REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 391 OF 2010

DANCAN NJATHI MACHARIA…….…… PLAINTIFF

- VERSUS –

RICHARD MURIGU WAMAI ……..…..……..…… DEFENDANT

RULING

1. I have before me a notice of motion by the plaintiff dated 19th July 2010. It is expressed to be brought under order V1 rule 13(b) (c) and (d), and order XII rule 6 of the old Civil Procedure Rules. It is also premised on sections 3A and 63(e) of the Civil Procedure Act.

2. The plaintiff prays that the statement of defence dated 6th July 2010 be struck out and that judgment on admission be entered against the defendant for the sum of Kshs 22,415,000. The gist of the matter is laid out in the annexed affidavit of the plaintiff sworn on 19th July 2010 and the annextures. The plaintiff avers that he supplied goods to the defendant and advanced personal loans totalling to Kshs 22,415,000. The plaintiff and defendant executed an acknowledgement of debt exhibited marked "DNM1" and dated 12th March 2010 in the presence of an advocate Francis Gachie. An affidavit by the lawyer is sworn on even date confirming that the parties appeared before him on that date when he drew and attested to the agreement. The plaintiff avers that the acknowledgment of the debt is unequivocal.

3. The defendant contests the motion. He relies on grounds of opposition dated 13th August 2010. The pith of the objection is that the statement of defence raises triable issues that require to be ventilated at a full trial on tested evidence. He submitted that the advocate who drew the acknowledgment of debt should be called as a witness. It is the defendant's case in the statement of defence that the plaint does not disclose the consideration for the debt. The defendant also seeks to impeach the admission of debt for having been obtained under duress. In sum, the defendant says that he should not be removed from the seat of justice at this stage.

4. I take the following view of the matter. The amended plaint dated 25th June 2010 prays for Kshs 22,415,000. The plaint does not state how the debt arose. But it is pleaded at paragraph 4 that on 12th March 2010, the defendant expressly admitted the debt and proposed to liquidate it in two installments. The first, of Kshs 10,000,000 was to be paid on 23rd April 2010 and the balance on 23rd July 2010. I have perused that acknowledgement of debt titled *commitment to pay debt* dated 12th March 2010. It is executed by both parties before an advocate called Francis Gachie. The latter has attested the agreement

and endorsed it with his rubberstamp. He confirms he did that in the deposition I have referred to earlier.

5. I thus ask myself why the defendant would execute the acknowledgement of debt and then deny indebtedness. I have said the defendant has not sworn a replying affidavit. The grounds of opposition, in a synopsis, say that the defence raises triable issues particularly the issues of consideration for the debt or the alleged duress. I would add that the statement of defence of 6th July 2010 has at paragraphs 3 and 4 raised those two matters to traverse the claim. The rest of that short defence is a denial of all the claims in the amended plaint. Regarding consideration, the amended plaint states the facts are well within the knowledge of the defendant. I find it hard to accept the allegation of duress when faced with a full acknowledgment of debt attested to by an independent advocate. If there was duress, that session would have provided a good opportunity not to execute the admission. And it is not lost on me that the defendant has not deponed to such critical elements in a replying affidavit.

6. To that extent, I find the statement of defence spurious, contradictory and a mere denial. It is not what I can call a genuine or bonafide defence. Mirrored against the express admissions in the agreement dated 12th March 2010, it appears to me evasive and a stratagem contrived to delay trial. Striking out a pleading is a draconian measure and should be employed sparingly and in the clearest of cases. See *Wambua Vs Wathome* [1968] E.A 40.

7. The court has power under order VI rule 13 of the old Civil Procedure Rules which is *pari materia* with order 2 rule 15 of the Civil Procedure Rules, 2010 to strike out a pleading that is embarrassing, frivolous, scandalous or vexatious. A frivolous suit must be plainly so on its face. It is one that is so baseless as to have no legs to stand on and to that extent it can be said to vex the defendant. For example in *Silvanus Tubei Vs Kenya Commercial Bank* [2006] e KLR Justice Ransley found that where a party, against clear evidence of a registered charge, continued to insist there was no such charge was then frivolous in its pleadings. So that a matter is frivolous if it carries no weight or importance or when on its face it does not answer the claim of the other party. See *Brite Print (K) Ltd Vs Attorney General* Nairobi HCCC No 1096 of 2000 (unreported). Justice A. Visram, as he then was, held in the same decision, and citing with approval the case of *Fischer Vs Owen* (1878) 8 C.D 645 that a matter can only be said to be scandalous if it is irrelevant. Cotton L.J. in the *Fischer* case at page 653 said "nothing can be scandalous which is relevant". A pleading is only said to be vexatious when it is baseless and its only intention is to vex or harass the other party. Again a pleading is embarrassing "if it is so drawn that it is not clear what case the opposite party has to meet at trial". See *Brite Print (K) Ltd Vs Attorney General* (Supra). See also *British Land Association Vs Foster* (1888) 4 TLR 574.

8. Again, an application to strike out a pleading must be brought with expedition. Where there has been inordinate delay in bringing it, the court will frown upon it and will not exercise its discretion in favour of the applicant. See *Meru Farmers Co-operative Union Vs Abdul Aziz Suleman* (No 1) [1966] E.A. 436 for the proposition that an application to strike out a plaint on ground it discloses no cause of action should be made promptly.

9. The bottom line cannot be better set than in the words of Sir Udo Udoma C.J. *in Musa Misango Vs Eria Musigire* (Supra) 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"

10. The application must be brought timeously. See *Meru Farmers Co-operative Union Vs Abdul Aziz Suleman* (No 1) [1966] E.A. 436. The amended plaint here was filed on 25th June 2010. The defence itself was filed on 6th July 2010. The present motion was presented shortly thereafter on 19th July 2010. I find no laches.

11. The court again is entitled to enter judgment on admission under order XII of the old Civil Procedure Rules which is again *pari materia* with order 13 of the Civil Procedure Rules 2010. Where an admission is made by any party either in the pleadings or otherwise, the other party has a right to apply

for judgment on the admitted claim without waiting for final determination of the suit. I am satisfied that the document executed by the parties on 12th March 2010 titled *commitment to pay debt* is an unequivocal admission of the entire debt of Kshs 22,415,000. Mirrored against the law, I am also satisfied that the statement of defence dated 6th July 2010 is frivolous and only meant to vex the plaintiff and hold the trial in abeyance. It is a sham and discloses no cause of action capable of going to trial. I have already stated in my analysis of the facts and evidence before me that the allegations of duress or want of consideration on the contract are a red herring. The defendant has not repaid the debt.

12. I would thus be inclined to find that the Notice of Motion by the plaintiff dated 19th July 2010 has merit. I allow it and strike out the defence dated 6th July 2010. I enter judgment in favour of the plaintiff against the defendant for Kshs 22,415,000.

13. I also award the plaintiff costs of the motion and of the suit. Interest is awarded at court rates from the date of the decree till full payment.
It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of February 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Kiiru for the Plaintiff.
No appearance for the Defendant.