Defence paragraph 8, in my perusal of the Loan Application Form annexed to the Affidavit in support of the Application, I can see no mention of any interest to be charged against the loan. Indeed in the Exhibit "B M 1" to the Court's copy of the Supporting Affidavit, the Loan Application Form is shown but not the letter of offer and acceptance or the cash acknowledgement voucher, both of which documents are stated to be attached as per paragraph 3 of the Supporting Affidavit.

7. The conclusion to all the above is that, with some reluctance, I dismiss the Plaintiff's Notice of Motion dated 12 January 2012. As the Defendant has put up little or no opposition thereto, I make no order as to costs.

**DATED and delivered at Nairobi this 18<sup>th</sup> day of February 2013.**

**J. B. HAVELOCK  
JUDGE**