



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 923 OF 2009

**AFRICAN BANKING CORPORATION
LTD.....PLAINTIFF**

VERSUS

**ELIJAH GATHATWA
NJOROGE.....DEFENDANT**

RULING

In the Chamber Summons dated 5th October 2010, the Plaintiff/Applicant seeks orders of this court as follows:-

- 1 That the Statement of Defence filed by the Defendant herein be struck out with costs.**
- 2 That judgment be entered for the Plaintiff herein as prayed in the Plaint.**
- 3 That the Defendant do pay the costs of thiS application in any event.**

The application, which is supported by an affidavit sworn on 5th October 2010, by the Applicant's legal officer, **GREGORY OMUSOLO**, is premised on five grounds set out as follows:-

- 1. The Defendant is truly indebted to the Plaintiff in the sum of Kshs. 5,359,558.45 plus interest at 3% per month from 15th December 2009, which debt arose from an Asset Finance Agreement dated 20th June 2006 under which the Plaintiff advanced Kshs. 5,385,000.00 to the Defendant.**
- 2. The Defendant merely and generally denies owing the Plaintiff the sum claimed in the Plaintiff without availing documents or relevant evidence of payment of the sum claimed.**
- 3. The Defence departs (?) and contradicts itself.**
- 4. The Defence is scandalous, frivolous and vexatious.**
- 5. The Defence may also prejudice, embarrass or delay the fair trial of this action, especially as it is clear that the Defendant cannot prove payment of the amounts due and claimed in the Plaintiff.**

The Plaintiff's cause of action as per the facts pleaded in the Plaintiff, which facts have been restated in the supporting affidavit, arises out of a loan agreement dated 19th September 2006, under which the Plaintiff/Applicant advanced the Respondent a sum of Kshs. 5,385,000/= to purchase a Mercedes Benz Actros Prime Mover (KAW 182 R) and a Trailer ZC 5220 (both referred to herein as the motor vehicle). The terms of the loan agreement are set out in letter of offer and acceptance by the Respondent, annexed to the Supporting Affidavit as "annexture A1", and have been duly pleaded and restated in the Supporting Affidavit.

The Applicant's case is that despite having agreed to repay the loan by 36 equal installments of Kshs. 194,459/= the Respondent defaulted, causing his loan account to run into arrears, on account of which, the Applicant repossessed the motor vehicle, auctioned the same but realized only part of the loan. The Applicant therefore filed this suit for the recovery of the shortfall, in accordance with the terms of the agreement.

In the defence filed on 16th March 2010, the Respondent denies the existence of the loan agreement and the terms thereof or that he received the sum of Kshs. 5,383,000/= from the Applicant. He also denies having defaulted in the repayment of his installments, pleading in the alternative, that he repaid the entire loan plus interest thereon. In paragraph 8 of the Defence, the Respondent admits that the Plaintiff did repossess and sell the Prime Mover and apply the proceeds of sale towards the debt owed by the Respondent. He denies however that a substantial amount was left outstanding, contending, in the same breath, that the Applicant has "failed and/or refused to debit his loan account with the said proceeds of sale (underlining by this court). The Respondent denies also that he has concealed the whereabouts of the Trailer thus hindering its repossession and disposal by the Applicant. He then introduces a set off in which he expressly denies the Applicant's claim while stating in Paragraphs 17 and 19 thereof as follows:-

"17. The Defendant reiterates that he repaid the entire loan or a substantial part thereof by way of monthly installments. Further, that upon the Plaintiff's repossession and sale of motor vehicle KAW 182R, the Plaintiff refused, failed and/or neglected to debit the Defendant's loan account with the proceeds from the sale.

18. The Defendant will seek to set off the installment payments already paid to the Plaintiff, as well as the said proceeds of the sale against and/or in satisfaction of the amount in the Plaintiff's claim herein".

Counsel for the parties hereto filed written submissions in arguing their respective client's cases. In the Applicant's submissions filed on 1st March 2011, learned counsel for the Applicant submits that the Defence, particularly at paragraphs 3, 4 and 5 is frivolous, vexatious and evasive and that on the whole, it discloses no triable issues. He asks the court to find that the same is "*without doubt, a mere denial, a sham, scandalous, frivolous and vexatious and calculated to cause a delay in the hearing of (the) suit....*". Counsel referred the court to the depositions and annexures to the Supporting Affidavit which have not been controverted, submitting that the case of **MPAKA ROAD DEVELOPMENT LTD v KANA [2004] 1 E.A. 124** and the treatise at **Page 343** of the **SUPREME COURT PRACTICE (1995) VOL 1 (part 1) LONDON, 1994** paragraph 18/19/32 as to what constitutes a scandalous, and/or frivolous, vexatious and embarrassing pleading do support the Applicant's position in that the Respondent has pleaded matters which are contradictory and a set off which is not maintainable in view of the proof of indebtedness as demonstrated by the annexures. To support the submission that the Defence is a sham counsel relies on the case of **NATION MEDIA GROUP v COMMUNICATION CONCEPT (2006) e KLR.**

The Respondent appears not to have filed any reply to the application. In the submissions filed on his behalf the only issues raised are that the Respondent in his defence disputes the interest charged and that the Applicant has not demonstrated, with sufficient clarity, how the amount claimed is made up. In this regard the Respondent's position is that in view of the sale of the repossessed vehicle, any sums owed must be less than claimed.

Contrary to what has been submitted by learned counsel for the Respondent, the Defence filed does not question the interest applied and/or charged on the loan. As to how the sum claimed under the Plaintiff is made up, the Defendant never raised any query on the bank statement as issued, which clearly shows the debits and credits effected on the loan account. In the absence of a Replying Affidavit the facts as stated in the Supporting Affidavit and the annexures thereto remain uncontroverted.

The Defence as filed is clearly not a real defence and raises no triable issues. By the contradictory averments contained therein the Respondent approbates and reprobrates the contents of the Plaintiff which clearly shows that he is not serious in his defence. The set off is also not pleaded with sufficient clarity. Given the facts, as set out in the Plaintiff and supported by the annexures furnished by the Applicant in this application, it is clear to me that the Respondent has no real defence to the action. The defence filed discloses no triable issue, is in my considered view, frivolous, scandalous and vexatious and without a doubt, likely to embarrass and delay the fair trial of the action. The claim for a set off has no merit in the absence of a cause of action being disclosed.

For the above reasons I allow the application and grant the orders sought. Accordingly the Defence and Set Off filed herein on 16th March 2010, is hereby dismissed with costs and judgment entered for the Applicant as prayed in prayers (a), (b) and (c) of the Plaintiff dated 17th December 2009.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST day of SEPTEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Mwaniki For the Applicant

Mr. Miyare holding brief for Mr. Kariuki For the Respondent