



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 365 of 2011**

**ECO BANK KENYA LIMITED.....PLAINITFF**

**VERSUS**

**SOLUTION WIZARDS LIMITED.....1<sup>ST</sup> DEFENDANT**

**ANANDA PRAKASH MISHRA.....2<sup>ND</sup> DEFENDANT**

**KISHORE PREMJI KERAI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application dated 17<sup>th</sup> February 2012 has been brought under the provisions of Order 2 Rule 15 (1) (a), (b), (c) and (d), Order 50 Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all the enabling provisions of the law. It seeks the following orders:-

- a. **THAT the Defendant's (sic) Statement of Defence dated 15<sup>th</sup> December 2011 and filed on 16<sup>th</sup> December, (sic) be struck out with costs.**
- b. **THAT judgment be entered for the Plaintiff and against the Defendant (sic) as prayed in the Plaintiff.**
- c. **THAT cost (sic) of this application (sic) awarded to the Plaintiff.**

1. The grounds on which the Plaintiff relied on in support of its application were as follows:-

- a. **THAT the Defence by the Defendant is scandalous, frivolous and vexatious and is merely intended to delay the fair trial of this suit and is otherwise an abuse of the court process.**
- b. **THAT the Defence is filed in total disregard of the mandatory provisions of the Civil Procedure Rules 2010.**
- c. **THAT the Defence herein is a mere sham and does not in any way specifically affirm or deny the Plaintiff's pleadings or controvert the Plaintiff's averments.**

**d. THAT the Defence herein is bad in law.**

**e. THAT it is in the interest of justice that the Defence be struck out and judgment entered as prayed.**

1. Dominic N. Sese, the Plaintiff's Credit Manager swore an Affidavit on 23<sup>rd</sup> February 2012 in support of the Plaintiff's application. Without repeating specific facts, the deponent reiterated all the averments contained in the Complaint, the Witness Statement, List and Bundle of Documents, Verifying Affidavit and the Reply to Defence in a general manner.
  2. He added that the Defendant(s) had not tendered any evidence to show that the 1<sup>st</sup> Defendant company had been deregistered as had been stated in the Defence. It was the Plaintiff's case that the Defendants had not pleaded any averments with regards to the Plaintiff's documents No1 and 2 which were not attached to the Supporting Affidavit as exhibits. Perusal of the List of Documents showed the letter dated 27<sup>th</sup> June 2008 approving the facility and the Credit Agreement dated 25<sup>th</sup> September 2008 as documents (1) and (2). However, the said Credit Agreement had not been attached to the Plaintiff's Bundle of Documents making it difficult for the court to discern which document was no (2) in the Plaintiff's Bundle of Documents.
  3. The Plaintiff also deposed that the Defendant did not attach the Witness Statements, List and Bundle of Documents as was required by the Civil Procedure Rules. It was therefore its contention that the Defendants Defence did not meet the requirements set out in the said rules. The Defence was therefore frivolous, vexatious and intended to delay the fair determination of the Plaintiff's claim. It was thus an abuse of the court process.
  4. The Plaintiff filed its written submissions dated 24<sup>th</sup> October 2012 on 25<sup>th</sup> October 2012 reiterating the aforesaid facts.
  5. In opposing the Plaintiff's said application, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Grounds of Opposition dated 26<sup>th</sup> October 2012 on 29<sup>th</sup> October 2012. The grounds were as follows:-
    - a. **THAT** the application was *ex-facie* incompetent and fatally defective.
    - b. **THAT** the application was not supported by sufficient material.
    - c. **THAT** the application was an abuse of the court process.
    - d. **THAT** the defence on record raised serious issues of both law and facts.
    - e. **THAT** the application had no merit.
1. In their written submissions dated and filed on 11<sup>th</sup> December 2012, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the matter was *ex-facie* incompetent and fatally defective because no evidence was required for a pleading to be struck out under Order 2 Rule (15) (a) of the Civil Procedure Rules. They argued that the application could not stand as it was because it had combined the provisions of Order 2 Rule 15 (a)-(d) of the said rules.
  2. The Defendants also contended that the Plaintiff did not attach any documents showing a request of the facilities by the Defendants and that the statements did not reflect that the sum advanced was by way of an overdraft facility. It was the Defendants' view that these issues of both facts and law were serious and would necessitate the matter to proceed for trial. They averred that it was now settled that even where there was a single triable issue, the matter should proceed for trial for determination.
  3. The court must be cognisant of the judicial time wasted in engaging itself in hearing matters in a trial where it is clear that evidence adduced at such a hearing would not change much or at all if it was to enter judgment following successful prosecution of an application for striking out of the pleadings and entry of judgment against a Defendant.
  4. The court is called upon to proceed to trial where the evidence on the court record is not self-explanatory. Being interlocutory in nature and having the capability of disposing of a suit before it proceeds for trial, an application for striking out of pleadings must be one in which a Plaintiff

- must satisfy the court that a Defence should be struck out and judgment entered in its favour.
5. The Plaintiff herein was under a duty to demonstrate in a clear manner that the Defence was frivolous, vexatious, an abuse of the court process or it was intended to embarrass and delay the fair trial of this action by laying a basis of its application.
  6. The Plaintiff annexed the Defendants' Defence as an exhibit marked "DNS 1" in which it stated that it contained mere denials. However, it did not elucidate the facts of its case in the said affidavit. It is not sufficient for a party to refer the court to certain documents which are on the court record as the Plaintiff did. This evidence must be attached to the said Affidavit, if such party is to rely on the same in support of its application. It is not the duty of the court to rummage through the evidence on record to establish whether an applicant has succeeded in its application.
  7. The specificity of the averments is mandatory. This was the holding by the Court of Appeal in **Gakumbi & Another vs Maina [2008] KLR**, when it stated as follows:-

**“An affidavit was evidence in which a person stated under oath about the truth or falsity of certain matter. It had to be on some specific portion, not a general statement on the state of affairs. So a deponent must specifically direct his collective mind to each paragraph in the affidavit and accordingly affirm the truth thereof.”**

1. In this regard, I find that the Plaintiff's Supporting Affidavit was not helpful to the court at all as it was based on generalities. I do not, therefore, find it necessary for me to delve into the arguments of whether or not the application herein was fatally incompetent or whether the Defendants' Defence was a sham as I am of the view that the Plaintiff's application would fail in the first instance due to its failure to lay a basis of its claim by virtue of the scanty nature of its Supporting Affidavit.
2. It is clear that the orders sought in the Plaintiff's Notice of Motion application are at complete variance with the orders it had sought in the Plaint. I must also point out that it was not clear whether the Plaintiff was seeking entry of judgment against all the Defendants and if not, against which Defendant. The body of the application and the Supporting Affidavit refer to a "Defendant" yet the Plaint prays for judgment against the "Defendants" jointly and severally.
3. This is not a mere procedural technicality that can be ignored as it goes to the very root of what the Plaintiff is seeking in his application as there is more than one Defendant. The Plaintiff is bound by its pleadings and cannot depart from the same when it applies for specific orders. From the way the application is drafted, it would be virtually impossible for this court to know against which Defendant the judgment is to be entered.
4. A party who brings an application must ensure that the prayers sought therein are related to the prayers in the substantive pleading. If there are typographical errors in the body of the application, it is incumbent upon an applying party to amend its application so that it mirrors the substantive prayers in the Plaint.
5. For the reasons aforesaid, I am not persuaded that the Plaintiff's Notice of Motion dated 17<sup>th</sup> February 2012 is merited. Accordingly, the same is hereby with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
6. It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of May 2013**

**J. KAMAU**

**JUDGE**