



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 108 of 2012

DANIEL MATHIU MBITI ..... PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (K) LIMITED ..... DEFENDANT

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R U L I N G  
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1. The matter before this Court is an Application by the Plaintiff being a Notice of Motion dated 22 August 2012. The Application seeks an Order to strike out the Defendant's Defence dated 26 March 2012 and to enter judgement for the Plaintiff as prayed in the Plaint. The Application is brought on the following 10 grounds:

1. **THAT the defence is scandalous, frivolous and vexatious.**
2. **THAT the defence will prejudice, embarrass or delay the fair trial of the action.**
3. **THAT it is otherwise an abuse of the process of the court.**
4. **THAT the defence herein offends mandatory provisions of Order 7 rule 5 of the Civil Procedure Rules 2010.**
5. **THAT the defence contains an admission that the Defendant/Respondent lost the Title Deed subject of the case.**
6. **THAT the Plaintiff has no loan arrears with the Defendant/Respondent.**
7. **THAT the amount of Kshs.105,575/= was paid under economic duress in hope that the title document held by the Defendant/Respondent would be released without further delay.**
8. **THAT the Defendant/Respondent only disclosed the fact that the title is lost in its Defence.**
9. **THAT the allegation that the title is held to secure a whopping Kshs.1,032,739.70 as at 31<sup>st</sup> October is neither here nor there.**
10. **THAT it is in the interest of justice that the orders sought be granted".**

2. The Application is supported by the Affidavit of the Plaintiff sworn on 22 August 2012. The deponent detailed that in the year 1982 he had borrowed monies from the Defendant in the amount of Shs. 60,000/- through its then branch at Meru. As far as he was concerned, he had cleared repaying the loan as at the year 1998 when he ceased to be a customer of the Defendant and closed his account. The only thing that he failed to do at the time was to collect the Title Deed to his property being Nyaki/Thuura/817 (hereinafter “the suit property”) which had been used to secure the loan vide a Charge registered on 5 February, 1982. The Plaintiff then stated that sometime in early April 2003, he had received a bank statements from the Defendant which bore the date 7 April 2003 which indicated a debit balance thereon of Shs.1/-. The Plaintiff went on to say that he intended to sell the suit property in December 2010 and discovered from the Meru branch of the Defendant bank that his title deed had been transferred to the bank’s Kenyatta Avenue branch in Nairobi. He made appropriate enquiries and on 10 January 2011 he went to collect his title deed at the bank’s Credit Section where he was served by a Mr. Munene. He was informed by Mr. Munene that as regards his Account No. 0109 A-105803-00, there was a debit balance not of Shs.1/-but Shs. 105,575/-. The deponent detailed that, as he was under pressure from the purchaser of the suit property, he paid the said amount of Shs. 105,575/-and attached a copy of the payment slip therefore to his said Affidavit. He noted that the purchaser of the suit property had entered an agreement with him dated 5 April 2011 to purchase same for Shs. 3,900,000/-. With reference to the Defence, the Plaintiff noted that the Defendant had admitted, at paragraph 11 thereof, that the title deed for the suit property had been misplaced and that the Bank was in the process of obtaining a provisional title. However, the main ground of the Defence was that the Plaintiff still owed the sum of Shs. 1,032,739/70 as at 31 October 2011. The Plaintiff maintained that from the said Statement dated 7 April 2003, he owed no monies to the Defendant as that statement detailed that his cleared balance as at 5 April 2003 were Shs. 1/-.

3. The Defendant responded to the Application by filing a Replying Affidavit sworn on the 4 October 2012 by its Manager with its Consumer Credit Risk Department, Martin Kirimi. The deponent admitted to the amount of the loan advanced to the Plaintiff in 1982 for Shs. 60,000/-but pointed out that the Plaintiff had not explained the period of non-repayment thereof from 1982 to 23 March 2011 when he made a payment of Shs. 105,575/-. The deponent noted that the Plaintiff had borrowed but refused to service the loan for over 20 years and that he had not demonstrated any repayment of the debt. The deponent referred to the reason given by the Plaintiff when he visited the Defendant’s Kenyatta Avenue branch in Nairobi on 10 January 2011 as follows: “*account is not cleared-bad debt-would like to service the same*”. He then went on to explain that there were two accounts as regards the Plaintiff’s liability to the Defendant. Firstly there was an account number 0109A10580300 upon which the overdraft was granted to the Plaintiff and which, according to Mr. Kirimi now stood at Shs. 1,032,729.70 Dr. Then there was a second account number 0109N10580300 with no overdraft but which was overdrawn by account charges and interest. The deponent annexed to his said Replying Affidavit statements of these two accounts. Mr. Kirimi maintained that the Plaintiff had all along been aware that the debt that he owed to the Defendant had been: “*put in a loan provision Bd credit suspense account which is not in itself evidence of repayment.*” The deponent also noted that, as regards the Plaintiff’s contention that the Defendant had failed to comply with the provisions of **Order 7 Rule 5** of the *Civil Procedure Rules, 2010*, the Defendant pleaded with this Court to be allowed to comply therewith.

4. The Defendant also filed Grounds of Opposition to the Plaintiff’s said Application before court on 3 October 2012. Such grounds detailed as follows:

- “1. The defence filed in court on 27<sup>th</sup> March 2010 and dated 26<sup>th</sup> March 2012 raises triable issues.**
- 2. The Plaintiff has admitted there are triable issues and filed the same on 18<sup>th</sup> June 2012 and cannot therefore take two contradicting positions in a court of law.**
- 3. Striking out of pleadings is a drastic step which should be applied in clear cases where the defence is sham.**
- 4. The Defendant seeks leave to file documents and comply with Order 7 Rule 5 of the Civil Procedure Rules 2010”.**

5. The Plaintiff opened its submissions filed herein on 5 December 2012 by stating that it was important to note that he had filed his list of witnesses, list of documents, witness statements and bundle of documents. Such had all been filed at the same time as the Plaintiff herein. In contrast, the Defendant had not filed any documentation in support of its Defence, in what the Plaintiff termed, in total disregard of the provisions of Order 7 Rule 5. The Plaintiff further noted that it had filed a Reply to the defence as well as a statement of issues in order to what he termed: “to provoke the Defendant, at least, to file documents in support for its claim but to date nine (9) months after filing its defence, no witness statement or documents have been filed to robust the Plaintiff’s claim.” Thereafter, the Plaintiff referred to the general sections of the Civil Procedure Act and the Rules made thereunder as to the need for speedy disposal of suits. The Plaintiff detailed to the Court the facts surrounding the Application concluding that the Defendant’s claim for outstanding loan amount of Kenyan shillings 1,032,729.10 is reflected in another account not the account opened and operated by the Plaintiff with the Defendant bank.

6. Turning to the law as applied to the facts, the Plaintiff maintained that the failure of the Defendant to comply with the provisions of **Order 7 Rule 5** of the *Civil Procedure Rules* was not only an act of impunity but was an absolute abuse of the court process and contempt of these proceedings which should not deserve any further indulgence or accommodation of the Defendant by this court. The Plaintiff noted that he had had to pay, under duress, the amount of Shs. 105,575/- as he was desperate to obtain his Title Deed back from the Defendant bank. He maintained that before court, there were no records as produced by the Defendant of the alleged amount owing of Shs.1,032,719.10 or the sum of Shs. 105,575/-. If there had been, the Plaintiff wondered why the Defendant had not filed a Counterclaim in respect of these amounts. The Plaintiff cited the case of **Kassam versus Bank of Baroda (K) Ltd 1KLR (2002) 294**. I must confess that having perused this authority, I did not consider it to be useful in assisting the Court in determining the Plaintiff’s said Application. The Plaintiff then set out in the substantive provisions of **sections 1A and 1B** of the *Civil Procedure Act* as regards the necessity for the court to endeavour to have matters disposed of with due diligence and without regard to technicality. The Plaintiff also referred the court to the authoritative case of **Shah versus Mbogo (1967) EA 116** but that was only as regards the general exercise of discretion by the court. The Plaintiff further noted that there had been an issue of delay on the part of the Defendant in not filing documents as per **Order 7 Rule 5**. He referred the Court to the case of **Margaret Muchiga versus Esther Gichobi Civil Application No 117 2009 (Nyeri)** as well as the case of **Ramesh Shah versus Kenbox Industries Ltd Civil Appeal No. 340 of 2004 (Nbi)**. In the latter case the Court of Appeal had stated:

**“the authorities cited before us are consistent that the delay in taking the necessary steps to mount an appeal should not be inordinate and that there should be reasons given for any delay. The period and the reasons given therefore were indeed the two factors first considered by the learned single judge and were found wanting. In effect they could not form the basis of exercise of his discretion in favour of the applicant.”**

I think it should be noted that this authority referred to delay in proffering an appeal and I do not consider it to be of particular relevance to the matter before me.

7. The Defendant’s submissions were filed herein on 20 December 2012. The submissions opened by detailing the substantive Orders sought in the Application and thereafter repeated the Grounds of Opposition as set out above. The Defendant maintained that the Defence dated 26 March 2012 raised the following triable issues:

(a) The Plaintiff had not repaid the loan borrowed from the Defendant in full. As a result, the Defendant was entitled to hold on to the Plaintiff’s Title Deed.

(b) The Defendant maintained that the sale alleged to have taken place as per the Plaintiff had been set up specifically for the purposes of this suit in that the Defendant, despite holding a Charge over the suit property, had not been consulted with regard to the alleged sale and no consent had been sought from it. Further, there was no evidence of any consent to the sale transaction under the provisions of **section 7** of the *Land Control Act*.

(c)The Defendant maintained that the contract as between the Plaintiff and the Defendant which resulted in the Charge over the suit property could not be set aside, varied or vacated on the basis of the alleged sale.

(d) The Defendant maintained that the Plaintiff had misled the purported purchaser of the suit property in that the purported sale agreement dated 5 April 2011 detailed that the seller was selling the suit property free from any encumbrances, lien or claim.

The Defendant went on to state that the Plaintiff had admitted that there were triable issues as set out in the Statement of Issues dated 16 June 2012 and filed in court on 18 June 2012. The Defendant also noted that it had, in its Grounds of Opposition, sought the leave of the court to file its documents in order to comply with **Order 7 Rule 5** of the *Civil Procedure Rules*. Finally, the Defendant submitted that most importantly, the Plaintiff had charged the suit property in 1982, had borrowed Shs. 60,000/-but had not made a single repayment as regards thereto from 1982 to 23 March 2011.

8. The law on striking out of pleadings has long been settled by the Court of Appeal in the definitive case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** wherein the Court stated:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it 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.”**

In the **D.T Dobie** case, the Court analyzed the issue of summary determination of proceedings and the principles that emerge are that the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

9. However, that power can and should be exercised in appropriate cases to save precious judicial time. In the present case the Plaintiff has alleged and produced evidence before court that he used to have an account with the Meru branch of the Defendant bank which he closed in 1998. In paragraph 5 of his Affidavit in support of the Application, he clearly stated that he had repaid the loan amount of Shs. 60,000/-in that year. Indeed, he attached to his Further Affidavit sworn on the 16 October 2012, copies of his then cheque-book for Account No. 0100110580300, showing unused cheques which had been punched (presumably by the Defendant Bank) when the Plaintiff closed his said Account. He also exhibited copies of cheque stubs which showed that the last date upon which he made out a cheque drawn on the said Account was 29 September 1995. I have also perused the documents exhibited by Mr. Kirimi annexed to his Replying Affidavit dated 4 October 2012. I concur with the Plaintiff’s submission in this regard that such documents do not support the Defendant’s allegation that the Plaintiff owes it Shs. 1,032,729/-.

10. On exhibit “MK 2” to the Replying Affidavit, the Statement of Account for the Defendant’s Kimathi Street Branch dated 7 April 2003 details in the “Deposit” column three figures being a cheque deposit of Shs. 100,000 on 6 February 1999, an “Prov. Applied” figure of Shs. 953,538.20 and a “Int. Applied” figure of Shs. 79,190.50. The latter two figures bear the date - 27 February 1999 and total Shs 1,032,728.70. The account is detailed in the Plaintiff’s name with the address P. O. Box 60085, Nairobi. This is possibly how the deponent to the Replying Affidavit is able to state that this amount is owing to the Defendant Bank by the Plaintiff. What the deponent does not explain is why these figures appear in the Deposit column leading to the final balance on the said Statement of Account of Shs.1.00. It is not for this court to speculate in that regard. However in view of the age of the account, it seems to this court that any claim by the Defendant against the Plaintiff would be caught by the provisions of the *Limitation of Actions Act*. Further, the Statement of Account exhibited to the Replying Affidavit and marked “MK 3” is dated 7 July 2008 and refers to an account with the Defendant’s Kenyatta Avenue Branch, Nairobi. This is a different account number from that held in the Plaintiff’s name in the Kimathi

Street Branch above referred to. Again, there are amounts detailed in the Deposit column of the said Statement of Account bearing the same terminology as for the Kimathi Street Branch Account referred to above but this time ending with a nil balance. However, I note that in that Statement of Account on 31 May 2003 the balance brought forward was Shs. 105,575/-. This is the amount that the Plaintiff details in his Affidavit in support of the Application, that he paid “*under economic duress on 23rd March 2011*”.

11. I set out all the above in detail, as in my opinion, there are a number of questions and/or discrepancies in the Affidavit evidence before this court for and against the Application which require explanation at a full hearing of this suit. To my mind, there would seem to have been 3 accounts operated by the Plaintiff in the Meru, Kimathi Street and Kenyatta Avenue, Nairobi Branches of the Defendant bank. How those accounts were closed or transferred from Meru to Nairobi needs clarification both from the Plaintiff and the Defendant alike. On the part of the Defendant, there needs to be explanation as to why the Plaintiff’s Title Deed for the suit property seems to have been mislaid and, further, what efforts have been made by the Defendant to obtain a provisional title thereto. There also needs to be a more candid explanation from the Plaintiff as to why he paid the said sum of Shs. 105,575/- “under duress” on 23<sup>rd</sup> March 2011.

12. All this now brings me to **Order 7 Rule 5** of the *Civil Procedure Rules*. That Rule reads as follows:

**“7 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by –**

- (a) an affidavit under under Order 4 rule 1 (2) where there is a counterclaim;**
- (b) a list of witnesses to be called at the trial;**
- (c) written statements signed by the witnesses except expert witness; and**
- (d) copies of documents to be relied on at the trial.**

**Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.**

Obviously **Rule 5 (a)** is not applicable in this case. However, **Rule 5 (b), (c) and (d)** are all applicable and are mandatory. The proviso to **Rule 5** details that the witness statements to be provided under **Rule 5 (c)** may be furnished at least 15 days prior to the trial conference under **Order 11** with the leave of the court. The Defendant herein, in its submissions, has asked for such leave but, as detailed, such only applies to witness statements. The Defendant has failed to provide a list of witnesses to be called at the trial and/or copies of documents that it wishes to rely upon. Such documents will, of course, include those exhibited by Mr. Kirimi to the Replying Affidavit dated 4 October 2012. It seems therefore, that as matters stand in relation to this case at the present time, the Defendant has put nothing before this Court to support its Defence dated 26 March 2012. There is nothing to show as regards its contention that the Plaintiff owes to it any monies whatsoever. Even the two Statements of Account which the Defendant has exhibited show a “nil” balance on the one Account and a Dr. entry of Shs.1/- on the other Account.

13. All in all therefore, I do not consider that the Defence filed herein is worthy of this Court’s discretion being exercised so as to allow it to stand. The Defendant has failed to comply with **Order 7 Rule 5**, such Rule being mandatory. In my opinion, such failure so to comply can only be alleviated by the exercise of this Court’s discretion under its inherent jurisdiction. I have carefully weighed up the contents of the said Defence and, to my mind, it obviously is no more than a try-on and a complete sham. I allow the Plaintiff’s Notice of Motion dated 22 August 2012 and strike out the Defence dated 26th March 2012 and enter Judgement for the Plaintiff herein. As the Plaintiff seeks both special and general damages, I direct that the Plaintiff do now set down this matter for Formal Proof. The Plaintiff will have the costs of the Application.

**DATED and delivered at Nairobi this 28<sup>th</sup> day of March 2013.**

**J. B. HAVELOCK**  
**JUDGE**