REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 773 OF 2009

EQUITY BANK LIMITED ::: PLAINTIFF/APPLICANT

- VERSUS -

ROBBIN (EPZ) LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff through a Notice of Motion dated 28th July 2010 seeks an order of summary judgment in the sum of Kshs.40,424,270.53 against the Defendant together with interest at commercial rates until payment in full. The alternative prayer is that the Respondent's Defence be struck out and judgement be entered for the Applicant as prayed in the Plaint. There is also a prayer for costs.

The application is based on a suit filed on 16th October 2009 claiming the same amount against the Defendant on grounds that the said amount was loaned to the Defendant on diverse occasions between 2007 and 2008 vide various facilities. The claim has been denied through a Defence filed in court on 24th November 2009.

The application is supported by the grounds stated therein among them that the Defendant has admitted the debt and that the Defence is a sham and raises no triable issues and is a bare denial and that the claim is for a bank overdraft and cheque discounting facilities granted to the Defendant over time and at its own request.

In support of the application an affidavit has been sown by Purity Kinyanjui dated 28th July 2010 together with its annextures, and a further affidavit by the same person dated 29th October 2010.

The application is opposed by a Replying Affidavit of Michael Arimbi dated 15th October 2010 together with its annextures and a further affidavit dated 9th November 2010 also with annextures.

I have considered the application in totality. I have also considered the opposition to it. I have also heard and considered counsel submissions. I have not found any evidence that the Defendant has admitted the claim. Neither have I found the claim to be so open and clear as submitted by the Applicant

In the case of **D.T. DOBIE & COMPANY (KENYA) LTD. – VS – MUCHINA, CIVIL APPEAL NO. 37 OF 1978** the court in regard to an application for summary judgement and/or striking out of a Defence stated as follows:-

"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. . ."

In **GICIEM CONSTRUCTION COMPANY – VS – AMALGAMATED TRADE & SERVICES, CIVIL APPEAL NO. 17 OF 1983**, the court observed:-

"The general principle applicable to applications for summary judgement is that where the Defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even fair probability that he has a bona fide defence he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried and there is no dispute as to the facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgement."

In my mind, the Defence and replying affidavits have raised doubts, not of the claim but rather of the exact amount now claimed to be due. The Defendant has submitted that the claim includes exaggerations in terms of penalties and interest. The charges disputed, as submitted by the Defendant, amount to over Kshs.32,000,000/=. In my view this is a triable issue which cannot be determined by way of summary proceedings. In view of the case law I have quoted above, I decline to grant the application. I dismiss the same with costs to the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 22ND DAY OF MAY 2012.

E. K. O. OGOLA
JUDGE
PRESENT:

Mr. Nyongesa for the Plaintiff/Applicant

Mwiti for the Defendant/Respondent

Teresia – Court clerk