



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MILIMANI COMMERCIAL COURT  
CIVIL SUIT 405 OF 2011

**MEDOL GROUP LIMITED.....PLAINTIFF**

**VS.**

**ADRIAN COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**BENARD WACHAI NJOROGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff through a Notice of Motion application dated 8<sup>th</sup> November 2011 and expressed to be brought under Sections 1A, 1B and 26 of the Civil Procedure Act and Order 2 Rule 15(1); Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules seeks orders for the striking out of the defendants' defence and for entry of judgment for the plaintiff as prayed in the defence. In the alternative, the plaintiff prays for judgment in its favour for the sum of Kshs. 8,500,000/- as admitted by the defendants. The application is based on grounds set out in the face of the application and is further supported by the affidavit of Edward Magero, a director of the plaintiff sworn on 8<sup>th</sup> November 2011. The application is opposed through the affidavit of Benard Njoroge, the 2<sup>nd</sup> defendant sworn on 1<sup>st</sup> December 2011.
2. On the other hand, the defendants have brought an application dated 1<sup>st</sup> December 2011 in which they seek orders that the suit against the 2<sup>nd</sup> defendant be struck out. The application is based on grounds set out on the face of the application and is supported by the 2<sup>nd</sup> defendant's affidavit sworn on 1<sup>st</sup> December 2011. This application is opposed through a replying affidavit by Edward Magero, the plaintiff's director.
3. Both applications were heard together on 26<sup>th</sup> January 2011. This ruling addresses both applications.
4. The plaintiff's application is based on the contention that by cash advance agreements between the plaintiff and the defendants, the plaintiff advanced to the defendants a sum of Kshs. 20,500,000/-. Under the agreements, the said amount was to be paid back with profits amounting to Kshs. 2,798,000/-. The plaintiff states that the defendant has only repaid back a sum of Kshs. 12,000,000/- leaving a balance of Kshs. 11,298,000/-. The plaintiff's claim against the defendants is therefore the balance of Kshs. 11,298,000/- which sum the plaintiff claims is due and outstanding to the plaintiff.
5. In response to the plaintiff's application, the defendants state that upon reconciliation of accounts between the parties, the sum they owe to the plaintiff is Kshs. 8,500,000/-. They however contend that under the agreement between the parties the admitted sum were to be paid by way of amortization once construction of base stations was completed and paid for, a position they state the plaintiff is well aware. They deny that there has been an admission that the sum of Kshs. 8,500,000/- is payable in lumpsum.
6. Through a supplementary affidavit by Edward Magero a director of the plaintiff sworn on 14<sup>th</sup> December 2011, the plaintiff denies that the parties ever carried out any reconciliation of accounts or that

the balance due to the plaintiff was payable by way of amortization. The plaintiff claims that there has never been any agreement between the parties that the sums due to the plaintiff would be paid upon completion of construction of base projects or upon payment to the defendant by the counterparties to the contracts for construction of such base stations.

7. The gist of the defendants application of 1<sup>st</sup> December 2011 is that the cause of action against the 2<sup>nd</sup> defendant cannot be sustained against him as his transaction with the plaintiff was entirely in his capacity as a director of the 1<sup>st</sup> defendant and has not at all transacted in his personal capacity. He cannot therefore be sued in his personal capacity.

8. In response to the 2<sup>nd</sup> defendant's application, the plaintiff contends that the 2<sup>nd</sup> defendant is enjoined to the suit in his personal capacity because he received part of the sums advanced by the plaintiff in his personal capacity and through his personal account at Barclays Bank of Kenya Limited – A/c No. 0771027075, at his own request. The 2<sup>nd</sup> defendant is therefore a relevant party to the proceedings.

9. I have considered the application, the affidavit evidence tendered by each party and the submissions made by counsel for both parties.

10. Order 2 Rule 15 of the Civil Procedure Act allows this court to order to be struck out any pleading on grounds that it discloses no cause of action or defence; is scandalous, frivolous and vexatious; if it may prejudice, embarrass or delay fair trial of the action; or if it is otherwise an abuse of the court process. These grounds have been tested time and again in our courts and are fairly well-settled. In my view, the holding in **DT Dobie & Company (Kenya Limited vs. Muchina [1982] K.L.R 1** provides sufficient parameters within which this application should be determined. These are captured in the following wording:

***“no suit ought to be summarily dismissed unless it appears so hopeless that that it plainly and obviously discloses no cause reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.***

11. On its part, Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the prayer for judgment on admission is premised allows a party at any stage of a suit to apply to court for judgment where admission of facts has been made either on the pleadings or otherwise.

12. With regard to the prayer for the striking out of the defence, my review of the affidavit evidence exchanged reveals that a number of issues are contested. These include;

- 1) Whether the loan extended by the plaintiff to the defendant was payable with profit and if so the quantum of such profit;
- 2) Whether the loan payable to the plaintiff was payable by way of amortization;
- 3) Whether the parties have carried out reconciliation of accounts and agreed on the sum payable by the defendant to the plaintiff.

13. The above issues render it obvious that the defence raises triable issues and cannot therefore be struck out under Order 2 Rule 15 of the Civil Procedure Act. In the **Muchina case**, it was held that where a suit shows some semblance of a cause of action, the same should not be struck out. The court indeed recognizes that even single triable issue was enough to allow a pleading to go to full trial. The prayer that the defence herein be struck out must therefore fail in the face of the several triable issues identified above.

14. With regard to the prayer for judgment to be entered as admitted by the defendants, the test was laid out by Madan J in the case of **Chotram vs. Nazan (1982-88) 1KAR 437** which this court (H.P.G.

Waweru J) cited with approval in the case of **Wood Products (Kenya) Limited vs N.K. Brothers Limited [2007] eKLR** as follows:

***“... admissions have to be plain and obvious, as plain as a pikestaff and clearly readable, because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...”***

15. In the instant case, paragraph 10 of the defence filed on 28<sup>th</sup> October 2011 states:

***“in response to paragraph 6 of the plaint, the defendant avers that the sum outstanding to the plaintiff is Kshs. 8,500,000/- which amount is tied up in a contract for construction of a base station as per the agreement envisaged by the parties”.***

16. Likewise, paragraph 15 of the replying affidavit of Benard Wachai Njoroge makes an exact repetition of the above quoted averment in the defence. Paragraph 16 of the replying affidavit then sets out a detailed table explaining how the figure admitted figure of Kshs. 8,500,000/- is arrived at. The same table is set out in paragraph 11 of the defence. In **Flex Air Cargo Limited vs. Delta Connections Limited [2008] eKLR**, a similar set of facts existed and Lesiit J observed as follows:

***“The admission is plain and clear. The defendant is saying that it admits US\$ 42,815.50 is owed to the plaintiff. From the letter, the defendant has set out the basis upon which it arrived at the figure admitted”***

17. In my view, the averments in both the defence and the replying affidavit constitute plain and unequivocal admission by the defendants that they owe the plaintiff the sum of Kshs. 8,500,000/-. I have therefore no basis upon which to delay or deny the plaintiff judgment for the admitted sum.

18. The defendants' contention is that the admitted sum is tied up to the contracts for construction of base stations which fact they claim is within the terms of the loan agreements with the plaintiff. My perusal of the loan agreements between the parties reveals that while the purpose of the loans was indicated as construction of base stations, there was no clause providing that repayment of the monies was subject to the receipt by the defendants of payments from the counterparties to such construction contracts. The agreements merely provided for the date when the sum advanced was payable. The contention that payment was tied to the base station construction contracts is therefore not a defence to the above finding that the sum of Kshs. 8,500,000/= is admitted.

19. Turning to the application seeking the striking out of the 2<sup>nd</sup> defendant from the suit, the issue arising is whether or not there is a cause of action against the said defendant. In that regard, the contention by the plaintiff is that the 2<sup>nd</sup> defendant personally received part of the loan proceeds which were paid to his personal account at Barclays Bank of Kenya. Exhibit “EM1” in the supplementary affidavit of Edward Magero exhibits a transfer of Kshs. 1,000,000/- from the plaintiff to Mr. Benard Njoroge's account as well as a deposit of Kshs. 750,000/- to his said account. The replying affidavit also exhibits evidence of receipt of a sum of Kshs. 6 Million by the defendant in his personal account. This evidence has not been rebutted by the 2<sup>nd</sup> defendant. Order 1 Rule 3 allows joinder of a person as a defendant where relief is sought in respect of or arising from the same act or transaction or where if separate suits were brought, common questions of law would arise.

20. In the present case therefore, I am convinced that unless the 2<sup>nd</sup> defendant is retained as a defendant to the suit, the plaintiff would have difficulty proving liability against the 1<sup>st</sup> defendant for the sums that were received by the 2<sup>nd</sup> defendant in his personal capacity and at his request. The defendants' application for striking out of this suit against the 2<sup>nd</sup> defendant therefore fails.

21. The upshot of the foregoing is that the plaintiff's Notice of Motion dated 8<sup>th</sup> November 2011 is hereby dismissed in terms of prayer 1 and allowed in terms of prayer 2 while the defendant's Notice of

Motion dated 1<sup>st</sup> December 2011 is hereby dismissed with costs.

**IT IS SO ORDERED.**

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2012.**

**J.M. MUTAVA**  
**JUDGE**