REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 33 OF 2009

BLUE SHIELD INSURANCE COMPANY LIMITED……..…. PLAINTIFF

VERSUS

ALICE W. KARIUKI…….....….....…..1ST DEFENDANT

INVESTMENT & MORTGAGES BANK LIMITED.....….2ND DEFENDANT

RULING

By its further Amended plaint dated 11th October, 2011, the Plaintiff claimed that it maintained an account with the 2nd Defendant known as Commission Advance Loan Scheme to which its employees including the 1st Defendant could borrow funds by way of loans and whose deposits therein secured overdraft facilities granted to the 1st Defendant by the Plaintiff, that under the said loan scheme the Plaintiff's deposits were to be advanced to its employees by the 2nd Defendant, that on 14th March, 2006, the Plaintiff and 1st Defendant instructed the 2nd Defendant to advance the 1st Defendant Kshs.10 million from the Plaintiff's said loan scheme account of which the 1st Defendant had repaid Kshs.3,880,000/- and there was a balance of Kshs.6, 120,000/- which the Plaintiff was claiming from the Defendants, jointly and severally.

The 1st Defendant decided not to respond to or file any reply to the said Further Amended Plaint. She decided to rely on her original Defence filed in Court on 6th March, 2009. In her defence, which had been filed against the original Plaint, the 1st Defendant contended that the monies had been advanced by the 2nd Defendant and that what the Plaintiff did was to guarantee the same, that the 2nd Defendant lacks locus standi to claim any outstanding amounts under the loan agreement between the 1st Defendant and the 2nd Defendant.

In its defence, the 2nd Defendant pleaded that it had received instructions from the plaintiff whereby it issued cheques totaling Kshs. 10 million payable on behalf of the 1st Defendant and debited the said sum to the Plaintiff's said Commission Advance Scheme. The 2nd Defendant further contended that when the 1st Defendant created charges on her properties to secure Kshs.3,880,000/- the 2nd Defendant did credit the said sum to the Plaintiff's said Commission Advance Scheme Account.

By its Notice of Motion dated 14th February, 2012 brought under Sections 1 (A), 1 (B), 3(A) of the Civil Procedure Act and Orders 2 Rule 15(1) (a), 13 Rule (2) and 36 of the Civil Procedure Rules, the Plaintiff has applied to have the 1st Defendant's defence struck out for disclosing no defence and for judgment on admission.

The grounds upon which the application was brought are that in light of the 2nd Defendant's defence, the 1st Defendant's Defence discloses no defence to the Plaintiff's claim, that the admissions made by the 2nd Defendant support the Plaintiff's claim in the Plaint, that the 1st Defendant has not filed a reply to the further amended Plaint and is therefore deemed to admit the claim and finally that the Defendant is justly and truly indebted to the Plaintiff.

The Defendant filed a Replying Affidavit sworn on 13th March, 2012. She contended that the Plaintiff had filed a similar application on 7th July, 2010 seeking the same orders, that the said application had been heard and dismissed by Okwengu J and the present application was therefore res judicata, that the Plaintiff should have set down the suit for trial rather than seek to circumvent the court process, that the Amended Defence only raised issues as against the 2nd Defendant and not the 1st Defendant as the issues touching on the 1st Defendant remained the same as canvassed in her defence of 5th March, 2009 and finally that the 1st Defendant had raised issues in her Defence that go to the core of the suit which can only be canvassed at a full trial.

I have carefully considered the application, the Replying Affidavit and the oral submissions of counsel. The Principles applicable in an application to strike out a pleading for disclosing no reasonable cause of action or defence were settled by the Court of Appeal in the case of **D.T. Dobie Ltd –vs- Muchina (1982) KLR 1.** That is, that the striking of pleadings is a drastic remedy and the procedure can only be invoked in plain and obvious cases and that such jurisdiction should be exercised with extreme caution.

I propose first to deal with the issue of res judicata raised by the 1st Defendant. It was submitted on behalf of the 1st Defendant that the Plaintiff had made a similar application which was dismissed after being considered on merit by Okwengu J (as she then was), that the issue being raised presently could have been raised then and that what the Plaintiff had done was to make cosmetic changes to the application which cannot escape the provisions of Explanation No. 4 of Section 7 of the Civil Procedure Act.

Mr. Orenge for the Plaintiff submitted that the doctrine of res judicata does not apply to the Plaintiff's application. That the Plaintiff's application dated 7/7/10 was different from the present one in that, that application was under Order VI Rule 13(1), (b), (c) and (d) which required evidence unlike the present application, that the parties were different, that the issue of admission which has been introduced in the present application was absent in the previous application in that it arose after the filing of the Further Amended Plaint.

In the case of **KYANZAVI FARMERS –VS- MIDDLE EAST BANK KENYA LTD NBI HCCC NO. 388 OF 2011 UR** while considering an application brought under order 2 Rule 15(1)(a) of the Civil Procedure Rules, I held that:-

"In my view, having sought to strike out the Plaint for disclosing no cause of action, it was not open for the Defendant to rely on evidence as it did in this case. The Motion stated in its body that:-

In the case of Olympic Escort International Co. Ltd & 2 others –vs- Perminder Singh Sandhu & another (2009) e KLR the Court of Appeal when considering an application made under our former Order VI Rule 13(a) held that:-

'We think for our part that <u>it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not</u>. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated

that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.\'

I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

In view of the foregoing, I am in agreement with Mr. Orenge that an application under Order 2 Rule 15(1) (a) is different from an application under Order 2 Rule 15 (1), (b), (c) and (d). Although the principles applicable in considering both applications may be the same, the considerations are different. In an application under Rule 15(1) (a) Parliament forbade reliance on any evidence whatsoever, whilst under Rule 15 (1), (b), (c) and (d) evidence must be called. In my view therefore, since no omnibus application can be made under Rule 15 (1) an application under Sub Rule 1(a) can only be made separately from one under Sub Rule 1(b), (c) and (d). In the present case, it has been submitted that the present application was made after the Further Amended Plaint had been delivered, there was obviously a changed landscape to warrant the brining of the application on the ground that the Defence discloses no reasonable defence. Accordingly, I reject the objection that the application is Res Judicata.

The grounds to the application as submitted by Mr. Orenge, learned Counsel for the Plaintiff are two-fold. Firstly, that there is no reasonable defence to the Further Amended Plaint since there was no reply to the same and that there is an admission of the claim. It was submitted that since the averments in the Further Amended Plaint were not replied to or denied the 1st Defendant is deemed to have admitted the same. Mr. Orenge referred the court to a text on **Odger’s Principles of Pleadings and Practice in the High Court of Justice 25th Edition** wherein at page 124, the learned authors have observed:-

“1. Any allegation of fact unless traversed is admitted.

The pleader must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, Rule 13 provides that any allegation of fact is deemed to be admitted unless traversed and that a traverse may be either by a denial or by a statement of non-admission and either expressly or by necessary implication.”

Ms Mutua, learned Counsel appearing for the 1st Defendant submitted that the 1st Defendant relied on her original defence dated 7/3/9 in which she had raised the issue of the Plaintiff’s lack of locus standi to sue and recover any monies under the loan agreement between the 1st and 2nd Defendant.

The present application having been brought under Order 2 Rule 15 1(a) of the Civil Procedure Rules, it was not supported by any evidence as Rule 15(2) prohibits any reliance on evidence on such an application. This court agrees with Mr. Orenge that when an allegation of fact is not traversed it is deemed to be admitted. This is so decreed by Order 2 Rule 11 of the Civil Procedure Rules which provide:-

"11. (1) Subject to sub-rule (4) any allegation of fact made in a plaint of counterclaim which a party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence and counter claim and a general denial of such allegations, or a general statement of non-admission of them, shall not be sufficient traverse of them.

(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication."

The Further Amended Plaint having been served upon the 1st Defendant with all the statements of facts set out in paragraphs 3, 3(a), 4, 5, 6 and 7, the 1st Defendant is deemed to have admitted the same since she never filed any denial or traverse the same. She was contented with reliance on her defence of 5th March, 2009. It is not true as submitted by Ms. Mutua that the amendments to the Amended Plaint only introduced allegations against the 2nd Defendant and not the 1st Defendant. To my mind, the amendments changed the original claim from Kshs.11,690,000/- to an advance of Kshs.10 million and a claim of Kshs.6,120,000/- as against the Defendants, jointly and severally thereby touching on the 1st Defendant. Having chosen not to deny the allegations of fact contained in the Further Amended Plaint, the 1st Defendant is deemed to have admitted the same.

Be that as it may, it is trite law that once the amendments were effected, the Further Amended Plaint related back to the Original Plaint filed on 20th January, 2009. Therefore the Court has to look at the Defence filed in answer to that Plaint to see whether any plausible defence has been raised against the Further Amended Plaint. I have perused the said defence and the only issue raised is whether the Plaintiff has locus standi to sue or claim the sum of Kshs.6, 120,000/- advanced by the 2nd Defendant to the 1st Defendant.

Whilst I have held that the 1st Defendant has not denied the fact that monies belonging to the Plaintiff and held by the 2nd Defendant was advanced to her to the tune of Kshs.10 million by the 2nd Defendant, the question which still remains unanswered is to whom was the amount advanced repayable? What were the terms of the said advancement? Was the loan agreement tripartite in nature or was it one way i.e. between the Plaintiff, the 2nd Defendant and the 1st Defendant or was it between the 1st and 2nd Defendants only? These issues are not clear from the pleadings. The Further Amended Plaint did not plead that the monies advanced by the 2nd Defendant to the 1st Defendant was payable by the 1st Defendant to the Plaintiff. It only stated in paragraph 5 that:-

"The obligation to make good any sums so advanced rested with the employee so borrowing and in particular the 1st Defendant."

I agree that the 1st Defendant was under an obligation to repay the amount advanced. But to who was she to pay the said sum? Was it the Plaintiff or the 2nd Defendant who had advanced her the monies? The only connection between the 1st Defendant and the Plaintiff is that she was the Plaintiff's employee and that the monies advanced to her was debited to the Plaintiff's account with the 2nd Defendant. But as I have already stated, it is not clear from this complicated arrangement to whom the loan was repayable. A reading of paragraphs 6 and 7 of the 2nd Defendant's Defence will show that the sum of Kshs.3,880,000/- was first repaid to the 2nd Defendant who then credited the Plaintiff's Commission Advance Scheme. Why would therefore the balance of Kshs.6,120,000/- not payable to the 2nd Defendant then credited to the Plaintiff's Commission Advance Account? This is not clear from the material before court.

Accordingly, since there is no evidence to explain what I have set out above, I am not prepared to hold that the 1st Defendant's Defence discloses no reasonable defence.

Mr. Orenge urged the 2nd ground that there was an admission of the Plaintiff's claim. Although the failure by the 1st Defendant to answer the Further Amended Plaint was an admission of the facts set out therein, I

am not prepared to hold that the same was an admission of the Plaintiff's claim. The party who has made express admission is the 2nd Defendant but not the 1st Defendant. In my view none of the pleadings on record have solved the problem that I have raised above, i.e. to whom was the advanced sum repayable?

Accordingly, I find that the Plaintiff's Notice of Motion dated 14th February, 2012 is not merited and is hereby dismissed with costs.

DATED and delivered at Nairobi this 24th day of April, 2012.

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A. MABEYA

JUDGE