REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 471 OF 2012

SANKALE OLE KANTAI T/A KANTAI& CO. ADVOCATES.....….PLAINTIFF

- **VERSUS –**

HOUSING FINANCE COMPANY OF KENYA LIMITED .....DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 18th December 2012. There are two primary prayers: that the defence dated 23rd August 2012 be struck out for being frivolous, vexatious and abuse of court process; and that judgment be then entered for Kshs 9,200,000. The motion is expressed to be brought under Order 2 rule 15 (1) (b) and (d) of the Civil Procedure Rules 2010 and sections 1A and 3A of the Civil Procedure Act. There is a deposition in support sworn by Sankale Ole Kantai on 18th December 2012.
2. The plaintiff's claim is that the defendant unlawfully or fraudulently debited his account with Kshs 3,500,000 on 19th November 2010, Kshs 2,200,000 on 20th April 2011 and Kshs 3,500,000 on 17th August 2011 all totalling Kshs 9,200,000. The amounts were transacted into an account of his office messenger. Since the messenger was known to the bank, the plaintiff avers that it should have raised suspicion. He avers further that the bank failed to confirm with him the details of the transactions. This he states was in breach of established practice and custom by the bank. On 18th November 2010 an employee of the bank allegedly called the plaintiff to confirm instructions. The plaintiff avers that this was fraudulent because on that day, he was out of the country. The matter is under police investigation as shown in the annextures marked 'SOK 3' and 'SOK 4'. Lastly, the plaintiff avers that the bank issued two sets of bank statements to mask the fraudulent transactions. The plaintiff's case, in a nutshell, is that the defence proffered by the defendant is a mere sham and should be struck out.
3. The motion is contested. There is filed a replying affidavit sworn by Fridah Mchavo, a branch manager of the defendant. The plaintiff was the sole signatory to account number SD 200 – 0072932 at the bank. The bank concedes that the debits were made but its case is that they were made in good faith pursuant to the plaintiff's instructions on 17th November 2010, 20th April 2011 and 16th August 2011. Letters of instructions from the plaintiff's law firm are annexed. It is deposed that there are pending criminal proceedings against the plaintiff's employee for fraud relating to the transactions. The bank's case is that it has not been established that the plaintiff's signature or instructions were not genuine. The bank denies issuing different sets of bank statements. A true copy of the plaintiff's statement is enclosed. The bank's position is that its defence raises triable issues that should go to trial. Lastly, it is deposed that the bank has not been negligent and that the present motion is a strategy to force it to settle the claim unfairly.
4. I have considered the evidence and the written submissions filed by both parties. I am of the

following considered opinion. There are clear legal benchmarks for striking out pleadings. At any stage of the proceedings, the court may strike out a pleading if it is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119.

5. In the present case, the motion to strike out has been brought without delay. Its cornerstone is that the defence is frivolous, vexatious and an abuse of court process. A frivolous pleading must be self evident: it is one with no legs to stand on. For that reason, it can be said to vex the plaintiff. See *Silvanus Tubei Vs Kenya Commercial Bank* [2006] e KLR, *Brite Print (K) Ltd Vs Attorney General* Nairobi, High Court case 1096 of 2000 (unreported), *Fischer Vs Owen* (1878) 8 C.D 645, *Raphael Mugwanja Warari Vs Olkejuado County Council and 2 others* Nairobi, High Court ELC 101 of 2001 [2012] e KLR.
6. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited Vs Muchina* [1982] KLR 1 is an all time classic. He said at page 9;

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable 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 a case before it".*

7. The reason is that at this stage, the court is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This principle of restraint was restated recently by the Court of Appeal in *Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan* Kisumu, Civil Appeal 32 of 2003 (unreported). See also the *The Cooperative Bank Limited Vs George Wekesa* Civil Appeal 54 of 1999 (Court of Appeal, Nairobi, unreported). In addition, regard must now be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The court is now enjoined to do substantial justice to the parties. The overriding objective of the court is clearly laid out in those statutory provisions.
8. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Sir Udo Udoma C.J. *in Musa Misango Vs Eria Musigire* [1966] E.A 390 at 395 when he delivered himself thus;

> *"To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"*

9. When I juxtapose those principles against the facts, I find as follows. The plaint is predicated on breach of contract between a customer and his bank and specifically under the twin heads of fraud and the tort of negligence. Doubt is removed completely by the pleading at paragraphs 15, 16 and 17 of the plaint. The defence put forward is that the bank was not negligent and has not breached its fiduciary duties. In particular, it is submitted that the disputed signatures on bank mandates appearing in the instruction letters of the plaintiff should be tested on evidence. In a synopsis, the bank's case is that at this stage, the court is being invited to make a conclusive finding that it acted dishonestly or negligently. To my mind, there are a number of issues that call for detailed argument and consideration: what were the true bank mandates of the plaintiff customer? Were the note papers and signatures of the customer forged? Did the bank make sufficient enquiries as per the bank's custom and practice? Did the bank act fraudulently, negligently or dishonestly or breach its contract with the plaintiff? Is the plaintiff is then entitled to a refund of Kshs 9,200,000?

10. I have studied the statement of defence dated 23rd August 2012. Paragraphs 8, 9, 15, 17 and 20 for example, raise the issues I have highlighted in defence. It is pleaded at paragraph 20 that the plaintiff's employee Kimanzi Kithome may be criminally liable and was an accessory to the loss. Contributory negligence is also pleaded. Both parties acknowledge the underlying criminal investigation and

proceedings. I am thus unable to say that *prima facie* the statement of defence has no legs to stand on or is entirely hopeless. I cannot say it carries no weight or does not adequately traverse the claim. Customers place money in banks for safekeeping. It is thus a serious breach of trust when a substantial sum as in this claim disappears in such circumstances. That is the true province of the trial court. Some of the allegations made of forgery and fraud may require expert testimony to enable the court reach a just opinion. See *Amosam Builders Developers Limited Vs Gachie & 2 others* [2009] KLR 648.

11. While I commiserate with the plaintiff, the court must execute a delicate balancing act to ensure that both parties remain at equal arms length. In our adversarial system of justice, even the weak and vanquished must be granted a say at the throne of justice. The plaintiff may strongly feel that the defence set up is a strategy to delay justice but on the face of it, it cannot be said to be frivolous, vexatious or an abuse of court process. The veracity of that defence can only be fully tested on evidence at the trial.

12. For all the above reasons, I find that the plaintiff's notice of motion dated 18th December 2012 lacks merit. I order that it be dismissed. Costs shall abide the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Adhuok for the Plaintiff.

No appearance for the Defendant.